

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

INTRODUCTION

These explanatory notes relate to the Scotland Act 1998. They have been prepared by the Scotland Office in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament. They also include references to secondary legislation made under the Act and to other relevant delegated legislation made before September 2001. It does not include changes to the Act made since it came into force.

These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So, where a section or part of a section does not seem to require any explanation or comment, none is given.

The Act refers to matters within the responsibilities of the Scottish ministers and the Secretary of State for Scotland. References to the Secretary of State in the Act mean any Secretary of State. In practice, some of the functions conferred upon the Secretary of State will be exercised by the Secretary of State for Scotland.

SUMMARY

The Act gives effect to the Government's proposals for devolution to Scotland as set out in the white paper, *Scotland's Parliament* (Cm 3658, July 1997). It is divided into six parts:

Part I	The Scottish Parliament;
Part II	The Scottish Administration;
Part III	Financial Provisions;
Part IV	The Tax Varying Power;
Part V	Miscellaneous and General;
Part VI	Supplementary.

The Act also contains nine schedules. Of these, Schedule 4 lists enactments protected from modification by the Scottish Parliament. Schedule 5 lists matters reserved to the UK Parliament.

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.

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Act	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
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
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

*These notes refer to the Scotland Act 1998 (c.46)
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Act	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
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
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

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

Act	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
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	---	----	---	---
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

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

Act	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
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
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	---	---

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<i>Act</i>	<i>Lords 3R HL Bill 155</i>	<i>Lords R HL Bill 155</i>	<i>Lords C HL Bill 119</i>	<i>Comm R Bill 166</i>	<i>Comm C Bill 104</i>
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
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:

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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. $\frac{2}{3}$ 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
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

*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>
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.

North-East Scotland Region	Labour	Lib Dem	SNP	Con	Green	Result
Party Vote	72666	49843	92329	52149	8067	

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

North-East Scotland Region	Labour	Lib Dem	SNP	Con	Green	Result
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.
- 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

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

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

*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>
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.

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

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

*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>
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).

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

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
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

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

<i>Stage</i>	<i>Date</i>	<i>Column</i>
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.

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

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

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

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
Stage	Date	Column
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));

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

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

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

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

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 4th 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

*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	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 “respectation 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 respectation 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 respectation 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.

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

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

*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>
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

*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>
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 (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.

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

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

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

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

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

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

<i>Stage</i>	<i>Date</i>	<i>Column</i>
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 disapples 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 disappplied.

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.

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

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.

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

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

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

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
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
Stage	Date	Column
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

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

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
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

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

by Scottish Ministers without their consent and without the knowledge and consent of the Scottish Parliament. Even although the Scottish Parliament may not have any legislative competence over the transferred function, nevertheless Scottish Ministers are accountable to the Parliament for their exercise.

Parliamentary Consideration

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

Details of Provisions

Subsection (1) enables Her Majesty, by Order in Council, to provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable:

- (a) by the Scottish Ministers instead of by the Minister of the Crown;
- (b) by the Scottish Ministers concurrently with the Minister of the Crown; or
- (c) by the Minister of the Crown only with the agreement or, or after consultation with, the Scottish Ministers.

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

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

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

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;
- (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
Stage	Date	Column
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

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

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
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 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
Stage	Date	Column
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.

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

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

*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	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

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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	41
CC	23-Feb-98	124
Stage	Date	Column
LC	6-Oct-98	320
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”.

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

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
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”.

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

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

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

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.

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

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;

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

- (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

*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	6-Oct-98	386
LC	6-Oct-98	387
LC	6-Oct-98	388

Details of Provisions

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

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

Section 118 is also 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;

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

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 2000 ([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.

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

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

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

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
Stage	Date	Column
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

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

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
Stage	Date	Column
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.

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

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](#)).

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

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.

POWERS TO MAKE SUBORDINATE LEGISLATION

This table shows:

The section under which subordinate legislation may be made, along with a brief description of the power.

The person by whom the subordinate legislation may be made, i.e.

SofS = the Secretary of State by order;

Treas.= the Treasury by order;

SM = the Scottish Ministers by order;

HM = Her Majesty by Order in Council; or

Open = either a Minister of the Crown by order or Her Majesty by Order in Council.

The procedure which applies (if any) in the Westminster and Scottish Parliaments:

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

Type = Type of procedure, as set out in paragraph 2 of Schedule 7 (subject to the provisions of paragraphs 3 and 4 and Schedule 7 providing for alternative procedure for certain special cases.

A = order to be laid in draft and approved by Parliament;

N = order subject to annulment in pursuance of a resolution of Parliament; or

N(A) = order made under open powers, or an Order under sections 89 or 90, which may be laid in draft and approved by Parliament or subject to annulment in pursuance of a resolution of Parliament.

“Parliament” is to be read as referring to both Houses of Parliament, the House of Commons, or the Scottish Parliament as appropriate.

Whether orders may make modifications of the Scotland Act (other than Schedules 4 and 5) or may make provision having retrospective effect.

All powers to make subordinate legislation are exercisable by statutory instrument; may make different provision for different purposes; may be exercised in relation to a particular case or class of case; may make supplementary and transitional provision; may make provision for delegation of functions; and may make provision for sums to be payable out of, or charged on, the Scottish Consolidated Fund. Subordinate legislation made by a Minister of the Crown or by Her Majesty in Council may make provision for the payment of sums out of money provided by Parliament or for sums to be charged on and paid out of the Consolidated Fund. Most may make modifications of enactments, prerogative instruments etc., other than the Scotland Act and subordinate legislation under it.

<i>Power</i>		<i>Procedure</i>					
<i>Section</i>	<i>Description</i>	<i>Made by</i>	<i>Type</i>	<i>W'minster</i>	<i>Scot. Parl.</i>	<i>Mod Scot Act</i>	<i>Retrospective</i>
2(1)	Specification of date of first ordinary general election	SofS	C	A			
12(1)	Conduct of elections	SofS	C	A			
12(6)	Designation of regional returning officers	SofS					
15	Disqualification of office holders from membership of Parliament	HM	D		A		
18(5)	Alteration of maximum amount of caution	SM	J		N		
30(2)	Modification of Schedules 4 & 5	HM	A	A	A	See 30(2) and (4)	Yes
30(3)	Functions exercisable in or as regards Scotland	HM	A	A	A	See 30(2) and (4)	Yes
35	Prohibition of submission of Bill for Royal Assent in certain circumstances	SofS	I	N			
38	Form etc. of Letters Patent and royal proclamations	HM	J		N		

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

Power		Procedure						
Section	Description	Made by	Type	W'	minster	Scot. Parl.	Mod	Retrospective
							Scot Act	
56(2)	Shared powers	Open	G	N(a)				
58(1)	Prohibition of action incompatible with international obligations	SofS	I	N ¹				
58(2)	Requiring action to give effect to international obligations	SofS	I	N				
58(4)	Revocation of subordinate legislation in certain circumstances	SofS	I	N				Yes
60	Transfer of property etc. to the Scottish Ministers	Open	G	N(a)				
62	Transfer of property etc. to the Lord Advocate	Open	G	N(a)				
63	Transfer of functions to the Scottish Ministers	HM	A	A	A			
64(5)	designation of receipts payable into Scot Consolidated Fund	Treas.	K	N (HofC)				
67	Increase of maximum sum which may be lent to Scottish Ministers	SofS	E	A (HofC)				
71(6)	Registers of Scotland borrowing	SofS	K	N (HofC)				
79(1)	Provision in consequence of tax-varying power	Treas.	E	A (HofC)			See 79(1)	See 79(4)
79(2)	Exclusion of tax-varying power in respect of particular enactments	Treas.	E	A (HofC)			See 79(1)	See 79(4)
79(3)	Effect of tax-varying resolution on operation of PAYE	Treas.	K ²	N (HofC)				See 79(4)
88	Cross-border public authorities: initial status	HM	I	N				
89	Adaptation of cross-border public authorities	HM	F	N(a)	N(a)		Yes	
90	Transfer of property etc. of cross-border public authorities	HM	F	N(a)	N(a)			
93	Agency arrangements	HM	H	N	N			
97	Assistance for opposition parties	HM	A	A	A			
103(3)a	Conferral of powers on Judicial Committee of Privy Council	HM	I	N				

1 Requirement does not apply to an order merely revoking an order under this subsection. See note to Table in Schedule 7.

2 See note to Table in Schedule 7.

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

Power		Procedure					
Section	Description	Made by	Type	W'minster	Scot. Parl.	Mod Scot Act	Retrospective
103(3)b	Application of Judicial Committee Act 1833	HM	I	N			
103(3)c	Making rules of procedure for JCPC	HM					
104	Provision consequential on Acts of the Scottish Parliament	Open	G	N(a)		Yes	Yes
105	Provision consequential on Scotland Act	Open	G	N(a)			
106	Adaptation of functions	Open	G	N(a)			
107	Remedying <i>ultra vires</i> acts	Open	G	N(a)		Yes	Yes
108	Agreed re-distribution of functions	HM	A	A	A	Yes	
109	Agreed redistribution of property & liabilities	HM	H	N	N		
110(1)	Treatment of individuals as Scottish taxpayers for social security purposes	SofS	C	A			
110(2)	Determination of basic rate of tax for social security purposes	SofS	I	N			
111	Regulation of Tweed and Esk fisheries	HM	A	A	A		
116(9)	Determination of disputes over compensation relating to transfer of property	Open	G	N(a)			
124(1)	Modification of sections 94 and 117 to 122	Open	G	N(a)			
126(2)	Determination of boundary of Scottish waters	HM	B	A			
126(8)	Variation of definition of Scottish Administration	HM	H	N	N		
129(1)	Transitory and transitional provisions	Open	G ³	N(a)		Yes	
130(1)	Commencement	SofS					
Schd.2 Para. 2	Transfer of property etc. to SPCB	Open	G	N(a)			
Schd. 2 Para. 7	Crown status for SPCB	HM	H	N	N		

³ See also paragraph 4 of Schedule 7.

¹ Requirement does not apply to an order merely revoking an order under this subsection. See note to Table in Schedule 7.

² See note to Table in Schedule 7.

³ See also paragraph 4 of Schedule 7.

SECTION 113: Subordinate legislation: scope of powers

Purpose and Effect

This section requires subordinate legislation made under powers provided by the Act to be made by statutory instrument, and permits such subordinate legislation to:

- make different provision for different purposes, or for particular cases or classes of case;
- include supplementary and transitional provision;
- provide for delegation of functions;
- in some cases modify other enactments, prerogative instruments or other instruments or documents;
- provide for payment of sums out of, or for sums to be charged on, the Consolidated Fund or Scottish Consolidated Fund.

It also limits the punishment which may be imposed for any criminal offence created in subordinate legislation under the Act.

General

See note to section 112.

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.

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.

SECTION 114: Subordinate legislation: particular provisions

General

See note to section 112

Details of provisions

Subsection (1) permits subordinate legislation made under certain provisions of the Act to modify the Scotland Act (except Schedules 4 and 5) and subordinate legislation made under the Act. The relevant provisions are:

section 89	adaptation of cross-border public authorities;
section 104	power to make provision consequential on Acts of the Scottish Parliament etc.;
section 107	power to remedy <i>ultra vires</i> acts;
section 108	agreed re-distribution of transferred functions;
section 129(1)	power to make transitory and transitional provision.

Section 30(2) and (4) permit Orders in Council under section 30 to make modifications of Schedules 4 and 5 of the Act, and of other provisions in or under the Act.

Subsection (2) provides that the reference in subsection (1) to a power to make subordinate legislation modifying the Scotland Act and subordinate legislation under that Act includes that power as extended by section 113. For example, section 113(4) extends powers so that they include power to make supplementary, consequential provision or transitional provisions, and it may be that modifications to the Scotland Act are necessitated by such supplementary etc. provisions rather than by the main power itself.

Subsection (3) permits subordinate legislation made under certain provisions of the Act to have retrospective effect. The relevant provisions are:

section 30	power to modify Schedule 5 (reserved matters);
section 58(4)	power to revoke certain subordinate legislation;
section 104	power to make provision consequential on Acts of the Scottish Parliament etc.;
section 107	power to remedy <i>ultra vires</i> acts.

SECTION 115: Subordinate legislation: procedure

Purpose and Effect

This section makes provision as to the procedure to which subordinate legislation made under the Scotland Act is to be subject in the UK and/or Scottish Parliaments.

General

Most orders under the Act are subject to some form of procedure in the Westminster Parliament only. Others, such as those relating to the disqualification from membership of the Scottish Parliament, and the procedures for Royal Assent to Acts of the Scottish Parliament, are subject to procedure in the Scottish Parliament only. Some orders are subject to procedure in both the Westminster and Scottish Parliaments. This is used where both Parliaments have an interest, for example in the modification of the list of reserved matters, the executive devolution of functions to the Scottish Ministers and in the adaptation of cross-border public authorities.

Some orders are expressly made subject to affirmative resolution procedure, requiring the Parliament(s) to take an active part in the making of the order. This is the case for orders which are considered to be most important, such as the provisions relating to elections, modification of the list of reserved matters; the adaptation of Ministerial functions (e.g. in relation to fisheries), and the determination of the boundary of Scottish waters. With the exception of minor orders such as orders appointing regional returning officers (section 12(5)) which require no Parliamentary procedure, all other orders are subject to negative resolution procedure and can be annulled in pursuance of a resolution of Parliament, unless for the reasons explained in the following paragraphs they are dealt with as an affirmative instrument.

Details of provisions

Subsection (1) introduces Schedule 7, which determines the Parliamentary procedure to which subordinate legislation under the Act is to be subject. See the note on Schedule 7 for further information.

Subsections (2) and (3) deal with the transitional circumstances where, by virtue of Schedule 7, a power to make subordinate legislation is subject to procedure in the Scottish Parliament but the power needs to be exercised before the Scottish Parliament itself is in existence. For example, the power in section 15 to specify office-holders who are disqualified from membership of the Scottish Parliament is to be subject to Type D procedure (laid in draft and approved by the Scottish Parliament), but a list of office-holders is clearly required for the first elections to the Parliament. Subsections (2) and (3) provide that such powers may nevertheless be brought into force at any time after the passing of the Scotland Act (although this may be before the Parliament is in existence) and that subordinate legislation under the power may be made subject to a different type

of procedure for the period until the principal appointed day (1 July 1999), with this procedure being specified by subordinate legislation under section 129(1).

This power was exercised in making the Scotland Act 1998 (Transitory and Transitional Provisions) (Subordinate Legislation under the Act) Order 1998 (S.I. 1998/3216), which adjusted the procedures for orders under sections 15, 38 and 97 and paragraphs 2 and 7 of Schedule 2. In the case of orders under section 15, which were mentioned above, the first order was made subject to Type B procedure (laid in draft and approved by both Houses of the UK Parliament).

As from the principal appointed day (1st July 1999), the parliamentary procedure for all orders is as set out in Schedule 7, and the powers in subsections (2) and (3) are effectively spent.

SECTION 116: Transfer of property: supplementary

Purpose and Effect

This section makes further provision in relation to the transfer of property under sections 60, 62, 90 and 109 and paragraph 2 of Schedule 2 dealing with property held by the Scottish Parliamentary Corporate Body (SPCB).

General

This section is linked to the series of provisions dealing with the transfer of property and liabilities to the Scottish Ministers and the Lord Advocate and to the SPCB. Sections 60 and 62 enable subordinate legislation to provide for the transfer of certain property and liabilities to the Scottish Ministers in connection with the exercise of their devolved functions and to the Lord Advocate in connection with the exercise of his retained functions. Section 109 provides for the reverse mechanism to that in sections 60 and 62, allowing property to be transferred from the Scottish Ministers and Lord Advocate to UK Ministers or government departments. Section 90 provides for the transfer of property of cross-border public authorities and paragraph 2 of Schedule 2 provides for the transfer of property to the SPCB.

Details of Provisions

Subsection (1) provides that this section applies in relation to subordinate legislation transferring property and liabilities under sections 60 (Transfers to the Scottish Ministers), 62 (Transfers to the Lord Advocate), 90 (power to transfer property of cross-border public authorities), 109 (agreed redistribution of property and liabilities) and paragraph 2 of Schedule 2 which provides for the transfer of property to the SPCB.

Subsection (2) provides that any subordinate legislation under those provisions may in particular:

provide for the creation of rights or interests, or the imposition of liabilities or conditions in relation to property transferred, or rights and interests acquired under the legislation;

provide for any property, liabilities and conditions to be determined by virtue of such legislation, rather than being specified in it; and

make provision (other than provision imposing a charge to tax) as to the tax treatment of anything done by or under such legislation. An example of this would be exemption from stamp duty, in respect of the transfers of the property of cross-border public authorities.

Subsection (3) provides that the power under subsection (2)(c) to make provision as to the tax treatment of a transfer may be exercised only with the agreement of the Treasury.

Subsection (4) provides that subordinate legislation to which this section applies has effect in relation to property or liabilities to which it applies despite any provision which would otherwise prevent, penalise or restrict the transfer of the property or liabilities.

Subsection (5) provides that a right of pre-emption, right of irritancy, right of return or other similar right shall not operate or become exercisable as a result of any transfer under subordinate legislation to which this section applies.

Subsection (6) provides that the rights in subsection (5) shall have effect in the case of any transfer under subordinate legislation to which this section applies as if the transferee were the same person in law as the transferor and as if no transfer of property had taken place.

Subsection (7) provides for just compensation to be paid to any person in respect of a right which, apart from subsection (5) would have operated in favour of that person or be exercisable by him, but which in consequence of the operation of subsection (5) cannot subsequently operate in his favour or be exercisable by him.

Subsection (8) provides that any compensation payable under subsection (7) shall be paid by the transferor, transferee or both.

Subsection (9) provides that subordinate legislation under this section can provide for the determination of any disputes as to whether and to whom or by whom such compensation is to be paid and how much that compensation should be.

This power has been exercised up to September 2001 in article 12(2) of [S.I. 1999/1104](#); article 6(2) of [S.I. 1999/1105](#); and article 4(2) of [S.I. 1999/1106](#).

Subsection (10) provides that subsections (4) to (9) apply in relation to the creation of rights or interests or the doing of anything else in relation to property in the same way as they apply to transfers of property.

Subsection (11) provides that a certificate issued by the Secretary of State that any property or liability has, or has not, been transferred by virtue of subordinate legislation under various powers is to be taken as conclusive evidence of the transfer (or lack thereof).

Subsection (12) makes similar provision to subsection (11) in respect of transfers under sections 90 and 109. In these cases the certificate is to be issued jointly by the Secretary of State and the Scottish Ministers.

Subsection (13) defines “right of return” as any right under a provision for the return or reversion of property in specified circumstances.

SECTION 117: Ministers of the Crown

Purpose and Effect

This section modifies references to a Minister of the Crown in any pre-commencement enactment and in other instruments or other documents to read as, or to include, references to the Scottish Ministers so far as may be necessary for the purpose of, or in consequence of, the exercise of a function within devolved competence by a member of the Scottish Executive.

General

This section forms part of a set of sections which are concerned with making general modifications to pre-commencement enactments following devolution. The section supplements section 53 which makes provision for the transfer of ministerial functions to the Scottish Ministers.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	14-Jul-98	240

Details of Provisions

The section provides that references to a Minister of the Crown in any pre-commencement enactment or prerogative instrument, or other instrument or document should be read as being or including references to the Scottish Ministers so far as may be necessary for the purpose of or in consequence of the exercise of a function within devolved competence by a member of the Scottish Executive.

“Pre-commencement enactment” is defined in section 53(3).

This section has also been applied to those functions transferred to the Scottish Ministers by order under section 63.

SECTION 118: Subordinate instruments

Purpose and Effect

This section modifies references in any pre-commencement enactment to the procedure in the Westminster Parliament to which certain subordinate legislation is subject so that it is subject to procedures in the Scottish Parliament rather than the Westminster Parliament.

It applies to subordinate legislation made, confirmed or approved by a member of the Scottish Executive (or certain other persons) within devolved competence. It also applies to subordinate legislation made by a Scottish public authority with mixed functions or no reserved functions (whether or not within devolved competence) or by certain other persons within devolved competence, such as Her Majesty by Order in Council.

General

This section forms part of a set of sections concerned with modifying pre-commencement enactments following devolution.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LR	2-Nov-98	11

Details of Provisions

Subsection (1) provides that subsection (2) applies in relation to the exercise within devolved competence by a member of the Scottish Executive of a function to make, confirm or approve subordinate legislation. In other words, it applies to powers to make subordinate legislation which have transferred to the Scottish Ministers under section 53.

Subsection (2) states that, if any pre-commencement enactment makes provision for a statutory instrument or a draft of an instrument to be laid before either or both Houses of Parliament or for the annulment or approval by resolution of such an instrument, then, in relation to subordinate legislation made, confirmed or approved by a member of the Scottish Executive within devolved competence, any references to either or both Houses of Parliament shall instead be a reference to the Scottish Parliament.

Thus where a function of making regulations has transferred to the Scottish Ministers under section 53, and those regulations would previously have been subject to annulment in the UK Parliament, regulations made by the Scottish Ministers would be subject to annulment in the Scottish Parliament.

Subsection (3) makes similar provision in relation to functions of making, confirming or approving subordinate legislation exercisable by a Scottish public authority with mixed functions or no reserved functions.

A Scottish public authority with mixed functions or no reserved functions is defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5 (e.g. local authorities or the Registrar General for Births, Deaths and Marriages for Scotland).

Unlike subsections (2) and (4), this is not restricted to the exercise of functions within devolved competence so, for example, regulations made by the Registrar General which relate to a reserved matter such as abortion will be subject to procedure in the Scottish Parliament.

Subsection (4) makes similar provision to subsection (2) in relation to functions of making, confirming or approving subordinate legislation exercisable by a person other than a Minister of the Crown or those persons dealt within subsections (2) and (3) within devolved competence e.g. Her Majesty in Council or the Privy Council.

Subsection (5) ensures that if a pre-commencement enactment applies the Statutory Instruments Act 1946 to statutory instruments made by a person other than a Minister of the Crown as if they were made by a Minister of the Crown then the 1946 Act will apply in cases to which subsection (3) or (4) applies as if the subordinate legislation were made by Scottish Ministers.

Where the subordinate legislation which is referred to in this section is made by statutory instrument, the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 (S.I. 1999/1096) includes them in the definition of Scottish Statutory Instrument, disapplies the Statutory Instruments Act 1946 to S.S.I.s and makes its own provision. The Standing Orders of the Parliament make provision for the way in which the Parliament and its committees exercise these parliamentary procedures in relation to S.S.I.s and scrutinise them.

SECTION 119: Consolidated Fund, etc.

Purpose and Effect

This section modifies references to the UK Consolidated Fund or the National Loans Fund in any pre-commencement enactment to ensure that, in relation to Scottish functions as defined in the section, sums are paid or issued out of, and paid into the Scottish Consolidated Fund rather than the UK Consolidated Fund or the National Loans Fund.

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 and, subject to provision made by the Scottish Parliament, for disposal of, or accounting for, such sums. Section 65 deals with the circumstances in which sums may be paid out of the Fund, and the purposes for which such sums may be applied.

Section 29(2)(b) and paragraph 5(a) of Schedule 4 protect section 119(3) in relation to judicial salaries from amendment by the Scottish Parliament.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
CR	12-May-98	254
CR	19-May-98	764
LR	2-Nov-98	11

Details of Provisions

Subsection (1) defines the “Scottish functions” in relation to which the modifications apply as (a) functions of the Scottish Ministers, the First Minister or the Lord Advocate which are exercisable within devolved competence and (b) functions of any Scottish public authority with mixed functions or no reserved functions.

A Scottish public authority with mixed functions or no reserved functions is defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5 (e.g. local authorities or the Registrar General for Births, Deaths and Marriages for Scotland).

Subsection (2) provides that, subject to subsections (3) and (5), a provision of a pre-commencement enactment which requires or authorises the payment of any sum out of the Consolidated Fund or money provided by Parliament, or requires or authorises the payment of any sum into the Consolidated Fund, shall cease to have effect.

Subsection (3) states that a provision of a pre-commencement enactment which (a) charges any sum on the Consolidated Fund, (b) requires the payment of any sum out of the Consolidated Fund without further appropriation, or (c) requires or authorises the payment of any sum into the Consolidated Fund by a person other than a Minister of the Crown shall have effect in relation to Scottish functions, as if it provided for the sum to be charged on the Scottish Consolidated Fund, or required it to be paid out of that Fund without further approval or paid to that Fund as the case may be.

Subsection (4) restricts the application of subsections (2) and (3) in relation to section 2(3) of the European Communities Act 1972. It provides that section 107 of the Act shall not apply to the words in section 2(3) of the 1972 Act from the beginning of that subsection to “such Community obligation”.

It is necessary to ensure that section 119 does not apply to the first part of section 2(3) of the 1972 Act, down to the words “such Community obligation” because that part relates to charges required to meet payments to the European institutions and payments in respect of contributions or loans to the European Investment Bank. It is not the intention that such charges should be capable of being met out of the Scottish Consolidated Fund.

Subsection (5) states that a provision of a pre-commencement enactment which authorises any sums to be applied as money provided by Parliament instead of being paid into the Consolidated Fund, shall apply to any Scottish functions as if it authorised those sums to be applied as if they had been paid out of the Scottish Consolidated Fund (in accordance with the rules under section 65(1)(c)) instead of being paid into that Fund.

Subsections (6) and (7) apply where a power to lend money is exercisable by the Scottish Ministers under a pre-commencement enactment, and for the purpose or as a result of the exercise of the power, sums would require to be issued by the Treasury out of the National Loans Fund or be paid into that Fund. Subsection (7) provides that those sums shall instead be paid out of the Scottish Consolidated Fund without further approval, or be paid into that Fund.

SECTION 120: Accounts and audit

Purpose and Effect

This section modifies certain references to the UK Comptroller and Auditor General in any pre-commencement enactment, in relation to Scottish functions (as defined in section 119) to refer to the Auditor General for Scotland.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
CR	12-May-98	254
CR	19-May-98	764
LR	2-Nov-98	11

Details of Provisions

This section states that a provision of a pre-commencement enactment which requires accounts to be examined, certified or reported on by, or to be open to inspection of the Comptroller and Auditor General, or requires him to have access to other documents for such examinations shall have effect in relation to “Scottish functions” (as defined in section 119(1)) as if the references to the Comptroller and Auditor General were to the Auditor General for Scotland. This is necessary to ensure continued arrangements for independent audit of public expenditure relating to Scottish functions.

SECTION 121: Requirements to lay reports etc. before Parliament

Purpose and Effect

This section modifies any provision in a pre-commencement enactment which provides for any report to be laid before the Westminster Parliament or either House of that Parliament in the case where the report concerns Scottish functions (as defined in section 119). It makes provision to ensure that these reports are laid before the Scottish Parliament instead of or as well as the Houses of Parliament.

General

A number of pre-commencement enactments make provision for reports to be laid before the House of Commons, the House of Lords, or both. This section ensures that such reports, where they concern Scottish functions, are to be laid before the Scottish Parliament.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	645

Details of Provisions

Subsection (1) states that this section applies where a “pre-commencement enactment” makes provision for a report which concerns “Scottish functions” to be laid before one or both Houses of Parliament.

“Pre-commencement enactment” is defined in section 53(3) and “Scottish functions” is defined in section 119(1).

Subsection (2) requires the report to be laid instead before the Scottish Parliament if it concerns only Scottish functions.

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

Subsection (3) requires reports, in other cases, to be laid before the Scottish Parliament and one or both Houses of Parliament.

Subsection (4) provides a definition of the terms “report” and “Scottish functions”.

See also the Scotland Act 1998 (Transitory and Transitional Provisions)(Laying of Reports) Order 1999 (S.I. 1999/1594).

SECTION 122: Crown land

Purpose and Effect

This section modifies references to a Minister of the Crown or a government department in

any provision about the application of any pre-commencement enactment to Crown land.

General

This section forms part of a set of sections dealing with property matters. Sections 59 and 61 make provision for the holding of property and liabilities by the Scottish Ministers and the Lord Advocate. Sections 60 and 62 enable subordinate legislation to provide for the transfer of certain property and liabilities to the Scottish Ministers in connection with the exercise of their devolved functions and to the Lord Advocate in connection with the exercise of his retained functions. Section 123 extends the exemption from payment of stamp duty to the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

Details of Provisions

Subsection (1) provides that any references to a Minister of the Crown or government department in any provision about the application of any pre-commencement enactment to Crown land should be read as including the Scottish Ministers and the Lord Advocate.

It also provides that references in such provisions to a Minister of the Crown or government department having the management of the land includes any member of the Scottish Executive having the management of the land. This ensures that provisions in existing enactments applying to Crown land also apply in relation to land belonging to or being managed by members of the Scottish Executive.

Subsection (2) defines “Crown land” as having the meaning given by section 242 of the Town and Country Planning (Scotland) Act 1997, that is land in which there is a Crown interest which means an interest belonging to Her Majesty in right of the Crown or to a government department or held in trust for Her Majesty for the purposes of a government department.

SECTION 123: Stamp duty

Purpose and Effect

The purpose of this section is to exempt any conveyance, transfer or lease made to the Scottish Ministers, Lord Advocate or the SPCB from liability for stamp duty in the same way that such conveyances etc. to a Minister of the Crown are exempt. This section provides for references to a Minister of the Crown in section 55 of the Finance Act 1987 (which provides for Crown exemption from stamp duty) to be read as including the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

Details of Provisions

Section 55 of the Finance Act 1987 provides for exemption from stamp duty under Schedule 1 of the Stamp Act 1891 in respect of any conveyance, transfer or lease made

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

or agreed to be made to a Minister of the Crown or the Solicitor for the affairs of Her Majesty's Treasury.

This section provides that any references in section 55 of the 1987 Act to a Minister of the Crown should be read as including the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

SECTION 124: Modification of [sections 94](#) and [117 to 122](#)

Purpose and Effect

This section enables Her Majesty or a Minister of the Crown, by subordinate legislation, to provide that any the provisions of sections 94 and 117 to 122 (which contain a number of general modifications to pre-commencement enactments etc. in connection with the transfer of functions to the Scottish Ministers) should not apply, or apply with modifications, in particular cases.

Detail of Provisions

Subsection (1) enables Her Majesty or a Minister of the Crown, by subordinate legislation, to provide that any the provisions of sections 94 and 117 to 122 (which contain a number of general modifications to pre-commencement enactments etc. in connection with the transfer of functions to the Scottish Ministers) should not apply, or apply with modifications, in particular cases.

Subsection (2) enables any subordinate legislation made by Her Majesty or a Minister of the Crown, in connection with any other provision made by that legislation, also to provide that any the provisions of sections 94 and 117 to 122 should not apply, or apply with modifications.

For example, the executive devolution orders under section 63, which provide for the transfer of certain Ministerial functions to the Scottish Ministers, apply with modifications the general modification in sections 94 and 117 to 121.

SECTION 125: Amendments and repeals

Purpose and Effect

This section gives effect to Schedule 8, which makes modifications to existing legislation, and to Schedule 9, which lists the enactments which are to be repealed.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	28-Oct-98	1959

Details of Provisions

The section gives effect to Schedules 8 and 9. Details of the modifications and repeals are contained in the notes on those Schedules.

SECTION 126: Interpretation

Purpose and Effect

This section provides for the interpretation of various terms used in the Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	951

*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>
CC	31-Mar-98	1162
CR	12-May-98	197
CR	12-May-98	244
CR	19-May-98	754
CR	19-May-98	823
CR	19-May-98	824
LC	8-Oct-98	655
LC	8-Oct-98	656
LC	8-Oct-98	657
LR	28-Oct-98	1918
L3	9-Nov-98	545
L3	9-Nov-98	601
L3	9-Nov-98	602

Details of Provisions

Subsection (1) defines a number of terms used in the Act.

Subsection (2) enables Her Majesty by Order in Council to determine, or make provision for determining, for the purposes of the Act, any boundary between waters which are to be treated as internal waters or territorial sea of the United Kingdom, or sea within British fishery limits, adjacent to Scotland and those which are to be treated as adjacent to other parts of the United Kingdom.

Section 126 (1) defines:

- (a) “Scotland” as including “so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland”; and
- (b) “the Scottish zone” as meaning the sea within British fishery limits which is adjacent to Scotland. (The Scottish zone is used in the reservation of sea fishing in section C6 of Part II of Schedule 5.)

It is therefore necessary to distinguish clearly between those parts of the internal waters and territorial sea of the UK and of British fishery limits which are in future to be treated as part of Scotland for the purpose of matters devolved to the Scottish Parliament. Such a boundary will, for example, be required in the internal waters of the Solway Firth, in the territorial sea on the East Coast, and in the west, between Scotland and England (outside the Solway Firth), between Scotland and the Isle of Man and between Scotland and Northern Ireland and, in the British fishery limits around Rockall.

The matters being devolved to the Scottish Parliament which may be affected by such boundaries include: inshore fisheries management (including salmon fisheries in the Solway Firth); control of pollution from landward sources; regulation of possible inshore developments such as aquaculture or marine dredging; licensing deposits in the sea; and enforcement of criminal law. Offshore oil activities would not be affected, since such matters are reserved.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

This power was exercised in making the Scottish Adjacent Waters Boundaries Order 1999 (S.I. 1999/1126).

Subsection (3) makes provision for determining various questions as to whether the functions of a body etc. relate to reserved matters.

Paragraph (a) provides that any question as to whether any function of a body, government department, office or office-holder relates to reserved matters is to be determined by reference to the purpose for which the function is exercisable. This purpose test echoes that which is included in section 29 (3). This ensures that a function of such a body is not deemed to relate to reserved matters merely because it incidentally affects reserved matters.

Paragraph (b) makes it clear that the bodies to which paragraph 3 of Part III of Schedule 5 applies (bodies or classes of bodies reserved by name in Schedule 5 plus the equal opportunities bodies etc.) are to be treated as if all their functions were functions which relate to reserved matters. This is to ensure that such bodies, even if they have functions which relate to devolved matters, do not fall to be treated as cross-border public authorities under section 88 or to be summonable by the Scottish Parliament under section 23. Such bodies are to remain accountable only to Whitehall and Westminster.

Subsection (4) defines what is meant by references in the Act to Scots private law - see section 29(4) and paragraph 2(3) of Schedule 4. It includes the general principles of private law (including private international law), the law of persons, the law of obligations, the law of property and the law of actions. The definition also includes judicial review of administrative action so that amendments to that law are also subject to the provisions of section 29(4).

Subsection (5) defines what is meant by references in the Act to Scots criminal law. It includes jurisdiction, criminal offences, evidence, procedure and penalties and the treatment of offenders.

Subsections (6) to (8) define the term “Scottish Administration” for the purposes of the Scotland Act and other enactments.

These subsections define references to the Scottish Administration as being to:

- (a) the office-holders in the Scottish Administration:
 - (i) members of the Scottish Executive and junior Scottish Ministers; and
 - (ii) holders of non-ministerial offices, as follows:
 - the Registrar General of Births, Deaths and Marriages for Scotland;
 - the Keeper of the Registers of Scotland;
 - the Keeper of the Records of Scotland; and
 - any other office of a description specified in an Order in Council; and
- (b) the members of the staff of the Scottish Administration i.e. the staff of the persons referred to in (a). Those staff, together with the non-ministerial office holders, are all civil servants under section 51(2).

The power to make an Order in Council was exercised in the Scottish Administration (Offices) Order 1999 (S.I. 1999/1127).

Subsection (9) defines “Community law” for the purposes of the Act as:

- (a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and

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

- (b) all those remedies and procedures from time to time provided for by or under the Community Treaties.

The definition of Community law thus includes all rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Community Treaties as defined by section 1(2) of the European Communities Act 1972, or as specified in an order under section 1(3) of that Act. It also includes international agreements to which the Communities are party and which form part the Community legal order.

Subsection (10) defines what is meant by references in the Act to “international obligations”. These include any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights. “Convention rights” are defined in subsection (1) by reference to the Human Rights Act 1998.

Subsection (11) provides that the term “by virtue of” includes “by” and “under”.
SECTION 127: Index of defined expressions

Purpose and Effect

This section provides a table of expressions used in the Act and the appropriate provisions of the Act in which they are defined or in accordance with which they are to be interpreted.

General

A number of expressions are used widely in the Act. This section provides a simple reference to their definitions to aid interpretation.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
CR	12-May-98	244
CR	19-May-98	754
Stage	Date	Column
LC	21-Jul-98	818
LC	21-Jul-98	835
LC	23-Jul-98	1145
LC	27-Jul-98	1336
LC	30-Jul-98	1721
LC	6-Oct-98	309
LC	8-Oct-98	624
LC	8-Oct-98	655
LR	28-Oct-98	1918
LR	2-Nov-98	11
L3	9-Nov-98	602

SECTION 128: Expenses

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

Purpose and Effect

This section provides for Parliament to provide money to cover the expenditure of Ministers of the Crown resulting from the Scotland Act. It also requires certain sums received by Ministers of the Crown to be paid into the Consolidated Fund.

Details of Provisions

Subsection (1) provides that any expenditure:

- (a) incurred by a Minister of the Crown by virtue of the Scotland Act; and
- (b) any increase attributable to the Scotland Act in the sums payable out of money provided by Parliament under any other enactment,

shall be paid out of money provided by Parliament.

Subsection (2) provides that any sums received by a Minister of the Crown by virtue of the Scotland Act shall be paid into the Consolidated Fund, unless they are otherwise directed to be paid into the National Loans Fund (see for example sections 67(4) and 71(8)).

SECTION 129: Transitional provisions etc.

Purpose and Effect

This section provides for subordinate legislation to make transitory and transitional provision in connection with the commencement of the Act. It also provides for the interaction of the commencement of the Scotland Act and the Human Rights Act 1998.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-1079 Mar-98	
CC	31-1162 Mar-98	
CR	6-734 May-98	
Stage	Date	Column
CR	19-785 May-98	
LC	6-427 Oct-98	
LR	28-2072 Oct-98	

Details of Provisions

Subsection (1) enables Her Majesty by Order in Council or a Minister of the Crown by order to make such provision as is considered necessary or expedient for transitory or transitional purposes in connection with the coming into force of any provision of the Scotland Act.

As at September 2001 this power has been exercised as follows:

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

S.I. 1998/3216	The Scotland Act 1998 (Transitional and Transitory Provisions) (Subordinate Legislation under the Act) Order 1998.
S.I. 1999/441	The Scotland Act 1998 (Transitory and Transitional Provisions) (Finance) Order 1999.
S.I. 1999/674	The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Order 1999.
S.I. 1999/901	The Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999.
S.I. 1999/1017	The Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999.
S.I. 1999/1081	The Scotland Act 1998 (Transitory and Transitional Provisions) (Grants to Members and Officeholders) Order 1999.
S.I. 1999/1082	The Scotland Act 1998 (Transitory and Transitional Provisions) (Scottish Parliamentary Pension Scheme) Order 1999.
S.I. 1999/1095	The Scotland Act 1998 (Transitory and Transitional Provisions) (Standing Orders and Parliamentary Publications) Order 1999.
S.I. 1999/1096	The Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999.
S.I. 1999/1097	The Scotland Act 1998 (Transitory and Transitional Provisions) (Salaries and Allowances) Order 1999.
S.I. 1999/1098	The Scotland Act 1998 (Transitory and Transitional Provisions) (Administration of the Parliament) Order 1999.
S.I. 1999/1334	The Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Amendment Order 1999.
S.I. 1999/1350	The Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999.
S.I. 1999/1351	The Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999.
S.I. 1999/1379	The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999.
S.I. 1999/1593	The Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999.
S.I. 1999/1594	The Scotland Act 1998 (Transitory and Transitional Provisions) (Laying of Reports) Order 1999.
S.I. 1999/1595	The Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Amendment Order 1999.
S.I. 1999/1891	The Scotland Act 1998 (Transitory and Transitional Provisions) (Grants to Members and Officeholders and Scottish Parliamentary Pension Scheme) Amendment Order 1999.
S.I. 1999/3273	The Scotland Act 1998 (Transitory and Transitional Provisions) (Finance) Amendment Order 1999.
S.S.I. 1999/175	The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Amendment Order 1999.
S.S.I. 2000/69	The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Amendment (Scotland) Order 2000.

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

Subsection (2) makes provision to take account of the possibility (which occurred) that the Human Rights Act 1998 might not be brought into force until after the creation of the Scottish Executive and Parliament. In fact, the Human Rights Act did not come into force until 2 October 2000. It was, however, intended that the Scottish Executive and the Parliament should be required to observe the Convention rights from the date when they assumed their powers. The date of the assumption of powers was 1 July 1999 in the case of the Parliament and Scottish Ministers and 20 May 1999 in the case of the Lord Advocate (see the note on section 57). This subsection therefore provides that provisions of the Scotland Act, which refer to the Human Rights Act, were to have effect as they would have effect when the Human Rights Act was brought into force.
SECTION 130: Commencement

Purpose and Effect

This section provides for the commencement by order of certain of the provisions in the Act and for subordinate legislation to make transitory and transitional provision in connection with the commencement.

General

This section governs the commencement of the provisions of the Act, other than sections 1 to 18, 112 to 116 and 125 to 132, Schedule 7 and certain provisions in Schedule 8. These sections and Schedules, which mainly relate to the elections to the Scottish Parliament, the making of subordinate legislation, commencement interpretation, extent and the short title, came into force immediately on Royal Assent.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	261
L3	9-Nov-98	602

Details of Provisions

Subsection (1) provides that sections 19 to 43, Parts II to V (sections 44 to 111) and sections 117 to 124 and section 125 (in relation to certain provisions in Schedule 8) are to come into force on such day as the Secretary of State may by order appoint. This order is not subject to any Parliamentary procedure. Section 126 provides for a day appointed by such an order to be designated as the principal appointed day. This is of relevance for the interpretation of references to enactments in Schedule 5, as provided for by Part III of that Schedule.

Subsection (2) provides that different days may be appointed for different purposes.

This power has been exercised by the Secretary of State in making the Scotland Act 1998 (Commencement) Order 1998 ([S.I. 1998/3178](#)).

Purpose and Effect

This section sets out the extent of the Act.

General

The Act in general extends to the whole of the United Kingdom.

Details of Provisions

This section makes an exception for section 25. That section creates an offence in connection with the power of the Parliament to summon persons or require documents and extends to Scotland only.

SECTION 132: Short title

Purpose and Effect

This section gives the short title of the Act.

General

The choice of short title reflects that of similar legislation in the past, such as the Scotland Act 1978 and the Wales Act 1978.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	28-Jan-98	357

Details of Provisions

The section provides that the Act may be cited as the Scotland Act 1998.

SCHEDULES

SCHEDULE 1: Constituencies, Regions and Regional Members

Purpose and Effect

This Schedule is given effect by section 1. It sets out the constituencies and regions for the purposes of elections to the Parliament, provides for the involvement of the Parliamentary Boundary Commission for Scotland in altering the regions and number of members to be returned from each region according to set rules, and provides for local inquiries to be held as a result of objections raised in relation to any proposed changes.

General

The section is linked to the set of sections on elections (sections 1-12) and to section 86 which removes the guaranteed minimum level of Scottish representation in the UK Parliament and prevents the amalgamation of Orkney and Shetland with another UK Parliamentary constituency.

The Parliamentary Boundary Commission for Scotland is established under section 2 of the Parliamentary Constituencies Act 1986. Its function is to keep under review the distribution of seats at elections to the UK Parliament. The Commission reports to the Secretary of State under section 3(1) and (3) of the 1986 Act and its recommendations may be given effect to by Order in Council.

These functions of the Boundary Commission were 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. As a consequence 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. In consequence, the provisions of paragraphs 3 to 8 of this Schedule were amended by paragraphs 17 to 24 of Schedule 3 to that Act. These notes therefore describe the position as it exists as at September 2001 under Schedule 1 to the Scotland Act, as originally enacted prior to the amendments to it come into force.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	28-Jan-98	412
CC	28-Jan-98	451
CC	28-Jan-98	452
Stage	Date	Column
CR	12-May-98	215
CR	12-May-98	216
LC	8-Jul-98	1323
LC	8-Jul-98	1331
LC	8-Jul-98	1340
LR	22-Oct-98	1590
LR	22-Oct-98	1591
LR	22-Oct-98	1593
LR	22-Oct-98	1599
LR	22-Oct-98	1600
LR	22-Oct-98	1608
LR	22-Oct-98	1612
LR	22-Oct-98	1613
L3	9-Nov-98	602
L3	9-Nov-98	603
LCCLA	17-Nov-98	1180
LCCLA	17-Nov-98	1198
LCCLA	17-Nov-98	1199

Details of Provisions

Paragraph 1 provides that the constituencies of the Scottish Parliament are to be the same as the UK Parliamentary constituencies in Scotland, except that Orkney and Shetland will each have their own constituency. Thus, at the first election to the Scottish Parliament, the constituencies were Orkney, Shetland and the remaining 71 UK Parliamentary constituencies in Scotland. Each constituency returned a single member in accordance with section 1(2) and there were therefore 73 constituency members. However, any reduction in the number of UK Parliamentary constituencies as a result of the amendments made by section 86 will, by virtue of this provision, lead to a corresponding reduction in the number of constituencies for the Scottish Parliament.

Paragraph 2 provides what are the regions for the purpose of the return of regional members and what are the number of regional members to be returned. There are eight regions and seven members returned for each region (sub-paragraphs (1) and (3)). The eight regions are the same as the eight European Parliamentary constituencies which were provided for by sub-paragraph (2) of the European Parliamentary Constituencies (Scotland) Order 1996 (S.I. 1996/1926) even although those European parliamentary constituencies were superseded by the [European Parliamentary Elections Act 1999 \(c.1\)](#). The regions and number of members for each region may be altered by an Order

in Council under the Parliamentary Constituencies Act 1986, as extended by paragraph 2(4) of this Schedule 1.

Reports of the Boundary Commission

Paragraph 3 applies where the Boundary Commission for Scotland submits a report to the Secretary of State under section 3(1) or (3) of the Parliamentary Constituencies Act 1986 making recommendations for the alteration of UK Parliamentary constituencies (sub-paragraph (1)). It effectively provides that, in such a case, the Commission must also consider whether or not changes are also required to be made to the boundaries of regions and the number of seats for those regions in order to give effect to the rules in paragraph 7 (sub-paragraph (2)).

Sub-paragraph (4) requires any report by the Boundary Commission recommending alterations to any region to state the name by which the region should be known and the number of regional members to be returned for it. Sub-paragraph (5) requires the Boundary Commission to lay before the Parliament any report recommending changes in parliamentary constituencies. This is in addition to the existing requirement of the Boundary Commission to lay its reports before the UK Parliament.

Paragraph 4(1) provides that an Order in Council under section 4 of the 1986 Act which alters any constituency or region may come into force for the purposes of elections to the Scottish Parliament on a different date from that on which it comes into force for the purposes of elections to the UK Parliament.

Paragraph 4(2) provides that the coming into force of such an Order in Council will have no effect on the return of any member, or on the constitution, of the Parliament until the Parliament is dissolved.

Notices

Paragraph 5(1)(a) and (b) requires the Boundary Commission to publish in at least one newspaper circulating in the region a notice stating the effect of any recommendations it proposes to make affecting that region, and that a copy of the proposed recommendations is open to inspection in a specified place or places within the region and that any representations concerning the proposed recommendations may be made to the Boundary Commission within one month after the notice is published. The Boundary Commission is required to take account of any such representations.

Paragraph 5(2) requires the Boundary Commission to re-publish a notice in the same way as in paragraph 5(1) where its original proposals have been revised in the light of representations received.

Local Inquiries

Paragraph 6(1) provides for the Boundary Commission to hold a local inquiry in respect of any region whenever they think fit. This inquiry can be combined with an inquiry in respect of any UK Parliamentary constituency in the region.

Paragraph 6(2) provides that the Boundary Commission must hold a local inquiry before deciding on a recommendation if, in response to a notice published under paragraph 5(1) proposing an alteration to a region or its members, objections to that proposal are received from an interested authority or from 500 electors or more.

Paragraph 6(3) relates to local inquiries held under paragraph 6(1) before the publication of a notice under paragraph 5(1). In such circumstances the Boundary Commission can decide to disregard paragraph 6(2) if, in its opinion, the matters raised at the local inquiry, the nature of the representations received in response to the published notice and other relevant factors, would not justify holding another local inquiry.

Paragraph 6(4) provides, for the purposes of paragraph 6, that an “interested authority” means the council for an area which is wholly or partly included in the region affected by the recommendations; and that an “elector” means a person who, may vote in any constituency in the region.

Paragraph 6(5) applies the provisions regarding the attendance of witnesses at inquiries in sections 210(4) and (5) of the Local Government (Scotland) Act 1973 to any local inquiry held under paragraph 6.

The Rules

Paragraph 7 sets out the rules which the Commission are required by paragraph 3(2)(b) to give effect to when considering whether or not to recommend any alteration in any region or in the number of seats for a region. These rules are intended to ensure that:

no constituency falls within more than one region;

the regional electorate of a region is more or less the same as that in each of the other regions (allowing for differences in geography);

so far as reasonably practicable, the ratio of regional seats to constituency seats remains constant at 56 to 73, which was the ratio at the first election to the Parliament. Thus, if there was a reduction in the number of constituency seats in the Parliament (as a result of a reduction in the number of UK Parliamentary constituencies in Scotland), this should lead to a reduction in the number of regional seats so as to ensure, so far as reasonably practicable, that the same balance is maintained between constituency and regional members;

a region will have approximately the same number of regional seats as each of the other regions. If the number of regional seats cannot be divided exactly by eight, paragraphs 7 and 8 provide for the distribution of the residual seats among the regions with the larger regional electorates.

Paragraph 8 defines “the regional electorate” for the purposes of any report prepared by the Boundary Commission in relation to an electoral region. It is the number of persons whose names appear, on the enumeration date, on the registers of local government electors and who are registered for that purpose at an address within any Parliament constituency within a region. The enumeration date is the date on which the Boundary Commission published a notice of intention to make a report under section 5(1) of the Parliamentary Constituencies Act 1986.

SCHEDULE 2: Scottish Parliamentary Corporate Body

Purpose and Effect

This Schedule makes further detailed provision relating to the Scottish Parliamentary Corporate Body (SPCB), which is established by section 21. This Schedule covers the membership, property, staff, powers, proceedings and Crown status of the SPCB. The SPCB will carry out the functions conferred on it by the Scotland Act and may have additional functions conferred on it by other enactments. It will carry out its functions under directions issued by the Parliament.

There were various transitional provisions made relating to the administration of the Parliament by the Scotland Act 1998 (Transitory and Transitional Provisions) (Administration of the Parliament) Order 1999 (S.I. 1999/1098). In particular, in the period from 1 June 1999 to 1 April 2002 (or such earlier date as the SPCB may notify), the Secretary of State or, after 1 July 1999, the Scottish Ministers, were required to provide the SPCB with such staff and services as the SPCB may request. Most of the staff and all of the services are now provided directly by the SPCB.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	14-Jul-98	240
LC	14-Jul-98	242
LR	22-Oct-98	1676

Details of Provisions

Paragraph 1 provides that a member of the SPCB appointed under section 21(2)(b) will continue to hold that office until another member of the Parliament is appointed in his place unless he previously resigns, or ceases to be an MSP otherwise than by virtue of a dissolution of the Parliament, or is removed from office by resolution of the Parliament. A member of the SPCB will not therefore cease to be a member of the SPCB merely because he ceases to be an MSP because the Parliament has been dissolved. This ensures that the SPCB can continue to function during a dissolution.

Paragraph 2 gives power to the SPCB to hold property and this includes, by implication, the acquisition and disposal of property. Property is defined in section 126(1) as including rights and interests of any description. Sub-paragraph (2) confers a power to provide, by subordinate legislation for the transfer of any property belonging to a Minister of the Crown or government department to the SPCB, or for the SPCB to have rights or interests in relation to such property. Sub-paragraph (3) provides that the subordinate legislation under sub-paragraph (2) may also provide for the transfer to the SPCB of any liabilities relating to the property to which a Minister of the Crown or government department is subject, immediately prior to the Order coming into force. Sub-paragraph (4) provides that the power in sub-paragraph (2) may only be used if the person making the subordinate legislation considers it appropriate to do so to enable the SPCB to exercise its functions or to facilitate their exercise or in connection with their exercise or proposed exercise.

Further provision about the making of subordinate legislation under this power is to be found in sections 112 to 115 and Schedule 7. In particular, it is subject to Type G procedure specified in paragraph 2 of Schedule 7 which means that it is subject to either draft affirmative procedure or negative procedure in the Westminster Parliament.

This power was exercised in making the Transfer of Property (Scottish Parliamentary Corporate Body) Order 1999 ([S.I. 1999/1106](#)).

In addition, where there is Parliamentary copyright in any work, the SPCB is the first owner of any copyright in the work by virtue of the amendments made to section 165 of the Copyright, Designs and Patents Act 1988 by the Parliamentary Copyright (Scottish Parliament) Order 1999 ([S.I. 1999/676](#)).

Paragraph 3 makes provision for the appointment of the staff of the Parliament. The appointment of assistant Clerks and other staff of the Parliament is a matter for the SPCB (sub-paragraph (1)) and they, together with the Clerk, are referred to in the Act as the staff of the Parliament (sub-paragraph (2)). Under sub-paragraph (3) it is for the SPCB to determine the terms and conditions of appointment of the staff of the Parliament and this will include the payment of salaries. The SPCB will also be able to make arrangements for the payment of pensions, gratuities or allowances to, or in respect of, any person who has ceased to be a member of the staff of the Parliament. The SPCB can, in particular, make contributions or payments towards provision for such pensions, gratuities or allowances and can establish and administer one or more pension schemes (sub-paragraph (4)).

See also the Superannuation (Application of the Superannuation Act 1972, Section 1) (No.2) Order 1999 ([S.I. 1999/2092](#)) which adds employment by the SPCB to those listed

in Schedule 1 to the Superannuation Act 1972. This enables the staff of the Parliament to be covered by the Principal Civil Service Scheme.

Paragraph 4 makes provision as to the powers of the SPCB. The SPCB has power to do anything which appears to it to be necessary or expedient for the purpose of or in connection with the discharge of its functions (sub-paragraph (1)). In particular, under sub-paragraph (2), this includes power to enter into contracts; to charge for goods and services, to invest sums not immediately required by the SPCB in relation to the discharge of its functions and to accept gifts. Sub-paragraph (3) provides that the corporation may sell goods or provide services and may make arrangements for the sale of goods or provision of services to the public. Sub-paragraphs (4) and (5) allow the SPCB to borrow money but only in sterling by way of an overdraft or otherwise to meet a temporary excess of expenditure over income. Such money can only be borrowed in accordance with the special or general approval of the Parliament.

Paragraph 5 allows the SPCB to delegate any of its functions to the Presiding Officer or the Clerk.

Paragraph 6 makes provision as to the proceedings and business of the SPCB. The membership of the SPCB stands at five (including the Presiding Officer), however, the validity of any proceedings of the SPCB will not be affected by any vacancy among its members or, by any defect in the appointment or qualification for membership of any member (sub-paragraph (1)). Sub-paragraph (2) gives power to the SPCB to determine its own procedure and it is for the Presiding Officer to preside over the meetings of the SPCB (sub-paragraph (3)). If the Presiding Officer's office is vacant or the Presiding Officer is unable to act, then the SPCB can appoint another of its members to preside over the meeting.

Paragraph 7 deals with Crown status. The SPCB is not a Crown body as it is exercising functions on behalf of the Parliament rather than the Scottish Executive. Sub-paragraph (1) however provides that Her Majesty may, by Order in Council, provide for the SPCB to be treated as a Crown body for the purpose of any enactment. In particular the Order in Council may provide for employment under the SPCB to be treated as Crown employment or for land held, used or managed by the SPCB or operations carried out by them to be treated as Crown land or operations. This mirrors provision made in relation to the Parliamentary corporate bodies of the House of Commons and the House of Lords. Paragraph 7(3) provides that "Crown body" means a servant or agent of the Crown and includes a government department.

This power was exercised in making the Scottish Parliamentary Corporate Body (Crown Status) Order 1999 ([S.I. 1999/677](#)), which provides for the SPCB to be treated as a Crown body for the purposes of various enactments relating to planning, building legislation, fire precautions, VAT and data protection.

SCHEDULE 3: Standing orders: further provisions

Purpose and Effect

This Schedule requires the Parliament in its standing orders to make provision for certain matters.

General

See the note on section 22, which introduces this Schedule.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	29-Jan-98	543

*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>
CC	29-Jan-98	554
CR	12-May-98	243
CR	12-May-98	244
LC	14-Jul-98	242
LC	16-Jul-98	439
LC	16-Jul-98	443
LC	16-Jul-98	458
LC	16-Jul-98	465
LC	16-Jul-98	470
LR	22-Oct-98	1680
LR	22-Oct-98	1681
L3	9-Nov-98	513
L3	9-Nov-98	603

Details of Provisions

Paragraph 1 - Preservation of order. Standing orders must make provision for preserving order in the proceedings of the Parliament. Provision must be made for (a) preventing conduct which could constitute a criminal offence or contempt of court and (b) a *sub judice* rule. These provisions may provide for the exclusion of a member.

Paragraph 2 - Withdrawal of rights and privileges. Standing orders may include provision for withdrawing from a member of the Parliament his rights and privileges as a member.

Paragraph 3 - Proceedings to be in public. Standing orders must make provision for the proceedings of the Parliament normally to be in public, but may provide for circumstances where proceedings may be in private. Standing orders may set out conditions with which members of the public who are attending the proceedings must comply and may provide for the exclusion of a member of the public.

Paragraph 4 - Reporting and publishing. Standing orders must make provision for the proceedings of the Parliament to be reported and for reports to be published.

Paragraph 5 - The Presiding Officer and deputies. Standing orders must make provision to ensure that the Presiding Officer and deputies do not all represent the same political party.

Paragraph 6 - Committees. The Parliament has power to establish committees. The standing orders about the appointment of committees may allow committees to appoint sub-committees. Standing orders must make provision to ensure that in appointing members to committees and subcommittees regard is had to the balance of political parties in the Parliament. The standing orders may also provide for the exclusion of any member who is not a member of the committee concerned.

Paragraph 7 - Crown interests. This paragraph places Bills of the Scottish Parliament in the same position as Bills of the UK Parliament by requiring standing orders to include provision for obtaining the consent of Her Majesty or HRH The Prince of Wales, where a provision of a Bill impacts on Crown interests, before the Bill may be passed.

SCHEDULE 4: Enactments protected from modification

Purpose and Effect

Schedule 4 forms part of the definition of the legislative competence of the Scottish Parliament. Section 29(2)(c) provides that a provision of an Act of the Scottish Parliament is outside the legislative competence of the Parliament if it is in breach of the restrictions in Schedule 4. The restrictions are upon the extent to which certain enactments - including provisions of the Scotland Act 1998 itself - and other aspects of the law may be modified by an Act of the Scottish Parliament. The schedule also sets out some modifications of sections 53 and 54 (which provide for the general transfer of functions exercisable within devolved competence to the Scottish Ministers).

General

This is one of a set of provisions defining the legislative competence of the Scottish Parliament. Section 28 provides for the Parliament to make laws known as Acts of the Scottish Parliament (ASPs). Section 29 defines the legislative competence of the Parliament. 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, subject to the approval of both the Scottish Parliament and the UK Parliament.

Section 53 provides for the transfer to the Scottish Ministers of most types of Ministerial function which are exercisable within devolved competence. "Devolved competence" is defined in section 54. Essentially, a function is exercisable within devolved competence if it could have been conferred by an Act of the Scottish Parliament. Part III of the present Schedule modifies sections 53 and 54 in relation to those enactments and other aspects of the law which are protected from modification by Parts I and II. Its effect is that, in general, Ministerial functions under such enactments or law are not transferred. However, there are certain exceptions to this.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	254
Stage	Date	Column
LC	21-Jul-98	830
LR	2-Nov-98	126
LR	2-Nov-98	127
L3	9-Nov-98	545
L3	9-Nov-98	603
L3	9-Nov-98	605
L3	9-Nov-98	606

Details of Provisions

Part I: The protected provisions

Paragraph 1 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, certain enactments. Those enactments are:

- (a) *Articles 4 and 6 of the Union with Scotland Act 1706 and the Union with England Act 1707* so far as they relate to freedom of trade. The Union of the Kingdoms of Scotland and England is a reserved matter by virtue of paragraph 1 of Schedule 5. However, the Acts of Union also contain provisions relating to freedom of trade;

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

- (b) *the Private Legislation Procedure (Scotland) Act 1936*. By virtue of amendments made to the 1936 Act by paragraph 5 of Schedule 8, private legislation may continue to be made under the 1936 Act procedure at Westminster about matters which are wholly or partly outside the legislative competence of the Scottish Parliament. Entrenchment of the Act by the present paragraph has the effect that Ministerial functions under the Act in relation to such legislation do not transfer to the Scottish Ministers;
- (c) Sections 1, 2 (other than subsection (2), the words following “such Community obligation” in subsection (3), and the words “subject to Schedule 2 to this Act” in sub-section (4)), 3(1) and (2) and 11(2), and Schedule 1 of the European Communities Act 1972). These are the key provisions of the 1972 Act which give effect to EC law in the law of the UK;
- (d) *Paragraphs 5(3)(b) and 15(4)(b) of Schedule 32 to the Local Government, Planning and Land Act 1980*. These provisions are concerned with a requirement for Treasury consent to the designation of enterprise zones. Their entrenchment by the present paragraph ensures that the Scottish Parliament cannot modify the requirement and that the function of giving consent does not transfer to the Scottish Ministers. Under section 55, this consent requirement is an exception to the general disapplication of requirements for UK Ministerial consent in relation to the exercise by the Scottish Ministers of functions within devolved competence. The exception is maintained because of the tax privileges conferred by enterprise zone status;
- (e) *Sections 140A to 140G of the Social Security Administration Act 1992*. This will ensure that, despite the general devolution of the funding of Scottish public authorities with mixed (reserved and otherwise) functions (see Part III of Schedule 5), functions of funding council tax benefit and housing benefit remain with the UK Government; and
- (f) *the Human Rights Act 1998*. Entrenchment of this Act ensures that the Scottish Parliament cannot modify the way in which the European Convention on Human Rights is given effect in UK law. Under section 29, the Scottish Parliament must legislate consistently with the Convention rights as given effect by the 1998 Act, and under section 57(2) 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 such rights.

Paragraph 2 provides that an ASP cannot modify, or confer power to modify, “the law on reserved matters”. “The law on reserved matters” means the law which is about reserved matters rather than, for example, planning law which, although it relates to a matter which is not reserved, may apply to a reserved matter such as coal mining. Sub-paragraph (2) defines the law on reserved matters as enactments (other than the Scotland Act itself, as there are specific provisions about the degree to which that may be modified in paragraph 4) and rules of law whose subject-matter is reserved by Schedule 5. Sub-paragraph (3) provides that the restriction on modification applies to a rule of Scots private or criminal law only to the extent that the rule in question is special to a reserved matter - a rule which results in a distinct and separate treatment of a reserved matter - and to certain other specified aspects of private law. However, under section 29(4) it is within legislative competence for the Scottish Parliament to modify Scots private or criminal law as it applies to reserved matters only if the purpose of the provision is to make the law in question apply consistently to reserved and non-reserved areas.

This paragraph has been modified by the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 ([S.I. 2000/1831](#)) to prevent the Parliament from modifying certain rules of Scots private law about pension earmarking and sharing.

Paragraph 3 provides that paragraph 2 does not apply to modifications which are incidental to, or consequential on, provision which does not relate to reserved matters and which do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision. It includes provision to ensure that this test of necessity is judged by reference to the legislative powers of the Scottish Parliament. Thus, the fact that a consequential provision might be given effect by an Act of the UK Parliament

or by an order made by a UK Minister will not affect what is considered to be necessary for the purposes of the test.

Under section 29, it is outside legislative competence to make provision which “relates to” a reserved matter, and the question of whether a provision relates to a reserved matter is to be determined, subject to some certain exceptions, by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. The Court can determine that a provision is for a permitted purpose, even if, as an ancillary matter, it affects reserved matters. However, paragraphs 2 and 3 of the present Schedule set out a test on necessity, under which modifications of the law on reserved matters may be made only where there are incidental to, or consequential on, provision which does not relate to reserved matters, and they do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.

Paragraph 4 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, the Scotland Act itself. It also provides for certain exceptions to that rule, for example to allow the Parliament to legislate about its protections from judicial proceedings and to add to or limit the powers of the Scottish Parliamentary Corporate Body.

Sub-paragraph (2) provides that the paragraph does not apply to modifying:

Section 1(4), which provides that the validity of any proceedings of the Parliament is not affected by any vacancy in its membership;

Section 17(5), which provides that the validity of any proceedings of the Parliament is not affected by the disqualification of any person from being a member;

Section 19(7), which provides that the validity of any act of the Presiding Officer or a deputy is not affected by any defect in his election;

Section 21(5), which provides that property and liabilities to which the Parliament would be entitled/subject to be treated as property or liabilities of the Scottish Parliamentary Corporate Body;

Section 24(2), which makes provision about the notice to be given to witnesses summoned to give evidence to the Parliament;

Section 28(5), which provides that the validity of an ASP is not affected by any invalidity in the proceedings of the Parliament leading to its enactment;

Section 39(7), which makes provision about the maximum level of fine to which a member of the Parliament would be liable in connection with offences relating to the registration and declaration of interests;

Sections 40-43, which make provision about legal proceedings by or against the Parliament etc., defamatory statements, contempt of court and corrupt practices;

Section 50, which 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 their nomination by the Parliament (or the Parliament’s agreement to their appointment);

Section 69(3), which 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;

Section 85, which makes provision about exemption from jury service of MSPs, members of the Scottish Executive and junior Scottish Ministers;

Section 93, which permits Ministers of the Crown and the Scottish Ministers to exercise functions on each others’ behalf on an agency basis;

Section 97 which make provision for assistance to Opposition parties. This was added by [S.I. 1999/1749](#); and

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

Paragraphs 4(1) to (3) and 6(1) of Schedule 2, which make provision about the powers, proceedings and business of the Scottish Parliamentary Corporate Body.

Sub-paragraph (3) provides that this paragraph does not apply to the modification of any provision of the Scotland Act which charges any sum on the Scottish Consolidated Fund, requires any sum to be paid out of that Fund without further approval, or requires or authorises any sum to be paid into the Fund. This list was amended by the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 (S.I. 2000/1831) to include any provision which requires any sum to be payable out of that Fund. However, certain provisions are excepted. Those are:

Section 64(7), which provides that certain receipts to be paid over to the Secretary of State shall be a charge on the Fund;

Sections 66(2) and 71(7), which provide for the sums required by the Scottish Ministers for the re-payment of borrowing or deemed borrowing from the Secretary of State (with interest) to be a charge on the Fund;

Sections 77 and 78, which provide for payments into and out of the Scottish Consolidated Fund in consequence of the operation of the tax-varying powers; and

Section 119, which translates statutory references to the Consolidated Fund to references to the Scottish Consolidated Fund.

Sub-paragraph (4) provides for a further exception to allow the Scottish Parliament to set up a fund, in addition to the Scottish Consolidated Fund, out of which loans may be made by the Scottish Ministers, and to amend Part III of the Act (which sets out the financial provisions) so far as necessary or expedient for that purpose on in consequence of the establishment of such a fund.

Sub-paragraph (5) provides that this paragraph does not prevent modification of enactments which are modified by this Act and that it does not prevent the Scottish Parliament from repealing provisions of the Scotland Act which amend other enactments if the provisions ceases to have effect in consequence of an ASP.

Paragraph 5 lists certain modifications made by the Act which the Parliament cannot modify, or confer power by subordinate legislation to modify. These are:

- (a) *the effect of [section 119\(3\)](#) (which translates statutory references to the Consolidated Fund to references to the Scottish Consolidated Fund) in relation to any provision of an Act of Parliament relating to judicial salaries. This ensures that judicial salaries will remain a direct charge upon the Scottish Consolidated Fund;*
- (b) *the amendments made by [Schedule 8 to the Crown Suits \(Scotland\) Act 1857](#), [the Crown Proceedings Act 1947](#) and [the Criminal Procedure \(Scotland\) Act 1995](#), so far as they relate to the Advocate General for Scotland. These amendments take account of the transfer of the office of Lord Advocate to become a member of the Scottish Executive and the establishment of the new office of Advocate General for Scotland as the Scottish law officer to the UK Government; and*
- (c) *the amendments made to the [Lands Tribunal Act 1949](#) by [paragraph 9 of Schedule 8](#) (to provide that the remuneration of members of the Lands Tribunal for Scotland shall be charged on the Scottish Consolidated Fund) and to the [Scottish Land Court Act 1993](#) by [paragraph 29 of Schedule 8](#) (to provide that the First Minister will recommend the appointment of a person as chairman of the Court and that he shall consult the Lord President of the Court of Session before doing so).*

Paragraph 6 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, enactments which relate to the powers which a Minister of the Crown shares by virtue of section 56. This ensures that where a Minister of the Crown has retained a concurrent power in a devolved area, the Scottish Parliament cannot remove that power.

Part II: General exceptions

Paragraph 7 provides that the restrictions in Part I do not prevent ASPs from restating the law (e.g. in a consolidation Act) or repealing spent enactments, or conferring power by subordinate legislation to do so. It also provides that the “law on reserved matters” (which is protected by paragraph 2) includes any such restatement of the law on reserved matters if the subject-matter of the restatement is a reserved matter. This is necessary to ensure that the Parliament is able to consolidate or codify the law.

Paragraph 8 provides that Part I does not prevent the operation of any provision of the Interpretation Act 1978. This is necessary, in particular, to ensure that section 17(2) (a) of the 1978 Act applies. That section provides where an Act repeals and re-enacts a previous enactment and unless the contrary intention appears any reference in any other enactment to the repealed enactment shall be construed as one to the re-enacted provision, and that subordinate legislation, or other things done under the repealed enactment, are to have effect as if made or done under the re-enacted provision.

Paragraph 9 provides that Part I does not prevent the consequential amendment of various titles (of registers, courts, tribunals, judges, chairman or offices of courts or tribunals, or holders of offices in the Scottish Administration which are not Ministerial offices or members of the staff of the Scottish Administration), or consequential amendments to any reference to a declarator.

Paragraph 10 provides that Part I does not prevent the modification of enactments for or in connection with the purposes of section 70 (financial control, accounts and audit) or 91 (maladministration). In particular, this ensures that the necessity test in paragraphs 2 and 3 does not unduly limit the competence of the Parliament to fulfil the requirements of those sections.

Paragraph 11 contains provision to ensure that the restrictions in Part I do not unduly limit the competence of the Parliament to legislate about its own subordinate legislation procedure. This is necessary, in particular, to ensure that the “necessity test” in paragraphs 2 and 3 does not prevent such legislation in relation to powers transferred to the Scottish Ministers under section 63 to make subordinate legislation in relation to reserved matters.

Part III: Consequential modification of [sections 53](#) and [54](#)

Paragraphs 12 to 14 clarify the effect of Part I upon the transfer of Ministerial functions. In general, functions under enactments which are protected from modification by Part I cannot transfer to the Scottish Ministers under section 53.

Paragraph 12 ensures that this is the case by providing that a function does not transfer to the Scottish Ministers if the Schedule would prevent an ASP from transferring the function to someone else.

Paragraph 13(1) provides for some exceptions to this. An exception is made for any function conferred by the European Communities Act 1972. That Act has been protected from modification because it is not intended that the Scottish Parliament should be able to alter the mechanisms under which EC law is given effect. The present paragraph ensures that that does not prevent the Ministerial powers and duties under the 1972 Act from transferring where they would otherwise be exercisable within devolved competence.

For similar reasons, exceptions are made for most functions conferred by the Human Rights Act and the law on reserved matters so far as contained in an enactment. For example, section 12(1) of the Official Secrets Act 1989 empowers a Minister to prescribe the persons who are to be Crown servants for the purposes of that Act. The 1989 Act is part of the law on reserved matters, but the Scottish Ministers are able to exercise the function for a devolved purpose⁴, for instance to change the name of

⁴ The function has also been executively devolved to the Scottish Ministers by [SI 1999/1750](#).

a person who may already have been prescribed as a Crown servant. Paragraph 13(3) ensures that an ASP or subordinate legislation made under an ASP may provide for the transfer of such functions to somebody else.

Paragraph 14 provides that subordinate legislation under section 105 (the power to make consequential amendments) may provide that functions under enactments or prerogative instruments modified by such subordinate legislation are not transferred by virtue of section 53.

[Schedule 5](#)

Derivations

The table below shows the legislative history of each of the provisions in Schedule 5 to the Act, providing the paragraph or Section number in each print of the Bill. For example in the “Comm C” print (which is the Bill as introduced and as used at Commons Committee stage), what was paragraph 9 of Part I eventually became paragraph 10 of Part I of the Schedule. In earlier prints of the Bill, Part II of Schedule 5 was divided into numbered Heads and Sections (shown below as “H” and “S”). These were changed in the final print of the Act so that the Heads were instead lettered, so that each section could be given a unique letter and number reference. For example Section C9 (Weights and measures) appeared in the introductory print as Head 3 Section 8.

<i>Act</i>	<i>Lords 3R HL Bill 155</i>	<i>Lords R HL Bill 155</i>	<i>Lords C HL Bill 119</i>	<i>Comm R Bill 166</i>	<i>Comm C Bill 104</i>
Part I					
§1	§1	§1	§1	§1	§1
<i>Act</i>	<i>Lords 3R HL Bill 155</i>	<i>Lords R HL Bill 155</i>	<i>Lords C HL Bill 119</i>	<i>Comm R Bill 166</i>	<i>Comm C Bill 104</i>
§2	§2	§2	§2	§2	§2
§3	§3	§3	§3	§3	§3
§4	§4	§4	§4	§4	§4
§5	§5	§5	§5	§5	§5
§6	§6	§6	§6	§6	---
§7	§7	§7	§7	§7	§6
§8	§8	§8	§8	§8	§7
§9	§9	§9	§9	§9	§8
§10	§10	§10	§10	§10	§9
Part II					
A1	H1 S1	H1 S1	H1 S1	H1 S1	H1 S1
A2	H1 S2	H1 S2	H1 S2	H1 S2	H1 S2
A3	H1 S3	H1 S3	H1 S3	H1 S3	H1 S3
A4	H1 S4	H1 S4	H1 S4	H1 S4	H1 S4
A5	H1 S5	H1 S5	H1 S5	H1 S5	H1 S5
B1	H2 S1	H2 S1	H2 S1	H2 S1	H2 S1
B2	H2 S2	H2 S2	H2 S2	H2 S2	H2 S2
B3	H2 S3	H2 S3	H2 S3	H2 S3	H2 S3

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

<i>Act</i>	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
B4	H2 S4	H2 S4	H2 S4	H2 S4	H2 S4
B5	H2 S5	H2 S5	H2 S5	H2 S5	H2 S5
B6	H2 S6	H2 S6	H2 S6	H2 S6	H2 S6
B7	H2 S7	H2 S7	H2 S7	H2 S7	H2 S7
B8	H2 S8	H2 S8	H2 S8	H2 S8	H2 S8
B9	H2 S9	H2 S9	H2 S9	H2 S9	H2 S9
B10	H2 S10	H2 S10	H2 S10	H2 S10	H2 S10
B11	H2 S11	H2 S11	H2 S11	H2 S11	H2 S11
B12	H2 S12	H2 S12	H2 S12	H2 S12	H2 S12
C1	H3 S1	H3 S1	H3 S1	H3 S1	H3 S1
C2	H3 S2	H3 S2	H3 S2	H3 S2	H3 S2
C3	H3 S3	H3 S3	H3 S3	H3 S3	H3 S3
C4	H3 S4	H3 S4	H3 S4	H3 S4	H3 S4
C5	H3 S5	H3 S5	H3 S5	H3 S5	H3 S5
C6	H3 S6	H3 S6	---	---	---
C7	H3 S7	H3 S7	H3 S6	H3 S6	H3 S6
C8	H3 S8	H3 S8	H3 S7	H3 S7	H3 S7
C9	H3 S9	H3 S9	H3 S8	H3 S8	H3 S8
C10	H3 S10	H3 S10	H3 S9	H3 S9	H3 S9
C11	H3 S11	H3 S11	H3 S10	H3 S10	H3 S10
C12	H3 S12	H3 S12	H3 S11	H3 S11	H3 S11
C13	H3 S13	H3 S13	H3 S12	H3 S12	H3 S12
C14	H3 S14	H3 S14	H3 S13	H3 S13	---
C15	H3 S15	H3 S15	H3 S14	H3 S14	H3 S13
D1	H4 S1	H4 S1	H4 S1	H4 S1	H4 S1
D2	H4 S2	H4 S2	H4 S2	H4 S2	H4 S2
<i>Act</i>	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
D3	H4 S3	H4 S3	H4 S3	H4 S3	H4 S3
D4	H4 S4	H4 S4	H4 S4	H4 S4	H4 S4
D5	H4 S5	H4 S5	H4 S5	H4 S5	H4 S5
E1	H5 S1	H5 S1	H5 S1	H5 S1	H5 S1
E2	H5 S2	H5 S2	H5 S2	H5 S2	H5 S2
E3	H5 S3	H5 S3	H5 S3	H5 S3	H5 S3
E4	H5 S4	H5 S4	H5 S4	H5 S4	H5 S4
E5	H5 S5	H5 S5	H5 S5	H5 S5	H5 S5

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

Act	Lords 3R HL Bill 155	Lords R HL Bill 155	Lords C HL Bill 119	Comm R Bill 166	Comm C Bill 104
F1	H6 S1	H6 S1	H6 S1	H6 S1	H6 S1
F2	H6 S2	H6 S2	H6 S2	H6 S2	H6 S2
F3	H6 S3	H6 S3	H6 S3	H6 S3	H6 S3
F4	H6 S4	H6 S4	H6 S4	H6 S4	H6 S4
G1	H7 S1	H7 S1	H7 S1	H7 S1	H7 S1
G2	H7 S2	H7 S2	H7 S2	H7 S2	H7 S2
G3	H7 S3	H7 S3	H7 S3	H7 S3	H7 S3
H1	H8 S1	H8 S1	H8 S1	H8 S1	H8 S1
H2	H8 S2	H8 S2	H8 S2	H8 S2	H8 S2
H3	H8 S3	H8 S3	H8 S3	H8 S3	H8 S3
J1	H9 S1	H9 S1	H9 S1	H9 S1	H9 S1
J2	H9 S2	H9 S2	H9 S2	H9 S2	H9 S2
J3	H9 S3	H9 S3	H9 S3	H9 S3	H9 S3
J4	H9 S4	H9 S4	H9 S4	H9 S4	H9 S4
J5	H9 S5	H9 S5	H9 S5	H9 S5	H9 S5
K1	H10 S1	H10 S1	H10 S1	H10 S1	H10 S1
K2	H10 S2	H10 S2	H10 S2	H10 S2	H10 S2
K3	H10 S3	H10 S3	H10 S3	H10 S3	H10 S3
K4	H10 S4	H10 S4	H10 S4	H10 S4	H10 S4
L1	H11 S1	H11 S1	H11 S1	H11 S1	H11 S1
Part II (contd.)					
L2	H11 S2	H11 S2	H11 S2	H11 S2	H11 S2
L3	H11 S3	H11 S3	H11 S3	H11 S3	H11 S3
L4	H11 S4	H11 S4	H11 S4	H11 S4	H11 S4
L5	H11 S5	H11 S5	H11 S5	H11 S5	H11 S5
L6	H11 S6	H11 S6	H11 S6	H11 S6	H11 S6
Part III					
Paras 1-2 Scottish public Authorities	Paras 1-2	Paras 1-2	Paras 1-2	---	---
Para 3 Reserved bodies	Para 3	Para 3	---	---	---
Para 4 Financial assistance to industry	Para 4	---	---	---	---
Para 5	Para 5	Para 4	Para 3	Pt III	Pt III

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

<i>Act</i>	<i>Lords 3R HL Bill 155</i>	<i>Lords R HL Bill 155</i>	<i>Lords C HL Bill 119</i>	<i>Comm R Bill 166</i>	<i>Comm C Bill 104</i>
Interpretation					

Executive Devolution and Advice to The Queen

These notes also describe, under the heading “Executive Devolution”, the provision in the various orders which have been made up to September 2001 under section 63 of the Scotland Act for transferring Ministerial functions which relate to reserved matters to the Scottish Ministers, or for modifying them so that they are exercisable by the Scottish ministers, e.g. after consultation with the Scottish Ministers or with the agreement of the Scottish Ministers. These orders are the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)), the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 1999 ([S.I. 1999/3321](#)), the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 ([S.I. 2000/1563](#)), the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No.2) Order 2000 ([S.I. 2000/3253](#)), the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2001 ([S.I. 2001/954](#)).

Where the descriptions of the functions in these entries show an asterisk beside a reference to “the Secretary of State”, the function in question is one which was originally conferred on the Lord Advocate and which was transferred to the Secretary of State by the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 ([S.I. 1999/678](#)).

In some cases, special arrangements for giving advice to The Queen have been made. Such functions are exercised by the First Minister rather than the Scottish Ministers, and were described in a written answer by the Prime Minister on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library. Where these functions relate to reserved matters, they are noted in the relevant section.

Agency Arrangements

Functions of a Minister of the Crown, which are specified in any order made under section 93 (agency arrangements) of the Scotland Act 1998 as at September 2001 are identified under the heading “Agency Arrangements”. The only Order under that section which has in fact done so is the Scotland Act 1998 (Agency Arrangements) (Specification) Order 1999 ([S.I. 1999/1512](#)).

The other orders which have been made under that section prior to that date have specified functions which are exercisable by the Scottish Ministers, namely 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](#)). As these functions are not necessarily related to a reserved matter, they are not identified in these notes.

Residual Functions

In some cases the effect of reserving a particular area was to leave a function in the hands of the Secretary of State for Scotland, which it was no longer appropriate for him to exercise. Such functions were transferred to other UK Ministers by means of Transfer of Functions Orders under the Ministers of the Crown Act 1975 (where the particular Secretary of State for Scotland was specified in the statute) or by means of a Prime Ministerial announcement (where the function was exercisable by the Secretary of State for Scotland as a matter of convention). Entries under the heading “Residual Functions” note any relevant Transfer of Functions Orders, eg in relation to Medicines and Poisons (Section J4).

Reserved Matters

Section 30(1) provides for Schedule 5 to define the matters which are “reserved” for the purposes of the Act.

The main purposes in the Act for which the definition of reserved matters is relevant are section 29 which deals with the legislative competence of the Scottish Parliament and section 53 which deals with the transfer of Ministerial functions which are exercisable within devolved competence to the Scottish Ministers. It is also used, however, in various other contexts, such as section 88 which deals with cross-border public authorities.

General

Section 30 introduces Schedule 5 which defines the reserved matters. Schedule 5 has been amended by the following Orders in Council which have been made under section 30(2) of the Scotland Act up to September 2001, namely [S.I. 1999/1749](#), [2000/1831](#), [2000/3252](#) and [2001/1456](#).

Schedule 5 is in three Parts. Part I defines general reservations. Part II sets out specific reservations arranged by Head and Section. Part III consisted of general provisions and contains general explanatory and interpretative provisions.

The Schedule must be read as a whole. Even though a matter is excepted from a reservation in one Section, it could be reserved at least in part by others.

Interpretative provisions

Part III and the “Preliminary” paragraphs at the beginning of Part II contain general explanatory and interpretative provisions. In particular:

- (a) paragraphs 1 to 3 in Part II explain how the entries in Part II are to be construed;
- (b) paragraphs 1 to 4 of Part II contain general provisions about Scottish public authorities, “reserved bodies” and financial assistance to industry; and
- (c) paragraph 5 of Part III contains a general provision as to how references in the Schedule to the subject matter of an enactment are to be construed. It provides that they are to be read as references to that enactment as it had effect on 1 July 1999. Accordingly, for the purposes of this Schedule, it does not matter if that enactment is amended or even repealed after that date: the reservation will remain the same.

TABLE OF RESERVED MATTERS

The table below shows where various reserved matters are to be found in Schedule 5 to the Act. Entries in upper case correspond to Section titles.

<i>SUBJECT</i>	<i>PART</i>	<i>PARAGRAPH/ SECTION</i>
ABORTION	II	J1
Agricultural Wages	II	H1
AIR TRANSPORT	II	E4
ARCHITECTS	II	G1
ASSISTED AREAS, DESIGNATION OF	II	C13
AUDITORS	II	G3
Bank Holidays	II	A3, L5

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

SUBJECT	PART	PARAGRAPH/ SECTION
Banks	II	A3
BETTING	II	B9
BROADCASTING	II	K1
Building societies	II	A3
BUSINESS ASSOCIATIONS	II	C1
Carriage of dangerous goods	II	E5
CHARITIES	II	C1
CHILD SUPPORT	II	F2
Cinemas	II	B5
Civil Defence	I	9
Civil Service, The	I	8
Classification of films	II	B5
COAL	II	D3
COMPETITION	II	C3
CONSTITUTION, THE	I	1 to 5
CONSUMER PROTECTION	II	C7
CONTROL OF WEAPONS	II	L3
Copyright	II	C4
Crown, The	I	1
Crown Estate Commissioners	I	2
CURRENCY, THE	II	A2
DATA PROTECTION	II	B2
DEFENCE	I	9
DRUGS, MISUSE OF	II	B1
ELECTIONS	II	B3
ELECTRICITY	II	D1
EMBRYOLOGY	II	J3
EMERGENCY POWERS	II	B10
EMPLOYMENT	II	H1
ENERGY CONSERVATION	II	D5
ENTERTAINMENT	II	B5
EQUAL OPPORTUNITIES	II	L2
EU	I	7
Estate agency business, The conduct of	II	C7
EXTRADITION	II	B11
FINANCIAL MARKETS	II	A4

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

SUBJECT	PART	PARAGRAPH/ SECTION
FINANCIAL SERVICES	II	A3
FIREARMS	II	B4
FISCAL, ECONOMIC AND MONETARY POLICY	II	A1
Fishing	II	C6
Food safety	II	C7
FOREIGN AFFAIRS	I	7
GAMING	II	B9
GENETICS	II	J3
GOVERNMENT INDEMNITY SCHEME	II	K3
HEALTH AND SAFETY	II	H2
HEALTH PROFESSIONS	II	G2
Honours and Dignities	I	2
IMMIGRATION	II	B6
IMPORT AND EXPORT CONTROL	II	C5
INDUSTRIAL DEVELOPMENT ADVISORY BOARD	II	C14
INDUSTRIAL RELATIONS	II	H1
Insider dealing	II	A4
INSOLVENCY	II	C2
Insolvency Practitioners	II	C2
Insurance	II	A3
INTELLECTUAL PROPERTY	II	C4
INTERCEPTION OF COMMUNICATIONS	II	B8
		C10
		C11
International Trade (see also import & export control)	I	7
JOB SEARCH AND SUPPORT	II	H3
JUDICIAL REMUNERATION	II	L1
Legal profession, The	II	C3
LIEUTENANCIES	II	B12
Local taxes	II	A1
Lord Lyon King of Arms	I	2
LOTTERIES	II	B9
MARINE TRANSPORT	II	E3
MEDICINES AND POISONS	II	J4
MISUSE OF DRUGS	II	B1

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

SUBJECT	PART	PARAGRAPH/ SECTION
MONEY LAUNDERING	II	A5
NATIONAL SECURITY	II	B8
NATIONALITY	II	B6
NUCLEAR ENERGY	II	D4
OCCUPATIONAL AND PERSONAL PENSIONS	II	F3
OFFICIAL SECRETS	II	B8
OIL & GAS	II	D2
ORDNANCE SURVEY	II	L4
OUTER SPACE	II	L6
Patents	II	C4
POLITICAL PARTIES	I	6
POST OFFICE, POSTS AND POSTAL SERVICES	II	C11
PRODUCT STANDARDS, SAFETY AND LIABILITY	II	C8
PROPERTY ACCEPTED IN SATISFACTION OF TAX	II	K4
PROTECTION OF TRADING AND ECONOMIC INTERESTS	II	C15
PUBLIC LENDING RIGHT	II	K2
Public passenger transport for disabled persons	II	E5
PUBLIC SERVICE	I	8
RAIL TRANSPORT	II	E2
RESEARCH COUNCILS	II	C12
ROAD TRANSPORT	II	E1
SCIENTIFIC PROCEDURES ON LIVE ANIMALS	II	B7
SEA FISHING	II	C6
SOCIAL SECURITY SCHEMES	II	F1
SURROGACY	II	J3
Taxes	II	A1
TELECOMMUNICATIONS AND WIRELESS TELEGRAPHY	II	C10
TERRORISM	II	B8
TIME	II	L5
Trading with the enemy and enemy property	I	9
Transport of radioactive material	II	E5
Travel documents, Issue of	II	A6
TREASON	I	10

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

<i>SUBJECT</i>	<i>PART</i>	<i>PARAGRAPH/ SECTION</i>
Vaccine Damage Payments Scheme, The	II	F1
Veterinary surgeons	II	G2
Veterinary medicines	II	J4
Video Recordings	II	B5
WAR PENSIONS	II	F4
WEIGHTS AND MEASURES	II	C9
WELFARE FOODS	II	J5
XENOTRANSPLANTATION	II	J2

Part I: General Reservations

Paragraphs 1 to 5: The Constitution

Purpose and Effect

These paragraphs reserve aspects of the Constitution, subject to certain exceptions.

Detail of Provisions

Paragraph 1: Constitution

Paragraph 1 provides that certain aspects of the Constitution are reserved matters. These aspects are:

- (a) the Crown, including the succession to the Crown and a regency;
- (b) the Union of the Kingdoms of Scotland and England;
- (c) the Parliament of the United Kingdom;
- (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal; and
- (e) the continued existence of the Court of Session as a civil court of first instance and of appeal.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	787

Paragraphs 2-5 provide for exceptions to be made from this basic reservation and clarify the scope of what is excepted and what is reserved.

Paragraph 2: Functions etc.

Paragraph 2(1) provides that paragraph 1 does not have the effect of reserving Her Majesty's prerogative and other executive functions, or functions exercisable by any person acting on behalf of the Crown. This enables the Scottish Parliament to legislate about those functions where they do not relate to other reserved matters and enables such functions which are exercised by a Minister of the Crown in or as regards Scotland to transfer to the Scottish Ministers under section 53. (See also the note at the end of this Section on the giving of advice to Her Majesty.)

Paragraph 2(1)(c) also makes it clear that the offices in the Scottish Administration are not reserved matters so that the Scottish Parliament has the competence to amend or abolish such offices, such as the Keeper of the Registers of Scotland. The Scottish Parliament could not, however, amend or abolish the Ministerial offices in the Scottish Administration (i.e. the members of the Scottish Executive as provided for by section 44) by virtue of paragraph 4 of Schedule 4.

Paragraph 2(2) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of honours and dignities or the functions of the Lord Lyon King of Arms with regard to the granting of arms i.e. the right to bear and use a coat of arms in Scotland (although this does not apply to the Lord Lyon King of Arms in his judicial capacity). This is required because otherwise, by virtue of paragraph 2(1), all the functions relating to honours and dignities (e.g. peerages, knighthoods, and decorations), such as the making of recommendations to the Queen regarding the grant of honours etc., and the functions of the Lord Lyon relating to the granting of arms would not be reserved. However, the functions of the Lord Lyon in his judicial capacity are not reserved. (See also the note at the end of this Section on the giving of advice to Her Majesty.)

Paragraph 2(3) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the management (in accordance with any enactment regulating the use of land) of the Crown Estate. This has the effect of ensuring that the Scottish Parliament cannot legislate about the Crown Estate Commissioners or their functions of managing the Crown property, rights and interests known as the Crown Estate under the Crown Estate Act 1961. The Scottish Parliament will, however, be able to legislate to affect the Crown Estate by virtue of paragraph 3(1).

Paragraph 2(4) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the functions of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters. This supplements the reservation of national security and interception of communications in Section B8.

Paragraph 2(5)⁵ qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the functions exercisable through the Export Credit Guarantee Department. The ECGD provides underwriting services and technical advice and assistance to exporters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	903
CC	30-Mar-98	906
CC	30-Mar-98	907
CR	19-May-98	806
LR	3-Nov-98	142
LR	3-Nov-98	143

Paragraph 3: Crown Property

Paragraph 3(1) provides that paragraph 1 does not have the effect of reserving Crown property. Crown property is:

⁵ This paragraph was inserted by article 3 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

- (a) property belonging to Her Majesty in right of the Crown. This includes property which the Crown can sell and alienate, such as the foreshore, and rights and obligations over such property which are vested in the Crown as trustee for certain public rights and which cannot be alienated, such as the right to recreational use of the foreshore or the right of public navigation in the waters over the seabed. This property forms part of the Crown Estate which is managed by the Crown Estate Commissioners; and
- (b) property belonging to any person acting on behalf of the Crown or held in trust for Her Majesty for the purposes of any person acting on behalf of the Crown.

This will enable the Scottish Parliament, for example, to apply its planning legislation to Crown property, subject of course to any provisions in other reservations. It will also enable the Scottish Parliament, when legislating to create a new harbour or port, to extinguish any public rights over the foreshore or seabed which might be affected.

Paragraph 3(2) provides that paragraph 1 does not reserve the position of the Crown as ultimate superior of all feudal land in Scotland or the superiorities owned by the Prince and Steward of Scotland. This provision is required because it is not clear whether such property can be said to belong to the Crown “in right of the Crown”. It enables the Scottish Parliament to abolish the feudal system of land tenure, as in the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Paragraph 3(3) qualifies paragraph 3(1) by providing that it does not affect the reservation by paragraph 1 of:

- (a) the hereditary revenues of the Crown, other than revenues from *bona vacantia*, *ultimus haeres* and treasure trove. Hereditary revenues are derived from property vested in the Crown in right of the Crown and various other prerogative rights and privileges which are customarily surrendered by the Crown to the nation in exchange for a fixed annual income, known as the Civil List. *Bona vacantia*, *ultimus haeres* and treasure trove, are however devolved;
- (b) the royal arms and standard. This is required because otherwise it could be regarded as part of the property belonging to Her Majesty in right of the Crown; and
- (c) the compulsory acquisition of property held or used by a Minister of the Crown or government department.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904
CR	19-May-98	806
LC	14-Jul-98	242

Paragraph: 4 Crown’s private property

Paragraph 4(1) provides that paragraph 1 does not have the effect of reserving property which the Queen holds in Her private capacity, such as Balmoral.

Paragraph 4(2) qualifies paragraph 4(1) by providing that it does not affect the reservation by paragraph 1 of the subject-matter of the Crown Private Estates Acts 1800 to 1873. These Acts regulate matters relating to such private estates, such as how they may be held or disposed of.

This provision enables the Scottish Parliament to legislate to affect the Queen’s private estates in Scotland. Any such provision in an Act of the Scottish Parliament will, however, require the Queen’s consent under standing orders made in accordance with paragraph 5 of Schedule 3.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904

Paragraph 5: Scottish Seal

Paragraph 5 provides that paragraph 1 does not reserve the use of the Scottish Seal. “Scottish Seal” is defined in section 2(6). It is the Seal which is currently used in connection with certain matters, such as appointments made under Royal Warrants (e.g. of judges and QCs) and grants of lands. The Act provides that the First Minister is to be the Keeper of the Scottish Seal (section 45(7)) and that it is to be used in connection with proclamations by the Queen regarding certain elections (sections 2(5) and 3(2)) and the Royal Assent to Scottish Bills (section 28(3)). The Scottish Parliament will be able to provide that it should have other uses.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904
CR	19-May-98	787
LR	3-Nov-98	144

Advice to The Queen

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library.

In cases where Her Majesty exercises a function which is exercisable within devolved competence for the purposes of the Scotland Act 1998 and She was, by convention, advised by a Minister of the Crown about the exercise of that function, then from 1 July 1999 She will be advised by the First Minister instead of by a Minister of the Crown. Examples of circumstances in which Her Majesty will in future be advised by the First Minister instead of by the Secretary of State in relation to the exercise of Her functions which relate in whole or in part to a devolved matter are shown below where they are relevant to paragraphs 1 to 5 of Schedule 5.

Her Majesty will be advised by the First Minister on:

the appointment of the Lord Lyon and Lyon Clerk.

use of the Royal Prerogative⁶ including the use of Royal Names⁷ and Royal Patronage⁸;

Receipt of and response to the submission of Loyal Addresses to Her Majesty from Churches and individuals in Scotland;

Response to a Petition submitted to Her Majesty;

⁶ In respect of the use of the Royal Prerogative, where the advice concerns a devolved matter the First Minister will advise Her Majesty.

⁷ An organisation may only call itself “Royal” if it has the authority of Her Majesty. Requests to name a street or other place after a member of the Royal Family also require approval by Her Majesty. Where the application is for something that is in Scotland, the First Minister will advise Her Majesty.

⁸ This refers to patronage of an organisation by a member of the Royal Family. Where the organisation is Scottish-based and operates in devolved areas the First Minister will advise Her Majesty.

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

Appointment to offices in the Royal Household in Scotland, including HM Sculptor in Ordinary in Scotland; HM Painter and Limner in Scotland; the Royal Astronomer for Scotland; the Historiographer Royal in Scotland; the Keeper of Dumbarton Castle.

There are some matters in respect of which the Prime Minister gives advice to Her Majesty on the exercise of Her functions and on which it is appropriate for the Prime Minister to consult or to take advice from the First Minister. These matters include recommendations of Scottish candidates for honours and dignities, which are a reserved matter, and advice on the appointment of Lord Lieutenants in Scotland, the Lord High Commissioner to the General Assembly of the Church of Scotland and members of the Royal Commission on Environmental Pollution and the Forestry Commission.

Part I, Paragraph 6: Political Parties

Purpose and Effect

This paragraph reserves the registration and funding of political parties, except for making payments to assist MSPs in performing their Parliamentary duties.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	21-Jul-98	858

Details of Provisions

This paragraph ensures that the registration and funding of political parties is a reserved matter, except for the making of payments to any political party for the purpose of assisting members of the Scottish Parliament who are connected with the party to perform their Parliamentary duties. This exception was added by article 2 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

The registration and funding of political parties is dealt with in the Political Parties, Elections and Referendums Act 2000 which consolidated the Registration of Political Parties Act 1998 which used to deal with the registration of political parties.

Section 97 provides a power for Her Majesty, by Order in Council to provide for the Scottish Parliamentary Corporate Body to make payments to registered political parties for the purpose of assisting members of the Parliament who are connected with such parties to perform their Parliamentary duties. This power has been exercised in making the Scottish Parliament (Assistance for Registered Political Parties) Order 1999 (S.I. 1999/1745).

Part I, Paragraph 7: Foreign affairs, etc.

Purpose and Effect

This paragraph reserves foreign affairs, subject to certain exceptions.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	914
LC	21-Jul-98	862

Details of Provisions

Reservation

Paragraph 7(1) provides that international relations, including:

- (a) relations with territories outside the UK, the European Communities (and their institutions) and other international organisations;
- (b) regulation of international trade; and
- (c) international development assistance and co-operation,

are reserved matters.

Subject to the exceptions in paragraph 7(2), this means that the conduct of international relations, including conduct of relations with the European Communities, is therefore a matter reserved to the UK Parliament and UK Government.

The reservation of international relations does not have the effect of precluding the Scottish Ministers and officials from communicating with other countries, regions, or international or European institutions, so long as the representatives of the Scottish Parliament or the Scottish Ministers do not purport to speak for the United Kingdom or to reach agreements which commit the UK.

Exceptions

Paragraph 7(2) makes certain exceptions to this reservation:

- (a) *Observing and implementing international obligations etc.* Firstly, paragraph 7(2)(a) provides that observing and implementing international obligations, obligations under the ECHR and obligations under Community law are not reserved. Community law and international obligations are defined in section 126(9) and (10).

So far as the legislative competence of the Scottish Parliament is concerned, this has the result that the Scottish Parliament will be able and required to legislate for the purpose of observing and giving effect to those obligations so far as they relate to devolved matters. Section 29(2)(d) provides that a provision of an Act of the Scottish Parliament would be beyond the legislative competence (i.e. *ultra vires*) of the Scottish Parliament if it was incompatible with any of the “Convention rights” (see section 126(1)) or with Community law. In the case of other international obligations, (i.e. not Convention obligations or EC law), which are not justiciable in our courts, section 35 enables the Secretary of State to make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent where he has reasonable grounds to believe that it would be incompatible with such obligations.

So far as executive competence is concerned, this exception also achieves the result that any obligations upon Ministers of the Crown to observe and implement international obligations in relation to devolved matters are transferred to the Scottish Ministers under section 53. In particular, this will mean that, in the case of EC obligations, the Scottish Ministers are liable under EC law for the same penalties as Ministers of the Crown if they fail to do so. Section 57(1) ensures, however, that Ministers of the Crown continue to share this responsibility and will have concurrent functions for the purpose of implementing EC obligations. In addition, section 57(2) makes a similar provision to section 29(2)(d) by providing that it would be *ultra vires* for a member of the Scottish Executive to make any subordinate legislation or to do any act which would be incompatible with any of the Convention rights or with EC law. There is also a similar provision to section 35 in section 58 enabling the Secretary of State to make an order revoking any subordinate legislation made by a member of the Scottish Executive or requiring him to make any such instrument if he considers that the instrument (or failure to make the instrument) would be incompatible with any international obligation (i.e. not Convention obligations or EC obligations).

- (b) *Assisting Ministers of the Crown.* Paragraph 7(2)(b) provides that assisting Ministers of the Crown in relation to any matter to which the reservation in paragraph 7(1) applies is not reserved.

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

This enables the Scottish Ministers to assist the UK Government in the conduct of international relations so far as relating to devolved matters and enables the Scottish Parliament to legislate about this. The Scottish Ministers will thus be able to assist Ministers of the Crown in the formulation, negotiation and implementation of policy relating to international relations. This allows the Scottish Ministers to be involved in the discussions within the UK Government about the formulation of the UK's policy position on all issues which touch on devolved matters; and allows participation where appropriate by the Scottish Ministers and officials in relevant European Council meetings and other negotiations with the UK's EU partners.

Executive devolution

The following function has been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Multilateral Investment Guarantee Agency Act 1988 (c.8) , section 6.	The function of the Secretary of State of making, by order, provision for the attendance of witnesses, taking of evidence and production of documents in relation to certain arbitration proceedings.
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Part I, Paragraph 8: Public Service

Purpose and Effect

This paragraph reserves matters relating to the Civil Service, subject to certain exceptions.

General

Section 51 provides for the staff of the Scottish Administration to be members of the Home Civil Service, as are the statutory office-holders in the Scottish Administration (see section 126(6)). It also makes provision for their salaries, allowances and pensions.

Details of Provisions

Reservation

Paragraph 8(1) states that the Civil Service of the State is a reserved matter. The Civil Service includes the Home Civil Service and the Diplomatic Service. The effect is that the Scottish Parliament is not able to legislate about matters relating to Civil Servants in Scotland, including their recruitment, selection, management, conduct, discipline, numbers, grading and terms and conditions of service. Matters relating to Civil Service pensions are reserved by Section F3 in Part II of the Schedule.

The Home Civil Service is ultimately regulated by the Royal Prerogative, and its management has been delegated to the Minister for the Civil Service. The Civil Service Management Code is issued under the authority of the Civil Service Order in Council 1995. Under the Civil Service (Management Functions) Act 1992, the Minister for the Civil Service has further delegated management functions to Ministers and office holders in charge of Departments. These include the authority to prescribe qualifications for appointment as Civil Servants, to determine the number and grading of posts (outside the Senior Civil Service) in such Departments and a wide range of other management functions. Those functions, which were delegated to the Secretary of State for Scotland in respect of Civil Servants who become staff of the Scottish Executive, have been delegated to the Scottish Ministers. This is provided for in section 51(4) and (6).

Exceptions

The subject-matter of the following enactments is excepted from the reservation:

- (a) *Part I of the Sheriff Courts and Legal Officers (Scotland) Act 1927*. This deals with the appointment of sheriff clerks, procurators fiscal and their deputies; and
- (b) *Part III of the Administration of Justice (Scotland) Act 1933*. This deals with the appointment and terms and conditions of service of officers of the High Court of Justiciary and the Court of Session, including the Principal Clerk of Justiciary, the Accountant of Court and Auditor of the Court of Session, staff in the Justiciary Office and the Court of Session, and Macers.

The officers concerned are already civil servants and by virtue of the Act continue to be members of the Home Civil Service. However, there are certain specialities of appointment and terms and conditions of service of such court staff which distinguish them from other civil servants and which are peculiarly Scottish, making it appropriate that legislative competence over these aspects should not be reserved. See also the amendments to the 1927 and 1933 Acts in paragraphs 3 and 4 of Schedule 8.

[Schedule 5](#), Part I, [Paragraph 9](#): Defence

Purpose and Effect

This paragraph reserves all matters relating to defence and the armed forces; but it does not reserve responsibility for civil defence or the right to confer enforcement powers on the armed forces in relation to sea fisheries matters.

General

Defence includes matters relating to the armed forces (including for example, their equipment, resources and deployment), defence policy, strategy, planning and intelligence and plans for the maintenance of essential supplies and services in case of war.

The reservation will not however prevent the Scottish Parliament from legislating about civil defence or conferring powers on the armed forces, notably the Navy or the Air Force, in relation to sea fishing, in particular to enforce offences created under Scottish sea fisheries legislation.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	939
LC	21-Jul-98	868

Details of Provisions

Reservation

The reserved matters set out in paragraph 9(1) are as follows:

paragraph 9(1)(a): *The Defence of the Realm*. This provision is intended to ensure that any matters related to the defence of the realm are reserved. It is a supplementary concept to that of the armed forces (which are identified separately, see below) designed to cover all the matters for which the Ministry of Defence are responsible, for defence purposes. These matters include the various defence establishments and contractors carrying out work for defence purposes; the Ministry of Defence Police and the services cadet forces (which do not form part of the armed forces but serve defence purposes); and special provisions for the acquisition, use or disposal of land and property for defence purposes.

paragraph 9(1)(b): *The Naval, Military or Air Forces of the Crown, including reserve forces*. This is the second main leg of the reservation. It makes clear that all matters

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

concerned with the armed forces themselves are reserved. This includes their command, establishment, maintenance, organisation, staffing and funding and all matters connected with the enlistment, management, disciplining and pay and allowances of both the military and civilian components of the armed forces. This reservation also covers the creation of offences relating particularly to the armed forces (for example, the unauthorised wearing of military uniforms), matters concerned with the territorial, auxiliary and volunteer reserve associations, special provisions relating to the status of members of the armed forces and the disclosure of information on military activities. The reservation also covers benefits to members and former members of the armed forces and their dependants and the matter of war graves. Equipment and explosives research for the purposes of the armed forces are also covered.

paragraph 9(1)(c): *Visiting Forces*. A separate reservation is required in order to ensure that all matters relating to visiting forces are covered. These are the armed forces of other countries visiting or based in the UK, including both their military and civilian components.

paragraph 9(1)(d): *International Headquarters and Defence Organisations*. This is simply to make clear that matters concerned with headquarters or organisations designated for the purposes of the International Headquarters and Defence Organisations Act 1964 are reserved.

paragraph 9(1)(e): *Trading with the Enemy and Enemy Property*. This reservation covers matters relating to the control of trade with the enemy and the confiscation, control or administration of enemy property. These matters are all aspects of the conduct of war and the conclusion of peace. This provision is not intended in any way to restrict the competence of the Scottish Parliament to legislate generally about the law of property in Scotland.

Paragraph 9(2) provides that paragraph 9(1) does not reserve the following:

paragraph 9(2)(a): *Civil Defence*, in particular planning, organisation and preparation by civilian authorities. The provision of non-combative defence against hostile attack is not reserved. The exercise of civil defence functions by a member of the armed forces, visiting forces or other defence force or organisation is, however, reserved.

paragraph 9(2)(b): *The Conferral of Enforcement Powers in relation to Sea Fishing*. It is necessary also to make clear that the Scottish Parliament has competence to confer powers to enforce obligations in relation to sea fishing (in particular powers usually exercisable by British Sea Fisheries Officers) on members of the armed forces. This is because the Royal Navy in particular carries out certain enforcement duties on behalf of the Fisheries Departments.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Reserve Forces Act 1996 (c.14) , Schedule 5, paragraphs 10 and 12.	The functions of the Secretary of State to give directions relative to the charitable property of a disbanded unit and to apply by petition to the Court of Session concerning such property.
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The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Reserve Forces Act 1996 (c.14) , sections 90(1) and (3) and 91(1) and (3).	Section 90(1) and (3) - The function of the Secretary of State and the Lord Chancellor to
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	appoint a panel of chairmen of reserve forces appeal tribunals and determine their term of appointment.
	Section 91(1) and (3) - The function of the Secretary of State and the Lord Chancellor to appoint a panel of ordinary members of reserve forces appeal tribunals and determine their term of appointment.

Schedule 5, Part I, Paragraph 10: Treason

Purpose and Effect

This paragraph reserves treason.

General

The law of treason covers the circumstances which can give rise to the crime of treason, treason felony, misprision of treason (i.e. the concealment of treason) and who can commit those crimes. There is no separate Scottish law of treason.

The crime of treason is based on the Treason Act 1351. It declares what offences are to be treason e.g. levying war against the sovereign in Her Realm. Certain of these forms of treason - compassing the death of or levying war against the sovereign - have been extended by judicial interpretation. These extended forms are known as constructive treason. The reservation also covers treason felony. This includes acts to depose the sovereign, or prompt any foreigner to invade the UK or any other part of Her Majesty’s dominions or countries. Treason can be committed by any person who owes allegiance to the Crown (i.e. in particular British citizens, or temporary UK residents.)

Details of Provisions

Treason (including constructive treason), treason felony, and misprision of treason (including the question of who can commit those crimes) is reserved.

Part II: Specific Reservations

This Part contains a number of specific reservations under various Heads and Sections. The titles of the Heads, Sections etc are merely signposts - they do not form part of the definition of reserved matters.

Part II: Preliminary paragraphs

Paragraphs 1 to 3 explain how the entries in Part II are to be construed. Reference should also be made to paragraph 5 of Part III as to how references to the subject matter of an enactment are to be construed.

Paragraph 1 provides that the matters to which any of the Sections in Part II “apply” are reserved matters.

Paragraph 2 defines what paragraph 1 means by “apply” by providing that a Section “applies” to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that Section.

Paragraph 3 provides that any illustrations, exceptions or interpretation provisions in a Section relate only to that particular Section. It provides specifically, as an example, that an entry under the heading “Exceptions” applies only to the matters listed in that Section and does not affect any other Section. The effect is that, even though a matter is excepted from one Section, it could be reserved at least in part by another.

Head A: Financial and Economic Matters

Section A1: Fiscal, Economic and Monetary Policy

Purpose and Effect

This Section reserves fiscal, economic and monetary policy, with the exception of local taxes.

Details of Provisions

Reservation

The reserved matters include the issue and circulation of money, taxes and excise duties (and the bodies which administer them), government borrowing and lending (including the issue of Government Securities), the exchange rate, the Bank of England and control over United Kingdom public expenditure. This last reservation does not affect the Scottish Parliament's ability to allocate resources, whether part of its assigned budget or raised through its tax-varying powers.

Exception

Local taxes to fund local authority expenditure are excepted from the reservation. Current examples of such taxes are the council tax and non-domestic rates.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	939
CC	30-Mar-98	951
CR	19-May-98	812
LC	23-Jul-98	1040
LR	3-Nov-98	185

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Taxes Management Act 1970 (c.9): (a) sections 2(3), 2(6) and 3(4); and</p>	<p>Section 2(3) - The function of the Secretary of State to appoint the General Commissioners for the divisions in Scotland and for determining their period of office. Section 2(6) - The function of the Secretary of State to create new divisions, abolish existing divisions or alter any divisions or their boundaries Section 3(4) - The function of the Secretary of State to dismiss clerks or assistant clerks of the General Commissioners</p>
<p>(b) sections 4(1) and (4), 4A(1), 46A(1) and 56B(1).</p>	<p>Section 4(1) and (4) - The function of the Secretary of State of being consulted by the Lord Chancellor on appointment of Commissioners for the special purposes</p>

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

	<p>of the Income Tax Acts and on removal of such persons.</p> <p>Section 4A(1) - The function of the Secretary of State of being consulted by the Lord Chancellor on appointment of a person to be a deputy Special Commissioner.</p> <p>Section 46A - The function of the Secretary of State of consenting to regulations made by the Lord Chancellor concerning jurisdiction in tax appeals.</p> <p>Section 56B - The function of the Secretary of State of consenting to regulations made by the Lord Chancellor concerning practice and procedure in tax appeals.</p>
The Income and Corporation Taxes Act 1988 (c.1) , sections 79(4) and 79(8).	Section 79(4) - The function of the Secretary of State to approve a body as an “approved local enterprise agency” for the purposes of section 79.
The Income and Corporation Taxes Act 1988 (c.1) , sections 79(4) and 79(8) (cont.).	<p>Section 79(8) - The function of the Secretary of State to make his approval of a body conditional upon compliance with certain requirements.</p> <p>The function of the Secretary of State, if it appears to him that certain circumstances apply, by notice to withdraw his approval from the body concerned with effect from such date as he may specify in the notice.</p>
The Finance (No.2) Act 1992 (c.48) , section 75(1).	The function of the Secretary of State of consenting to regulations by the Lord Chancellor providing for Commissioners to hold office by a different name.
The Value Added Tax Act 1994 (c.23) :	
(a) Schedule 12, paragraphs 2, 3(2), (4) and (5) and 9; and	<p>Schedule 12, paragraph 2 - The function of the Secretary of State of being consulted by the Lord Chancellor on appointment of the President of VAT tribunals and also the terms and conditions of the appointment.</p> <p>Schedule 12, paragraph 3 - The function of the Secretary of State of being consulted by the Lord Chancellor on the retention of the President beyond normal retirement age, removal of the President from office and discharge of the President’s functions by a nominated person.</p> <p>Schedule 12, paragraph 9 - The function of the Secretary of State of being consulted by the Lord Chancellor on procedural rules for VAT tribunals.</p>
(b) Schedule 12, paragraph 7(8).	Schedule 12, paragraph 7(8) - The function of the Lord Chancellor to pay

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

	salary and fees to a chairman or other member of a VAT tribunal.
The Social Security Contributions (Transfer of Functions etc.) Act 1999 (c.2) , section 13(1).	The function of the Secretary of State of concurring in regulations by the Board concerning appeals to the tax appeal Commissioners.

Section A2: The Currency

Purpose and Effect

This Section reserves matters relating to the currency.

General

In addition to the general macroeconomic reservation in Section A1, which reserves the issue and circulation of money, this Section explicitly reserves coinage, legal tender and bank notes.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	954
LC	23-Jul-98	1056

Details of Provisions

Reservation

The matters reserved are coinage, legal tender and bank notes. This includes the denominations of money in the currency and the coins or notes which constitute legal tender and what coins and bank notes may be issued.

Section A3: Financial Services

Purpose and Effect

This Section reserves financial services.

General

This reservation contributes to the preservation of common markets for financial services, and depositor, investor and policyholder protection, across the UK. Fixing the dates of bank holidays is excepted from the reservation.

Details of Provisions

Reservation

What is reserved are financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance.

All matters relating to financial services are reserved, not just those dealt with in the Financial Services Act 1986. The reservation expressly includes:

- (a) investment business, e.g. managing investments or providing investment advice and the authorisation and regulation of those who undertake such activities, as in the 1986 Act;
- (b) banking and deposit-taking e.g. the authorisation and regulation of those carrying on banking or deposit-taking business, as in the Banking Act 1987;

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

- (c) collective investment schemes e.g. unit trusts and open-ended investment companies and their regulation and authorisation, as in the 1986 Act; and
- (d) insurance.

The expression “financial services” also includes financial services, other than those expressly mentioned, such as the services provided by building societies or friendly societies.

Exception

The subject-matter of section 1 of the Banking and Financial Dealings Act 1971 is excepted from the reservation.

Section 1 of the 1971 Act deals with the fixing of bank holidays. The Scottish Parliament is able to legislate to fix what are bank holidays in Scotland. A further exception in this regard is made from section 1.5.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Insurance Brokers (Registration) Act 1977 (c.46) , section 20.	The function of the Secretary of State to make rules as to the functions of assessors appointed under section 20.
The Building Societies Act 1986 (c.53) , section 47(2)(a).	The function of the Secretary of State of appointing a chairman of a tribunal to determine an appeal by a building society under section 46.
The Financial Services Act 1986 (c.60) , section 96(2)(a).	The function of the Secretary of State of being consulted by the Lord Chancellor on the appointment of legally qualified members to the Financial Services Tribunal.
The Banking Act 1987 (c.22) :	
(a) section 28(2)(a); and	Section 28(2)(a) - The function of the Secretary of State of being consulted by the Lord Chancellor as to the appointment of a chairman of a tribunal to consider an appeal under section 27.
(b) section 30(4).	Section 30(4) - The function of the Secretary of State to make regulations in respect of the conduct of appeals under Part 1 of the Act where the appeal concerns a Scottish institution.
The Friendly Societies Act 1992 (c.40) :	
(a) section 59(2)(a); and	Section 59(2)(a) - The function of the Secretary of State of being consulted by the Lord Chancellor on appointment of a chairman of a tribunal to hear an appeal brought by a Scottish society.
(b) section 60(4).	Section 60(4) - The function of the Secretary of State to make regulations in respect of conduct of appeals under

the Act brought by any society with a registered office in Scotland.
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Advice to The Queen

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library. The Secretary of State for Scotland's role in providing advice to the Privy Council on Proclamations by Her Majesty in Council under section 1 of the Banking and Financial Dealings Act 1971 altering statutory bank holidays in Scotland etc. has passed to the First Minister.

Section A4: Financial Markets

Purpose and Effect

This Section reserves financial markets.

General

The reservation of financial markets ensures a common market across the UK in securities and other financial instruments, for investors and traders, including markets which operate for the purpose of raising capital and for dealing with financial instruments and currency, including foreign exchange.

Details of Provisions

Reservation

What is reserved are financial markets, such as investment exchanges or money markets.

The reserved matters are expressly stated to include:

- (a) the listing and public offers of securities and investments, such as the matters which have to be disclosed in the application for official or unofficial listing of securities by the Stock Exchange;
- (b) the transfer of securities e.g. on paper in the case of certificated securities or electronically in the case of uncertificated securities as in the CREST system; and
- (c) insider dealing. This reserves all matters relating to what constitutes insider dealing and its consequences.

Section A5: Money Laundering

Purpose and Effect

This Section reserves the regulation of financial and other businesses so as to require systems to be in place to prevent money laundering. It does not, however, reserve the criminal law as it relates to money laundering, competence in respect of which is, with certain exceptions, devolved as part of the general devolution of the criminal law.

Details of Provisions

The subject-matter of the Money Laundering Regulations 1993 ([S.I. 1993/1933](#)) is reserved. Those Regulations provide a scheme of rules to regulate certain financial businesses so as to prevent money laundering. The reservation is not however limited to financial businesses.

The Scottish Parliament is able to legislate on the criminal law generally, including the criminal law relating to money laundering. The only exception to this concerns

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

statutory offences involving money laundering the proceeds of drug trafficking which is reserved by Section B1 (Misuse of Drugs).

Head B - Home Affairs

Section B1: Misuse of Drugs

Purpose and Effect

This Section reserves the criminal law in respect of the misuse of drugs and the proceeds of drug trafficking.

General

The reservation covers matters relating to the possession, cultivation, production, supply, import and export of drugs. In addition it covers matters relating to drug trafficking, including the acquisition, possession or use of the proceeds of drug trafficking. It includes the statutory offences involving money laundering of the proceeds of drug trafficking, confiscation of the proceeds of drug trafficking, and forfeiture of things used in the commission of drug trafficking offences.

The Scottish Parliament, however, has competence in relation to other key matters which are relevant to the misuse of drugs, including education, health, social work, police and the criminal prosecution system.

The criminal law relating to the laundering of money obtained through other types of criminal activity is not reserved. However, Section A5 effectively reserves the regulation of financial and other businesses so as to require systems to be in place to prevent money laundering.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958
LC	23-Jul-98	1060

Details of Provisions

Legislative competence is reserved in relation to the subject-matter of the following enactments:

- (a) *the Misuse of Drugs Act 1971*, which makes provision with respect to dangerous or otherwise harmful drugs and related matters. In particular, it makes provision in relation to criminal offences in respect of the cultivation, possession, production, supply, import and export of “controlled drugs” (those controlled by the Act), the authorisation of certain activities in relation to such drugs, and confers certain special powers on the police in relation to such drugs. It also provides for the establishment of an Advisory Council on the Misuse of Drugs;
- (b) *Sections 12 to 14 of the Criminal Justice (International Co-operation) Act 1990*, which make it an offence to manufacture or supply certain substances knowing or suspecting that the substance is to be used in or for the unlawful production of a controlled drug; enable the Secretary of State to make regulations about Scheduled substances; and make it an offence to conceal, disguise, transfer, convert or remove from the jurisdiction the proceeds of drug trafficking for the purpose of avoiding, or assisting someone to avoid, prosecution for a drug trafficking offence or the making or enforcement of a confiscation order;
- (c) *Part V of the Criminal Law (Consolidation) (Scotland) Act 1995*, which confer powers of search and investigation and create offences in respect of drug trafficking, in particular

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

making it an offence for a person to acquire, use or possess property knowing that it represents the proceeds of drug trafficking; and

- (d) *the Proceeds of Crime (Scotland) Act 1995*, so far as relating to drug trafficking. This Act makes general provision for the forfeiture of things used in the commission of crime and special provision for the confiscation of the proceeds of crime.

Executive devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Misuse of Drugs Act 1971 (c38), Schedule 3, paragraphs 1(1)(b), 4, 13(1)(b) and 17.</p>	<p>Schedule 3, paragraph 1(1)(b) - The function of the Secretary of State to appoint members of a tribunal in Scotland.</p> <p>Schedule 3, paragraph 4 - The function of the Secretary of State to make procedural rules and evidential rules for proceedings before tribunals in Scotland.</p> <p>Schedule 3, paragraph 13(1)(b) - The function of the Secretary of State to appoint a person to an advisory body in Scotland.</p> <p>Schedule 3, paragraph 17, - The function of the Secretary of State to appoint chairman and 2 other persons to a professional panel in Scotland.</p>
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Section B2: Data Protection

Purpose and Effect

This Section reserves matters covered by certain United Kingdom and Community legislation concerning the protection of personal data.

General

Data protection concerns obtaining, holding, processing and disclosure of personal data (i.e. information about individuals) and the free movement of such data. Provision for this is currently made in the Data Protection Act 1998. The 1998 Act, which received Royal Assent on 16 July 1998, consolidated and repealed the Data Protection Act 1984. The 1998 Act is broader than the 1984 Act in two main respects. As required by Council Directive [95/46/EC](#), it extends data protection legislation to cover manually-held records as well as records held on computer. It also covers “accessible records” which are certain records in the social work, housing, health and education fields. Some parts of the 1998 Act did not come into force until 1 March 2000, but all of those matters are nevertheless reserved matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958
LC	23-Jul-98	1070
L3	9-Nov-98	607

Details of Provisions

The reservation of data protection is by reference to the subject-matter of the Data Protection Act 1998 and Council Directive [95/46/EC](#):

- (a) *The Data Protection Act 1998*. This regulates certain activities involving the obtaining, holding, processing and disclosure of personal data (i.e. data relating to an individual who can be identified from that information). It is in particular concerned with “data users” (i.e. persons who hold data which have been, or which are intended to be, processed by him or on his behalf) and “computer bureaux” (i.e. persons who process data on behalf of another person or allow that other person to use their equipment). It also covers manually held records and “accessible records” mentioned above.

The 1998 Act also deals with the office of the Data Protection Registrar. He or she is obliged to compile and maintain a register of data users and computer bureaux. This register is available for public inspection. Essentially, the entry for each data user on that register must describe, amongst other things, the personal data which he intends to hold, the purpose for which he intends to hold that data and a description of any persons to whom he intends or may wish to disclose the data. A data user may not, amongst other things, hold personal data of any description other than that specified in the entry, hold that data for any purpose other than the purpose so specified or disclose such data to any person who is not described in the entry. Similar provisions apply in respect of registered computer bureaux.

The 1998 Act also requires the Data Protection Registrar to promote the observance of the data protection principles by data users and computer bureaux. Those principles are set out in Part 1 of Schedule 1 to that Act. The purpose of the principles is to guide the use of data by data users and computer bureaux.

The interpretation part in the Section provides that where any provision of the 1998 Act is not in force on the principal appointed day (1 July 1999) it should be treated as if it were in force for the purpose of the reservation. This is necessary because some parts of the 1998 Act did not come into force until 1 March 2000.

- (b) *Council Directive 95/46/EC*. This is concerned with protection of individuals with regard to the processing of personal data and with the free movement of such data. It requires provision to be made which will:
- i. extend to certain types of manually processed data;
 - ii. set specific conditions of processing personal data;
 - iii. set tighter conditions for processing sensitive data (for example about health, political opinions or religious beliefs);
 - iv. provide certain exemptions for journalism;
 - v. allow individuals to object to processing in some circumstances; and
 - vi. restrict some fully automated decision-making.

Most of these provisions have been implemented in the 1998 Act. However, the Directive contains some discretionary provisions which the UK has chosen to interpret in a certain way in the 1998 Act and it also sets out provisions establishing a Committee composed of representatives of the Member States. The reference to the Directive is therefore included to ensure that all of those matters are reserved matters.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

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

The Data Protection Act 1984 (c.35), section 3(3)(a) and (b).	The function of the Secretary of State of being consulted by the Lord Chancellor on the appointment of chairman and deputy chairmen of the Data Protection Tribunal.
The Data Protection Act 1998 (c.29), section 6(4)(a) and (b).	The function of the Secretary of State of being consulted by the Lord Chancellor on appointments of the chairman and deputy chairmen of the Data Protection Tribunal.

Section B3: Elections

Purpose and Effect

This Section reserves matters regarding Parliamentary and European Parliamentary elections. It also reserves the franchise at local government elections but other matters concerning local government elections are not caught by the reservation.

General

The reservation covers all matters concerning elections for membership of the House of Commons, the European Parliament, and the Scottish Parliament. The law concerning elections covers, in particular, who may stand or vote in any elections, procedures under which votes are counted and candidates returned, and what the constituencies and timing of elections should be.

Provision is made under sections 1-14 and Schedule 1 of the Act for elections to the Scottish Parliament. These provisions will also be outwith the legislative competence of the Scottish Parliament by virtue of section 29(2)(c) and Schedule 4.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1075
LC	23-Jul-98	1077

Details of Provisions

Elections for membership of the House of Commons, the European Parliament and the Scottish Parliament are reserved, including the subject-matter of:

- (a) *the European Parliamentary Elections Act 1978*. This Act provides for the election of representatives to the European Parliament including the determination of the United Kingdom's European Parliamentary constituencies;
- (b) *the Representation of the People Act 1983 and the Representation of the People Act 1985*. These Acts contain the current provisions concerning Parliamentary elections in the United Kingdom including, in particular, provision as to who may vote how they may vote, the conduct of elections and the return of members; and
- (c) *the Parliamentary Constituencies Act 1986*. This Act effectively provides for the distribution of seats in the House of Commons amongst constituencies. In particular, it provides for Boundary Commissions for the constituent parts of the United Kingdom to review the distribution of seats and determines the rules under which the Commission must conduct these reviews,

so far as they apply, or may be applied, in respect of such membership.

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

The franchise at local government elections is also a reserved matter but other matters concerning local government elections are not caught by the reservation. The Scottish Parliament is thus able to legislate on:

- the frequency of elections;
- the terms of office of councillors;
- the division of local government areas into electoral wards and the number of councillors elected for each ward;
- the procedures under which votes cast in such an election should count e.g. proportional representation or first past the post;
- the separate election of specific persons to specific council offices e.g. the direct election of convenors or leaders of local authorities;
- the qualifications and disqualifications for holding office as a member of such a council; and
- what should happen on any vacation of office of a member of a council.

Agency Arrangements

The Scotland Act 1998 (Agency Arrangements) Order 1999 ([S.I 1999/1512](#)) specified certain functions of a Minister of the Crown in relation to UK Parliamentary, Scottish Parliamentary and European Parliamentary elections for the purpose of section 93 of the Scotland Act.

Section B4: Firearms

Purpose and Effect

This Section reserves firearms.

General

The reserved matter covers regulation of the manufacture, possession, handling, purchase or acquisition, sale, distribution and transfer of firearms.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958

Details of Provisions

Reservation

The reservation is expressed by reference to the subject-matter of the Firearms Acts 1968 to 1997. These Acts are the Firearms Act 1968, the Firearms Act 1982, the Firearms (Amendment) Act 1988, the Firearms (Amendment) Act 1992 and the Firearms (Amendment) Act 1997. These Acts, *inter alia*:

- make it criminal in certain circumstances and without authority to possess handle, purchase, acquire, sell, distribute or transfer certain firearms and imitation firearms;
- provide for the need for, and issue of, firearms certificates in relation to certain firearms and ammunition;
- make provision for the regulation of firearms dealers; and
- and provide for the licensing and regulation of pistol clubs.

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

The Acts distinguish between different types of firearms in certain respects and make different provision for different types.

The reservation also covers subordinate legislation made under the Firearms Acts, in particular the Firearms (Scotland) Rules 1989 (S.I. 1989/889) which prescribe the forms to be used in connection with the grant of certificates under the Firearms Acts and the registration of firearms dealers, and also the form of the register of transactions to be kept by dealers.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Firearms Act 1968 (c.27), sections 5 and 12(2).</p>	<p>The function of the Secretary of State to grant an authority to allow persons to possess prohibited weapons and ammunition, impose conditions under that authority and revoke an authority.</p>
<p>The Firearms (Amendment) Act 1988 (c.45), sections 15 and 19 and the Schedule (other than paragraph 3(1)(a)).</p>	<p>The functions of the Secretary of State under section 15 in relation to approving certain rifle and pistol clubs. All the functions conferred on the Secretary of State by the schedule to the Act (granting of Museums Firearms Licences which allow museums to hold firearms and ammunition without a certificate) except the function of determining a lesser amount of the fee for granting or renewing a licence.</p>
<p>The Firearms (Amendment) Act 1997 (c.5), section 7(3).</p>	<p>The function of making designations for the purposes of section 7(3) of the 1997 Act of a place at which a firearm is to be kept and used by virtue of a condition in a firearms certificate requiring it to be kept and used in such a place.</p>

Section B5: Entertainment

Purpose and Effect

This Section reserves certain matters which relate to entertainment.

General

The reservation covers licensing of premises for film exhibition and the classification of video recordings.

The classification of films for public exhibition, which is carried out by the British Board of Film Classification, is also to be reserved. The Board is a non-statutory body established by the film industry in 1912 which certifies films as suitable for different categories of audience (or refuses a certificate).

Legislative competence in respect of the classification and supply of video recordings is also reserved. The matter of broadcasting is reserved separately by Section K1.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958
CC	30-Mar-98	982
LC	23-Jul-98	1077
LR	3-Nov-98	186

Details of Provisions

The subject-matter of the following are reserved:

- (a) *the Video Recordings Act 1984*. This Act makes provision for regulating the distribution of video recordings. In particular it makes provision for the classification and labelling of recordings and the supply and possession of videos that are not classified; and
- (b) *sections 1 to 3 and 5 to 16 of the Cinemas Act 1985*. This Act makes provisions relating to the licensing of premises for use for film exhibition (including provision for certain exemptions from the requirements to hold a licence).

In addition, legislative competence in respect of the *classification of films for public exhibition* as carried out at present by the British Board of Film Classification, is reserved.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Cinemas Act 1985 (c.13), section 6(6) and (7).</p>	<p>The function of the Secretary of State to give a certificate on payment of such reasonable fee as he may determine to such an organisation which is not conducted or established for profit (section 6(6)); and the function of the Secretary of State to revoke a certificate given under section 6(6) (section 6(7)).</p>
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Section B6: Immigration and Nationality

Purpose and Effect

This Section reserves immigration and nationality.

General

Immigration and nationality covers a range of matters, including: entry to the UK; the granting of political or other forms of asylum; the status and capacity in the UK of non-British citizens, the grant of work permits and their regulation; free movement of persons within the European Economic Area; and the issue of passports and other travel documents.

Immigration control is now largely a matter of statute, the principal controlling statute being the Immigration Act 1971 (which has been amended by a number of subsequent Immigration Acts) together with the British Nationality Act 1981 and the Immigration (Carriers' Liability) Act 1987. Passports and other travel documents are not subject to statutory provision, but are issued under the Royal Prerogative.

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

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1070

Details of Provisions

The reservation includes the exercise of functions under the legislation described above; asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; and the issue of travel documents.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Immigration Act 1971 (c.77):	
(a) Schedule 2, paragraph 1(2); and	The function conferred on the Secretary of State to appoint medical inspectors for the purposes of that Act.
(b) Schedule 2, paragraph 1(3).	The function of the Secretary of State to give instructions to medical inspectors in relation to their functions under the Act.

Section B7: Scientific Procedures on Live Animals

Purpose and Effect

This Section reserves the use of live animals for experimental or other scientific purposes.

General

Regulation of the use of live animals for experimental or other scientific purposes is covered by the Animals (Scientific Procedures) Act 1986. The law regulating the use of viable tissues or organs of animals for transplantation into humans is dealt with elsewhere and is also reserved - see Section J2 (Xenotransplantation).

Matters relating to animal health and welfare generally are the subject of separate legislation, such as, the Animal Health Act 1981. These matters are not reserved.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958
LC	23-Jul-98	1080

Details of Provisions

The subject-matter of the 1986 Act is reserved. This Act makes it an offence for a person to carry out a procedure on an animal which may cause the animal pain, suffering, distress or lasting harm, unless the procedure is conducted by a person who is licensed to carry out that procedure and it is carried out as part of a programme of work for which there is a project licence. In addition the Act regulates the premises where such work can

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

be carried out and makes provision for the breeding of animals for experimental or other scientific purposes. The Act also makes provision for the appointment of Inspectors and for a Committee, known as the Animal Procedures Committee.

Section B8: National Security, Interception of Communications, Official Secrets and Terrorism

Purpose and Effect

This Section reserves national security, official secrets and special provisions for dealing with terrorism. The functions of the Security Service, the Secret Intelligence Service and the GCHQ are reserved by paragraph 2(4) of Part I of Schedule 5. It also reserves the interception of communications, but not intrusive investigative techniques or the interception of certain communications made to or by a person detained at a place of detention such as a prison or hospital.

This section was amended by article 4 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

General

The matters covered by the reservation are:

- (a) national security (including safeguarding the economic well-being of the United Kingdom) and in particular its protection;
- (b) the circumstances under which communications may be intercepted, but not the use by the police of intrusive investigative techniques, such as certain kinds of surveillance or;
- (c) official secrets, in particular the protection of the national interest from activities which involve, or could involve, the unauthorised disclosure of information which might damage that interest; and
- (d) special powers and provisions for dealing with terrorism.

The police and (with certain exceptions) the criminal law generally are not reserved.

The tribunal established by the Interception of Communications Act 1985 is a cross-border public authority and has been dealt with under sections 88 to 90.

Section B10 reserves emergency powers. Aviation and maritime security are reserved by Sections E3 and E4. Paragraph 2(4) in Part I of Schedule 5 reserves functions of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

Amendments to the Official Secrets Act 1989 are made by paragraph 26 of Schedule 8.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	186

Details of Provisions

The reserved matters are:

- (a) national security;
- (b) the interception of communications. This is now mainly covered by the Interception of Communications Act 1985. The 1985 Act sets out the circumstances in which communications (by post or by means of a public telecommunications system) may be

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

intercepted and provides for the issue of warrants for such purposes. It also provides for the establishment of a tribunal to investigate whether interceptions have been conducted lawfully, and for the functions and appointment by the Prime Minister of a Commissioner to keep interception activity under review and to assist the tribunal. There is, however, excepted from this reservation:

- (i) the subject-matter of Part III of the Police Act 1997 (authorisation to interfere with property etc.);
 - (ii) surveillance by the police not involving interference with property; and
 - (iii) the interception of certain communications made to or by a person detained at a place of detention such as a prison or hospital⁹. The types of communication which are not caught by the reservation are written communications intercepted at the place of detention or certain telephone calls from the place of detention. “Place of detention” is defined in the interpretation Section, as is “private telecommunications system” used in the reference to telephone calls. Place of detention includes prison, young offenders institution, remand centre, legalised police cell and hospitals in which persons can be detained.
- (c) the subject-matter of:
- i. the Official Secrets Act 1911 which makes provisions directed against spying and includes a definition of “prohibited place” such as military establishments, which may not be entered, and the Official Secrets Act 1920, which makes further provision for the protection of prohibited places; and
 - ii. the Official Secrets Act 1989, which makes provision in relation to the disclosure of official information and in particular about the circumstances in which disclosure can be made and the circumstances in which disclosure amounts to an offence. Section 4(2) protects from disclosure information, the disclosure of which results in the commission of a crime, facilitates an escape or otherwise prejudices the safekeeping of persons in legal custody, or impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders. In line with the general devolution of the criminal law, the protection of information for such criminal law purposes by that subsection is excepted from the reservation.
 - iii. special powers and other special provisions for dealing with terrorism. This will reserve competence to make special provision about terrorism such as is made in the Suppression of Terrorism Act 1978, the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Prevention of Terrorism (Additional Powers) Act 1996. The reservation does not catch general provisions of the criminal law or public order statutes which, although not directed against terrorists as such, can be used to deal with terrorists.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750), as amended by Article 4(3) of S.I. 2000/3253.

The Wireless Telegraphy Act 1949 (c.54), section 5(1)(b).	The function of the Secretary of State of authorising persons to use wireless telegraphy apparatus in order to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraphy or
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⁹ As amended by S.I. 1999/1749

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

	not) and to disclose information about the same: but only so far as the function is exercisable for the purpose of preventing or detecting crime (within the meaning of the Regulation of Investigatory Powers Act 2000) or of preventing disorder.
The Interception of Communications Act 1985 (c.56)¹⁰.	
(a) section 2; and	The function of the Secretary of State of issuing a warrant requiring the addressee to intercept in the course of their transmission by post or by means of a public telecommunications system, such communications as are described in the warrant and to require disclosure of any intercepted material: but only for the purpose of preventing or detecting serious crime.
(b) sections 4(3) and (4), 5(1)(a) and (2) and 6(1).	The function of the Secretary of State of renewing, modifying or cancelling warrants under section 2 for the purpose of preventing or detecting serious crime; and the function of the Secretary of State of making arrangements for the purpose of securing various safeguards in relation to material intercepted as a result of such warrants.
The Official Secrets Act 1989 (c.6), sections 7(5), 8(9) and 12.	The function of the Secretary of State of prescribing certain bodies which may give “official authorisation” and who may make an “official restriction”. The function of the Secretary of State of prescribing bodies which may give an “official direction”. The function of the Secretary of State of making orders prescribing bodies, office-holders and others who fall within the definition of “Crown servant”.
The Intelligence Services Act 1994 (c.13): (a) section 5; and	The function of issuing warrants on the application of the Security Service, the Secret Intelligence Service or GCHQ provided that is for the purpose of supporting the prevention or detection of serious crime. The function is transferred for the purpose of authorising the agencies to interfere with wireless telegraphy and, in the case of the Security Service only, also for interfering with property in Scotland.
(b) section 6(3) and (4).	The function of the Secretary of State of renewing and cancelling warrants issued

10 The entry relating to the 1985 Act was omitted with effect from 14 December 2000 by Article 4(3) of [SI 2000/3253](#)

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

	under section 5 so far as the function under section 5 is transferred.
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The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Police (Scotland) Act 1967 (c.77) , section 32A.	The function of the Secretary of State in making grants in respect of expenses incurred (or to be incurred) by a police authority or joint police board in connection with safeguarding national security.
The Sewerage (Scotland) Act 1968 (c.47) , sections 37B and 55(4).	Section 37B - The function of the Secretary of State to give directions specifying information to be excluded, on the grounds of national security, from a register maintained by a sewerage authority. Section 55(4) - The function of the Secretary of State to certify that, in the interests of national security, any power of entry under the Act should not apply to specified Crown premises.
The Control of Pollution Act 1974 (c.40) , sections 36(2B), 42A(1), 42A(2), 42A(4) and 105(3C).	Section 36(2B) - The function of the Secretary of State to certify that, in the interests of national security, details of a discharge consent application should not be advertised. Section 42A - The function of the Secretary of State to issue directions and make determinations concerning the exclusion, in the interests of national security, of information from registers maintained by SEPA. Section 105(3C) - The function of the Secretary of State to certify that, in the interests of national security, any power of entry in the Act should not apply to specified Crown premises.
The Water (Scotland) Act 1980 (c.45) , section 110A(4).	The function of the Secretary of State to certify that, in the interests of national security, any power of entry in the Act should not apply to specified Crown premises.
The Environmental Protection Act 1990 (c.43) , sections 21(1), 21(2), 21(4), 65(1), 65(2), 65(4) and 159(4).	Sections 21 and 65 - The functions of the Secretary of State to issue directions and make determinations concerning the exclusion, in the interests of national security, of information from registers maintained by SEPA. Section 159(4) - The function of the Secretary of State to certify that, in the

10 The entry relating to the 1985 Act was omitted with effect from 14 December 2000 by Article 4(3) of [SI 2000/3253](#)

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

	interests of national security, any power of entry under the Act should not apply to specified Crown premises.
The Radioactive Substances Act 1993 (c.12) , sections 25(1), 25(2) and 39(1).	The function of the Secretary of State to give directions to SEPA that, on the grounds of national security, knowledge of a particular application, registration or authorisation should be restricted
The Local Government etc. (Scotland) Act 1994 (c.39) , section 117(1), (2) and (5)	Section 117(1) and (2) - The function of the Secretary of State to give to a water and sewerage authority directions of a general or specific nature in the interests of national security or to mitigate a civil emergency Section 117(5) - The function of the Secretary of State to notify a person that, in the interests of national security, anything done under the section should not be revealed
The Environment Act 1995 (c.25) , sections 113(2), 113(3) and 115(5).	Section 113(2) and (3) - The function of the Secretary of State to express an opinion that disclosure, or further disclosure, of information under section 113 would be contrary to the interests of national security. Section 115(5) - The function of the Secretary of State to certify that, in the interests of national security, any power of entry under the Act should not apply to specified Crown premises.

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 ([S.I. 2000/3253](#)).

The Regulation of Investigatory Powers Act 2000 (c.23) : (a) section 5;	The function of the Secretary of State to issue a warrant authorising interception but only so far as the function are exercisable for the purpose of preventing or detecting serious crime
(b) sections 9(1)(b) and (3), 10(1)(a) and (2) and 15(1);	The functions of the Secretary to State to vary cancel or renew an interception warrant and to ensure the proper use of intercepted material but only so far as the functions are exercisable in relation to a warrant issued under section 5 by the Scottish Ministers by virtue of the Order
(c) sections 32 and 42;	The functions of the Secretary of State to grant authorisations for intrusive surveillance or an intelligence service authorisations but only so far as the function is exercisable in relation to an application made by a member of the Security Service and where the granting of the authorisation for the carrying out of

	intrusive surveillance is necessary for the purpose of preventing or detecting serious crime
(d) sections 44 (1) and (2)(b) and 45(1).	The functions of the Secretary of State to sign or cancel authorisations for intrusive surveillance but only so far as the functions are exercisable in relation to the grant of an authorisation for the carrying out of intrusive surveillance under section 32 that is made by a warrant issued under section 42 by the Scottish Ministers by virtue of the Order

Section B9: Betting, Gaming and Lotteries

Purpose and Effect

This Section reserves betting, gaming and lotteries (including the National Lottery).

General

Betting is at present regulated by various statutes in particular the Betting, Gaming and Lotteries Act 1963. This deals with, amongst other things, the granting of betting office licences and betting agency permits. The 1963 Act also makes provision in relation to betting at horse racecourses and dog racecourses. It provides for the constitution of the Horserace Totalisator Board (the "Tote") and prohibits pool betting from being carried out on a horse track other than by or with the authority of the Tote. It also makes provision for pool betting on licensed dog tracks and for a Levy Board which assesses and collects money from bookmakers and the Tote for the purposes of improving breeds of horses, advancing or encouraging veterinary science or education, and improving horse racing.

Gaming is regulated by the Gaming Act 1986. It is defined as the playing of a game of chance for winnings in money or moneys worth, whether any person playing the game is at risk of losing any money or money's worth or not. It establishes the Gaming Board for Great Britain and imposes on it the duty of keeping under review the extent and character of gaming in Great Britain.

A lottery is an arrangement in which prizes are distributed by chance to persons who have paid to participate.

Lotteries are regulated by the Lotteries and Amusements Act 1976 and the National Lottery etc. Act 1993. The National Lottery is run by a body licensed by the Director General of the National Lottery. Under the 1993 Act the Secretary of State can give the Director General directions as to the exercise of his functions. The 1993 Act also makes provision for the net proceeds of the National Lottery to be paid into a distribution fund maintained by the Secretary of State and for these to be distributed equally to the good causes of the arts, sport, charity, the national heritage and projects to mark the year 2000 and the beginning of the third millennium. Funds in Scotland are distributed for the arts and sport by the Scottish Arts Council and the Scottish Sports Council respectively, through a fixed formula allocating 8.9 per cent of the relevant UK expenditure to Scotland. Funds for the other three good causes are distributed on a UK basis by the National Lottery Charities Board (operating in Scotland through a statutory Scottish Committee), Trustees of the National Heritage Memorial Fund and the Millennium Commission respectively. The National Lottery Act 1998 proposes the establishment with Lottery funding of a New Opportunities Fund for projects connected with health, education or the environment, and the National Endowment for Science, Technology and the Arts, which is not a distributing body but which will receive an endowment from lottery derived funds.

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

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958
LC	23-Jul-98	1081

Details of Provisions

Legislative competence for all matters relating to betting, gaming and lotteries is reserved, including the circumstances in which such activities can be carried out, taxation of the proceeds of such activities, and the National Lottery.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Betting, Gaming and Lotteries Act 1963 (c.2), section 29(2)(b) and (4) and Schedule 1, paragraph 20(1A).</p>	<p>The function of the Secretary of State to appoint members of the Horserace Betting Levy Appeal Tribunal for Scotland.</p> <p>The functions of the Secretary of State to amend sub-paragraph (1) of that paragraph so as to vary anything specified in that sub-paragraph.</p>
<p>The Local Government (Scotland) Act 1966 (c.51), section 42(2).</p>	<p>The function of the Secretary of State by Order to amend the fees or maximum fees in the following enactments mentioned in paragraph 26 of the first column of Part II of schedule 4 to the 1966 Act, namely fees specified in paragraph 11 of schedule 2 to the Betting, Gaming and Lotteries Act 1963, being the maximum fee for registration of a pool promoter or continuation of the registration of a registered pool promoter; and the fees specified in paragraph 12 of schedule 3 to the 1963 Act, being the maximum fee for a track betting licence.</p>
<p>The Gaming Act 1968 (c.65):</p>	
<p>(a) sections 22(3) and (4); and</p>	<p>The function of the Secretary of State to make regulations prescribing the circumstances in which licensing authorities (in Scotland the local authority) may refuse to grant or renew licences under the Act or impose restrictions under paragraph 25 of Schedule 2 to the Act.</p> <p>The function of the Secretary of State by regulations to impose restrictions with respect to the hours during which gaming can take place on premises in respect of which a licence under the Act is in force.</p>

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

(b) section 48(5)(b).	The function of the Secretary of State by order to direct that a sum specified in the specified subsections (fees for licences, registrations certificates and permits) should be substituted with such other sum as may be specified in the order.
The Lotteries and Amusements Act 1976 (c.32): sections 7(4), 18(1)(d) and (f).	Section 7(4) - The function of the Secretary of State to consent, on application from a local authority, to use money accruing from a local lottery for a purpose suggested by the local authority other than the object of the lottery subject to the criteria specified in section 7(4). Section 18(1)(d) - The function of the Secretary of State by Order to vary the fee payable under paragraph 3 or 9 of Schedule 1 to that Act. Section 18(1)(f) - The function conferred on the Secretary of State by order to vary the fee payable under paragraph 18 of Schedule 3 to that Act ,or provide that it shall cease to be payable.
The National Lottery etc. Act 1993 (c.39):	
(a) section 25C(1), 26(1) and (2) as read with section 26A(2)(b), section 26(3), (3A) and (4) as read with section 26A(1)(a), section 29(1), (3), (4) and (5) as read with section 29(6)(c) and (d), sections 35(3) and 43B(1) and section 43C(1) as read with section 43CC(2)(b);	Section 25C(1) - The function of the Secretary of State to instruct a distributing body to prepare, review or replace a strategic plan, but only so far as relating to Scottish bodies.
	Section 26(1) and (2) as read with section 26A(2)(b) - The function of the Secretary of State to give directions to the National Lotteries Charities Board or the New Opportunities Fund or to the Trustees of the National Heritage Memorial Fund, but only so far as applying only to Scotland and providing for certain matters in relation to any distribution of lottery money made for a purpose which does not concern reserved matters. Section 26(3), (3A) and (4) as read with section 26A(1)(a) - The functions of the Secretary of State to give financial directions to a distributing body or directions relating to delegation of its powers of distribution, but only so far as relating to Scottish bodies. Section 29(1), (4)(a) and (5) as read with section 29(6)(c) and (d) - The function of the Secretary of State by order to amend section 23(1), (2), (3) or (4) so

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

	<p>as to substitute, add or omit bodies or substitute different percentages, but only so far as relating to Scottish bodies specified in section 23(1) or (2) and subject to the limitation that the order may substitute different percentages only where more than one Scottish body is so specified in either of those subsections and then only in relation to the particular percentage held in the Distribution Fund for distribution by that body.</p> <p>Section 29(3) and (4)(b) as read with section 29(6)(c) and (d) - The function of the Secretary of State by order to provide that section 23(1), (2), (3) or (4) shall, pending the making of an order amending that subsection under section 29(1), cease to have effect or have effect as if a body specified in it were omitted, but only so far as relating to Scottish bodies specified in section 23(1) or (2)</p> <p>Section 35(3) - The function of the Secretary of State to give directions to a distributing body about the preparation of annual accounts, but only so far as relating to Scottish bodies.</p> <p>Section 43B(1) - The Function of the Secretary of State to specify initiatives for the New Opportunities Fund, but only so far as relating to initiatives applying in Scotland only.</p> <p>Section 43C(1) as read with section 43CC(2)(b) - The function of the Secretary of State to give directions to the New Opportunities Fund but only so far as applying to Scotland only and providing for certain matters regarding any initiative relating to a purpose which does not concern reserved matters.</p>
<p>(b) section 25C(1) and section 26(1) as read with section 26A(1)(a);</p>	<p>Section 25C(1) and section 26(1) as read with section 26A(1)(a) - The function of the Secretary of State to give directions to a distributing body as to the matters to be taken into account in determining the persons to whom, the purposes for which and the conditions subject to which the body distributes any money under section 25(1), but only so far as relating to Scottish bodies.</p>
<p>(c) sections 26(5), 27(1) and (8), 43C(2), (4) and (5); and</p>	<p>Section 26(5) - The function of the Secretary of State to consult a distributing body before giving it directions, but only so far as the function of giving directions has been transferred to the Scottish Ministers.</p>

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

	<p>Section 27(1) and (8) - The functions of the Secretary of State to prohibit a body from distributing money or to require information, but only so far as relating to Scottish bodies.</p> <p>Section 43C(2), (4) and (5) - The functions of the Secretary of State to consult the New Opportunities Fund before giving them directions, or making or revoking an order under section 43B.</p>
(d) Schedule 3A, paragraph 2(1) and (2) as read with paragraph 2(6)(a).	Schedule 3A, paragraph 2(1) and (2) as read with paragraph 2(6)(a) - The function of the Secretary of State to authorise or approve a joint scheme, but only in relation to joint schemes applying only in Scotland.

The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The National Lottery etc. Act 1993 (c.39):	
(a) section 14;	Section 14 - The function of the Secretary of State of receiving the annual report of the National Lottery Commission and of laying a copy of the report before Parliament.
(b) section 25C(5)(c) and (d) and (6);	Section 25C(5)(c) and (d) and (6) - the functions of the Secretary of State of receiving and being consulted on a draft strategic plan of a lottery body and of receiving a copy of the strategic plan as adopted, and of laying a copy before each House of Parliament, but only as regards Scottish or GB bodies.
(c) sections 34, 35(4) and 39(3); and	<p>Section 34 - the functions of the Secretary of State of receiving annual reports of distributing bodies, other than the Millennium Commission, and of laying copies of each such report before Parliament.</p> <p>Section 35(4) - the function of the Secretary of State of receiving a copy of the annual statement of accounts from distributing bodies, other than the National Lottery Charities Board and the Millennium Commission.</p> <p>Section 39(3) - the function of the Secretary of State of receiving copies of the annual statement of accounts of the National Lottery Charities Board.</p>
(d) section 43D(3).	Section 43D(3) - the function of the Secretary of State of receiving copies of

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

	the annual statement of accounts of the New Opportunities Fund.
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The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The National Lottery Act etc. Act 1993 (c.39):	
(a) section 26(1) and (2) as read with section 26A(2)(a), section 26(3A) as read with section 26A(1)(b), section 28, section 43C(1) as read with section 43CC(2)(a), and Schedule 3A, paragraph 2(1) and (2) as read with paragraph 2(6)(b);	<p>Section 26(1) and (2) as read with section 26A(2)(a) - the function of the Secretary of State to give directions to the National Lottery Charities Board or the New Opportunities Fund or to the Trustees of the National Heritage Memorial Fund, but only so far as applying to the whole of the UK and providing for matters other than those to be provided specifically for Scotland in accordance with section 26A(3).</p> <p>Section 26(3A) as read with section 26A(1)(b) - the function of the Secretary of State to give directions to a distributing body as regards delegation of its powers of distribution, but only so far as relating to GB bodies.</p> <p>Section 28 - the function of the Secretary of State of amending section 22(3) to substitute different percentages.</p> <p>Section 43C(1) as read with section 43CC(2)(a) - the function of the Secretary of State to give directions to the New Opportunities Fund, but only so far as relating to directions applying to the whole of the UK and providing for matters other than those to be provided specifically for Scotland in accordance with section 43CC(3).</p> <p>Schedule 3A, paragraph 2(1) and (2) as read with paragraph 2(6)(b) - the function of the Secretary of State of authorising or approving a joint scheme applying in one or more parts of the UK, including Scotland.</p>
(b) section 29(1), (3), (4) and (5) as read with section 29(6)(a) and (b); and	<p>Section 29(1), (4)(a) and (5) - The function of the Secretary of State by order to amend section 23(1), (2), (3) or (4) so as to substitute, add or omit bodies or substitute different percentages, but only so far as relating to GB bodies or substitution of the total aggregate percentage specified as held in the Distribution Fund for Scottish bodies specified in section 23(1) or (2).</p> <p>Section 29(3) and (4)(b) - The function of the Secretary of State, by order, to provide that section 23(1), (2), (3) or (4) shall, pending the making of an order amending that subsection under section 29(1), cease</p>

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

	to have effect or have effect as if a body specified in it were omitted, but only so far as relating to GB bodies.
(c) Schedule 6A, paragraph 1(1) and (2).	Schedule 6A, paragraph 1(1) and (2) - the function of the Secretary of State to appoint members of the New Opportunities Fund, but only so far as relating to the appointment of a member suited to make the interests of Scotland his special care.

Section B10: Emergency Powers

Purpose and Effect

This Section reserves emergency powers.

General

This reservation is concerned with the circumstances in which unusual powers can be exercised for enabling effective rule in the event of a crisis. In practice this has often involved the deployment of the armed forces for example to provide essential services.

The main statutory provisions are set out in the Emergency Powers Act 1920. This gives power for Her Majesty to declare a state of emergency and to make regulations by Order in Council for securing the essentials of life to the community e.g. for the preservation of peace, and for securing and regulating the distribution of food, water, fuel etc.

In addition servicemen may be employed under the royal prerogative in extraordinary circumstances to deal with particular crises.

Planning by the civil authorities for emergencies is not, however, caught by the reservation.

Details of Provisions

Legislative competence on all matters relating to emergency powers is reserved. In particular this covers the circumstances in which such powers can be exercised, what the powers should be and any ancillary provision such as compensation for loss arising from the exercise of these powers.

Executive Devolution

The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Local Government etc. (Scotland) Act 1994 (c.39) , section 117(1), (2) and (5).	Section 117(1) and (2) - The function of the Secretary of State to give to a water and sewerage authority directions of a general or specific nature in the interests of national security or to mitigate a civil emergency Section 117(5) - The function of the Secretary of State to notify a person that, in the interests of national security, anything done under the section should not be revealed
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Section B11: Extradition

Purpose and Effect

This Section reserves extradition.

General

Extradition is the process under which a person may be surrendered by one state to another so as to face trial in that other state for an alleged crime.

There are restrictions upon who can be extradited, for example, covering political offences or speciality (under which the person can only be tried for the offence for which the extradition was ordered).

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	958

Details of Provisions

Legislative provision covering matters relating to extradition are reserved. In particular this covers the Extradition Act 1989 which consolidated and amended the Extradition Acts 1870 to 1935 and which provides the procedures for extraditing persons to states other than the Republic of Ireland. It also covers extradition to the Republic of Ireland which is carried out under a procedure known as the backing of warrants, under the Backing of Warrants Act 1965. It also covers extradition to the United Kingdom although there is in practice scope for only very limited provision under UK law since obligations on states to extradite persons to the UK are very largely a matter for international law and the law of the state in question.

Executive Competence

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Extradition Act 1989 (c.33): (a) section 6(1) to (4) and (6) and (7);</p>	<p>Section 6(1) to (4) and (6) - The function of the Secretary of State of determining whether a person should be returned to another country and of giving consent to a person being dealt with for another offence being an extradition crime. Section 6(7) - The function of the Secretary of State of issuing a certificate confirming the existence of an arrangement with a Commonwealth country or a colony and stating its terms.</p>
<p>(b) section 7(1);</p>	<p>Section 7(1) and (4) - The functions of the Secretary of State of issuing an order for the surrender of a person under the Act (referred to as ‘an authority to proceed’).</p>
<p>(c) sections 7(4), 8(4), 9(5), 11(1), 12, 13(1) and (4), 16(5) and 20(2).</p>	<p>Section 8(4) - The function of the Secretary of State of receiving a notice that a provisional warrant has been issued and the function of cancelling that warrant and of discharging the person from custody.</p>

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

	<p>Section 9(5) - The function of the Secretary of State of receiving notice of the period after which a person will fall to be discharged from custody.</p> <p>Section 11(1) - The function of the Secretary of State of receiving notice of committal.</p> <p>Section 12 - The function of the Secretary of State of making an order by warrant for return.</p> <p>Section 13 - The function of the Secretary of State of giving notice under subsection (1) that he is contemplating making an order under section 12(1) and considering representations under subsection (4).</p> <p>Section 16(5) - The function of the Secretary of State of receiving notice of an application for discharge.</p> <p>Section 20(2) - The function of the Secretary of State of arranging for a person to be sent back to a foreign state, Commonwealth country or colony.</p>
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Section B12: Lieutenancies

Purpose and Effect

This Section reserves the subject-matter of the Lieutenancies Act 1997.

General

The Office of the King's Lieutenant now known as Lord-Lieutenant stems back to the middle ages. Until comparatively recent times the office holders were principally concerned with the operation of the Militia Acts. The functions of Lord-Lieutenants are now largely ceremonial and include representing the Crown in various capacities e.g. attending visits, attending upon visiting Heads of State, presenting medals and colours. It is usual for the Lord-Lieutenant to chair and advise on the membership of the local advisory committee on justices of the peace, which makes recommendations about who should be appointed JPs.

Details of Provisions

The subject-matter of the Lieutenancies Act 1997 is reserved. That Act makes provision for the division of Scotland into areas for lieutenancy purposes, for the appointment and removal of Lord-Lieutenants, Lieutenants, deputy Lieutenants, vice Lord-Lieutenants and clerks of lieutenancies and about the functions and privileges of each office.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Lieutenancies Act 1997 (c.23) , section 2(4).	The function of the Secretary of State of informing a Lord Lieutenant that Her Majesty does not approve of the granting of a commission of a Deputy Lieutenant
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	to the person whom he proposed for appointment.
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Advice to The Queen

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library. Part of that answer was as follows:

“There are some matters in respect of which the Prime Minister gives advice to Her Majesty on the exercise of Her functions and on which it is appropriate for the Prime Minister to consult or to take advice from the First Minister. These matters include recommendations of Scottish candidates for honours and dignities, which are a reserved matter, and advice on the appointment of Lord Lieutenants in Scotland, the Lord High Commissioner to the General Assembly of the Church of Scotland and members of the Royal Commission on Environmental Pollution and the Forestry Commission.

Section B13: Access to information

Purpose and Effect

This Section reserves public access to information held by public bodies subject to certain exceptions. By so doing, it clarifies the extent to which the Scottish Parliament can legislate about public access to information held by public bodies (what is commonly referred to as “freedom of information”). It was added by Article 5 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 ([S.I. 1999/1749](#)).

Details of Provisions

This Section reserves public access to information held by public bodies or holders of public offices (including government departments and persons acting on behalf of the Crown).

There is excepted from that reservation information held by the Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body and any Scottish public authority with mixed functions or no reserved functions. However, information which has been supplied by a Minister of the Crown or government department and which is held by any of those bodies in confidence continues to be reserved. Subject to that qualification, however, the Scottish Parliament can legislate about information held by any of those bodies.

Head C: Trade and Industry

Section C1: Business Associations

Purpose and Effect

This Section reserves business associations, subject to certain exceptions.

General

This reservation is designed to ensure the reservation of a common United Kingdom system for the regulation of companies and other business organisations in order to preserve a level playing field for business within the United Kingdom.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	982

*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	23-Jul-98	1089

Details of Provisions

Reservation

This Section reserves the creation, operation, regulation and dissolution of types of business association.

Business association is defined in the interpretation part as any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and “business” is defined as including the provision of benefits to the members of an association. Accordingly, types of business associations will therefore include companies, whether or not registered under the companies legislation, partnerships, building societies, friendly societies, industrial and provident societies, European economic interest groupings (in terms of Article 1 of Council Regulation (EEC) No. 2137/85). This is not an exclusive list: any other type of business association which fell within this definition would be covered by the reservation.

The reserved matters are:

- (a) *the creation of types of business associations*, such as the manner in which limited liability companies are incorporated by registration under the Companies Act 1985 and matters relating to their constitution and membership;
- (b) *the operation of types of business associations*. This includes matters relating to the operation of the internal structure and organs of the type of business association, such as the appointment and powers of officers or boards of directors. It also includes matters such as the liability of members and officers of the association to the association and to its creditors;
- (c) *the regulation of types of business association*. This includes matters such as the authorisation, registration, supervision and investigation of business associations and their relationships and disqualification of persons from involvement in business associations and other civil or criminal sanctions; and
- (d) *the dissolution of types of business associations*. This includes the circumstances or procedures giving rise to the dissolution of a business association.

The reservation does not, of course, prevent the Scottish Ministers from establishing any business association, such as a company, for devolved purposes but any such company would require to comply with the relevant Act of the UK Parliament. What is reserved is the legislative competence to provide how companies can be created, operated and regulated.

The reservation also does not prevent the Scottish Parliament from legislating on Scots private law matters which apply to business associations, such as applying some provision about contract or liability for damages to companies, as long as the law concerned affects devolved and reserved matters consistently, as provided in section 29(4) of the Act. If the Secretary of State considered that any such legislation would have an adverse effect on the operation of the law as it applies to reserved matters, such as companies legislation, he could make an order under section 35(1) preventing the Bill from being submitted for Royal Assent.

Exceptions

What is excepted from the reservation is the creation, operation, regulation and dissolution of:

- (a) *particular public bodies or public bodies of a particular type established by or under any enactment*. This is to ensure that the Scottish Parliament is able by or under any enactment

to create and provide for the operation, regulation and dissolution of any public bodies for devolved purposes. These might include a particular statutory body, or types of statutory bodies, such as local authorities or other bodies required to carry on activities within a devolved area such as in the fields of health, education, the environment, legal aid, arts, sport, urban regeneration. This exception therefore permits the Parliament to establish public bodies for devolved purposes only: it would not permit the Parliament to establish bodies for purposes relating to any of the reserved matters; and

- (b) *charities*. This exception is required because business associations are defined in such a way as to catch any association carrying on a business, whether or not for profit. It would therefore catch charities. However, it is intended that the Scottish Parliament should be able to legislate to provide for how charities may be created, operated, regulated and dissolved under Scots law.

Section C2: Insolvency

Purpose and Effect

This Section reserves aspects of insolvency and winding up. It has been amended by [S.I. 2001/1456](#).

General

Most matters relating to the insolvency and winding up of business associations are reserved. However, where there are substantial differences in insolvency law and practice between England and Wales on the one hand and Scotland on the other affecting certain matters (as for example, in the case of matters relating to receiverships or the process of winding up), these matters are excepted from the general reservation.

A limited number of matters relating to the insolvency of all persons (and not only to the insolvency of business associations) are also reserved under this Section. These are the reservations relating to preferred or preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

Paragraph 23 of Schedule 8 also provides for certain non-reserved functions of the Registrar of Companies in Scotland and the Assistant Registrar of Friendly Societies for Scotland to be transferred to the Accountant in Bankruptcy who is an office-holder in the Scottish Administration. This means that functions relating to the devolved aspects of insolvency in Scotland are concentrated in a single office-holder appointed by and accountable to the Scottish Ministers. The Registrar of Companies and Assistant Registrar of Friendly Societies will be left with their functions and will be accountable only to the UK Government and Parliament.

Details of Provisions

The reserved matters are:

- (a) *Winding up of business associations*. In general, matters relating to the winding up of business associations are reserved, subject to certain exceptions.

For this purpose “business association” is defined as having the same meaning as in Section C1 (Business associations), subject to the qualification that it does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985, such as a partnership, or any public body established by or under an enactment. Sequestration or winding up of those bodies will not be reserved.

The expression “winding up” is also defined, in relation to business associations, as including the winding up of solvent, as well as insolvent, business associations.

The matters which are reserved, in relation to business associations, are:

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

- i. the modes of, the grounds for and the general legal effect of winding up, and the persons who may initiate winding up;
- ii. liability to contribute to assets on winding up;
- iii. powers of courts in relation to proceedings for winding up, other than the power to sist proceedings;
- iv. arrangements with creditors; and
- v. procedures giving protection from creditors.

These reservations have the effect that all matters leading to the commencement of the winding up of business associations, and matters relating to the commencement itself of the winding up, are reserved. Thus, the circumstances in which a business association may be wound up voluntarily or by the courts; the grounds on which a petition for winding up may be presented; the persons who may initiate a winding up; the powers of the courts on hearing a petition for winding up; the definition of the commencement of the winding up; and the liability of persons (such as shareholders) to contribute to the assets on a winding up, are all reserved. This ensures that, so far as possible, the law relating to the winding up of business associations will be similar in England and Wales and Scotland.

Furthermore, matters relating to arrangements with creditors entered into by business associations (such as company voluntary arrangements) or procedures which give such associations protection from creditors (such as administration orders) are also reserved.

However, there is excepted from these reservations, in relation to business associations:

- i. the process of winding up. In other words, matters relating to the winding up process itself after it has commenced are not reserved. This includes the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or that part;
- ii. the effect of winding up on diligence. Diligence is the process under Scots law whereby court judgements are enforced against a debtor's assets. Under Scots law, diligences done within a certain time of the commencement of winding up are equalised so that all creditors are treated equally in the ranking of their claims; and
- iii. the avoidance and adjustment of prior transactions on winding up. Thus, it is open to the Scottish Parliament to legislate in respect of transactions concluded before the winding up of a business association, to provide for them to be rendered void, or for some other appropriate remedy. The need for that could arise, for instance, where such a transaction has been concluded for less than full value, or has the effect of giving a preference to a particular creditor, to the prejudice of the general body of creditors. Such matters would be dealt with in the course of a winding up and are excluded from the reservation.

[S.I. 2001/1456](#) also added further exceptions in relation to business associations which are social landlords, namely:

- i. the general legal effect of winding up;
- ii. procedures for the initiation of winding up;
- iii. powers of courts in relation to proceedings for winding up; and
- iv. procedures giving protection from creditors,

but only in so far as they relate to a moratorium on the disposal of property held by a social landlord and the management and disposal of such property. Social landlords are defined as being registered companies or industrial and provident societies which have their registered office in Scotland and which satisfy certain conditions, namely that they do not trade for profit and are established for the purpose of, or have among their objects

and powers, the provision, construction, improvement or management of houses for letting or for occupation by members of the body or hostels. This exception was made for the purpose of enabling the Scottish Parliament to legislate about such matters in Schedule 8 to the [Housing \(Scotland\) Act 2001 \(asp 10\)](#).

- (b) *Preferred or Preferential Debts.* There are also reserved matters relating to preferred or preferential debts for the purpose of the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 and any other enactment relating to the sequestration of the estate of any person or to the winding up of business associations, the preference of such debts against other such debts and the extent of their preference over other types of debt.

Certain types of debts, such as taxes which the debtor has collected on behalf of the Crown and sums due to employees, are given a special priority in the bankruptcy or sequestration of individuals and other persons, and in the winding up of business associations, in the sense that they are paid in advance of other debts. What is reserved are matters relating to such debts and the extent of their priority over other debts.

- (c) *Regulation of insolvency practitioners.* Matters relating to the regulation of insolvency practitioners are reserved.

Under Part XIII of the Insolvency Act 1986, which applies to Great Britain, a person who acts, for example, as a liquidator in a winding up or as trustee in the sequestration of a person's estate or as a trustee under a trust deed for an individual's creditors is required to be qualified to act as an insolvency practitioner.

These matters are reserved, even although the Scottish Parliament has legislative competence over the appointment and powers of liquidators or a person having responsibility for the conduct of a winding up.

- (d) *Co-operation of insolvency courts.* Matters relating to the co-operation of insolvency courts are reserved.
- (e) *Floating Charges and Receivers.* Matters relating to floating charges and receivers are not reserved, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

The circumstances in which receivers may be appointed and the effect of their appointment, are not reserved. However, matters relating to the qualifications which a receiver must have before he may act as such are reserved under the reservation relating to the regulation of insolvency practitioners.

Section C3: Competition

Purpose and Effect

This Section reserves the regulation of anti-competitive practices and agreements; abuse of dominant position, and monopolies and mergers. It does not, however, prevent the Scottish Parliament from legislating to regulate particular practices in the legal profession for the purpose of regulating the profession or the provision of legal services, although the Scottish legal profession will still be subject to general UK competition law.

General

This reservation is designed to ensure the continuation of a common United Kingdom system for the regulation of competition matters. Responsibility for competition policy rests with the Secretary of State for Trade and Industry.

Competition matters are currently regulated by the Competition Act 1998 which introduced a prohibition approach to anti-competitive agreements and abuse of a dominant position. The Director General of Fair Trading is responsible for enforcement

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

of the prohibitions with rights of appeal to a new tribunal within a new Competition Commission. The Competition Commission will also take over the existing functions of the Monopolies and Merger Commission. Existing merger and monopoly legislation under the Fair Trading Act 1973 will remain in force.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1070
Stage	Date	Column
LC	23-Jul-98	1091
L3	9-Nov-98	607
L3	9-Nov-98	609

Details of Provisions

Reservation

What is reserved is the regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers. This includes all matters relating to that regulation, including:

- (a) the powers to investigate any body or person for the purposes of enforcing competition law;
- (b) the administration of competition law through the respective powers of the Secretary of State for Trade and Industry, the Director General of Fair Trading and any other authority exercising competition functions.

Exception

What is excepted from the reservation is the regulation of particular practices in the legal profession for the purpose of regulating that profession or the provision of legal services. What constitutes the legal profession for this purpose is expressly defined.

This is intended to reflect the former position in terms of which the Secretary of State for Scotland had policy responsibility for regulating the legal profession and the provision of legal services in Scotland. This is mainly for the purpose of the protection of the public (or, in other words, consumer protection) but also includes regulating the rules and organisations of the legal profession, where the regulation may affect competition in the provision of legal services. For example, provisions increasing the provision of court services by permitting certain solicitor advocates to have a right of audience in the Court of Session and High Court requires, in order to be effective, to be accompanied by provisions which regulate rules of conduct by advocates which, by being anti-competitive, might thwart that policy objective - see, for example, section 31 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 ("the 1990 Act") which requires the Faculty of Advocates to submit certain rules for the approval of the Secretary of State for Scotland who, in turn, is required to consult the Director General of Fair Trading. One of the effects of this exception is that the functions exercisable by the Secretary of State for Scotland were, upon devolution, transferred to the Scottish Ministers under section 53. However the Scottish Ministers are still required to consult the DGFT before exercising those functions.

The exception does not, however, enable the Scottish Parliament to legislate generally about the regulation of anti-competitive practices concerning the legal profession in Scotland. This remains a matter for the UK Parliament. Nor does the exception limit the ability of the UK competition authorities to investigate anti-competitive practices

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

concerning the Scottish legal profession and apply to the members of that profession the provisions of general competition legislation.

Interpretation

The expression “legal profession” is defined as meaning not only advocates and solicitors but also qualified conveyancers and executry practitioners who are authorised under the 1990 Act to provide conveyancing and executry services respectively.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Competition Act 1998 (c.41) , Schedule 7, paragraphs 2(4) and 4(4).	The functions of the Secretary of State of being consulted by the Secretary of State on appointments to the panel of chairmen of the Competition Commission and on appointment of the President of the Competition Commission Appeal Tribunals.
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Section C4: Intellectual Property

Purpose and Effect

This Section reserves intellectual property, subject to an exception for plant breeders’ rights.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	815
LC	23-Jul-98	1097

Details of Provisions

Reservation

Intellectual property is reserved.

This reservation covers all matters relating to existing and future intellectual property and ancillary matters, including registration of patent and trademark agents. This includes patents, design right, trade marks and copyright and all other existing and future analogous rights and matters, such as design registration, publication rights, rights in performances and semi-conductor topographies, technical measures for protection of works and rights management information, moral rights, and the law on passing-off, trade secrets and database rights.

Exception

There is excepted from this reservation the subject-matter of Parts I and II of the Plant Varieties Act 1997. These Parts deal with the proprietary rights of plant breeders, the licensing of the use of the plant varieties, and with the establishment of an appeals tribunal and related matters. The Scottish Parliament has legislative competence to legislate about plant breeders’ rights in view of the devolution of agricultural matters generally.

The purpose and scope of the reservation of intellectual property was explained in a Written answer by Henry McLeish on 17 November 1998 (WA Col 466). The same

question was also answered by Lord Sewel on the same day (WA Col 152). The text is as follows:

“Intellectual Property

Mr. David Stewart: To ask the Secretary of State for Scotland what is the purpose and scope of the reservation of intellectual property in the Scotland Bill. [60441]

Mr. McLeish: The purpose of the reservation is to ensure the continuation of uniform intellectual property laws across the UK. This will avoid difficulties for owners of intellectual property rights arising from, for example, difference in what can be protected, the extent of the protection and remedies for breach of rights. Indeed, the benefits of harmonisation in this area are becoming increasingly recognised with the ever wider harmonisation of intellectual property rights and related matters across Europe and the rest of the world.

Patents, designs, registered trade marks and copyright are well known examples of intellectual property rights and are reserved. The reservation also embraces all other existing and future analogous rights and matters, such as rights in performances and semi-conductor topographies, moral rights, the law of passing off and trade secrets, and the new database right. Moreover, rights such as those in utility models and matters such as technical measures for the protection of copyright works and information relating to the management of rights, all of which are included in recent draft EC Directives on intellectual property, fall within the scope of the reservation. Furthermore, all matters relating to the Patent Office are reserved, as are current and future ancillary matters.

The existing major legislation on intellectual property, namely the Copyright, Designs and Patents Act 1988, the Patents Act 1977, the Trade Marks Act 1994 and the Registered Designs Act 1949, exemplifies but does not limit the range of provisions relating to 'intellectual property' which falls or may in the future fall within the reservation.

There is just one exception from the reservation, that is UK plant breeders' rights within the meaning of the Plant Varieties Act 1997. Agricultural Ministers, that is the Minister of Agriculture, Fisheries and Food and the Secretaries of State for Scotland, Wales and Northern Ireland, are jointly responsible for UK plant breeders' rights. Devolution in this one area of intellectual property is therefore consistent with the joint responsibility which already exists for plant breeders' rights.

Executive devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Copyright, Designs and Patents Act 1988 (c.48), sections 145(2) and 150(1).</p>	<p>Section 145(2) - The function of the Secretary of State of being consulted by the Lord Chancellor on appointment of chairman and 2 deputy chairmen of the Copyright Tribunal.</p>
	<p>Section 150(1) - The function of the Secretary of State of being consulted by the Lord Chancellor on procedural rules for the Copyright Tribunal.</p>
<p>The Trade Marks Act 1994 (c.26), section 77(4).</p>	<p>The function of the Secretary of State of being consulted by the Lord Chancellor on appointing a person to hear appeals under the Act and on removing such a person from office.</p>

Residual Functions

The functions of the Secretary of State for Scotland under the Plant Varieties and Seeds Act 1964 and the Plant Varieties Act 1997 were transferred to the Minister for Agriculture, Fisheries and Food, as appropriate, by the Transfer of Functions (Agriculture and Food) Order 1999 (S.I. 1999/3141).

Section C5: Import and Export Control

Purpose and Effect

This Section reserves the control of import and export of goods and of endangered species of animals or plants to and from any part of the United Kingdom. It has been amended by [S.I. 2000/3252](#).

The control of movement of food, animals, plants and other items into and out of Scotland for the purposes of protecting human, animal or plant health, or to safeguard animal welfare, to protect the environment or to meet EU obligations under the Common Agricultural Policy is not reserved.

General

This reservation is intended to ensure that in all parts of the UK common rules will continue to govern the import and export of goods. It will preserve a level playing field for business within the framework of European law and international trade agreements, which are reserved matters under paragraph 7 of Part I of Schedule 5. It also covers, *inter alia*, the import and export of works of art and the international trade in endangered species under the Convention on International Trade in Endangered Species (CITES).

Reservation in this Section of control of the import and export of goods is supplemented by reservations for product standards, safety & liability (Section C8), protection of trading and economic interests (Section C15), and control of weapons (Section L3).

The work of Scottish Trade International - a joint bureau of the Scottish Executive and Scottish Enterprise - in promoting exports from Scotland is not, however, reserved by this Section.

Details of Provisions

The reserved matters are:

- (a) *the subject-matter of the Import, Export and Customs Powers (Defence) Act 1939*. This Act provides for controlling the import, export and carriage coastwise of goods and for the enforcement of the law relating to these matters. It empowers the Secretary of State to prohibit or regulate the movement of goods to or from the UK, or specified parts of the country; and to make provision to enforce such regulations including penal sanctions and seizure of goods. The Treasury is given power to impose charges in connection with the regulation of trade in goods; and
- (b) the prohibition and regulation of the import and export of endangered species of animals and plants.

Originally enacted in emergency powers legislation in September 1939, the 1939 Act is now part of the body of legislation governing controls over trade. It also includes certain provisions relating to trading with the enemy, also a reserved matter under Defence at paragraph 9(1)(e) of Part I of Schedule 5.

Responsibility for operating import and export controls lies primarily with the Secretary of State for Trade and Industry. The control over imports is comprehensive but most types of goods are released from control by an open general import licence. But, particular controls are applied under the Act on, at present, imports of: certain steel and

textile products from certain countries; certain other non-textile products from China; firearms and ammunition; radioactive materials; goods falling within the scope of the chemical weapons convention; and goods from areas subject to comprehensive UN sanctions.

The prohibition and regulation of the import and export of endangered species is also reserved because animals and plants do not otherwise fall within the controls on “goods”. The basis for current law at a British and EC level is the Convention on International Trade in Endangered Species (CITES), although the Regulations which give effect to CITES at the EC and UK levels in some respects go beyond the Convention’s requirements and involve ancillary controls e.g. over advertising or transport for sale. The great majority of species to which CITES applies are exotic, but some are indigenous to the UK, e.g. the golden eagle.

Exceptions

In line with the general devolution of agriculture, fisheries, food and related matters, the prohibition and regulation of movement into and out of Scotland of the following are excepted from the reservation:

- (a) food, animals, animal products, plants and plant products but only for the purposes of protecting human, animal or plant health, animal welfare or the environment or observing or implementing obligations under the Common Agriculture Policy; and
- (b) animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985)¹¹ but only for the purposes of protecting human, animal or plant health or the environment.

Section C6: Sea Fishing

Purpose and Effect

This Section reserves the regulation of sea fishing outwith the Scottish zone, except in relation to Scottish fishing boats. By so doing, it clarifies the extent to which the Scottish Parliament can legislate about sea fishing outwith Scotland.

Details of Provisions

This Section reserves the regulation of sea fishing outwith the Scottish zone.

The Scottish zone is defined in section 126(1) as meaning the sea within British fishery limits (that is, the limits set by or under section 1 of the Fishery Limits Act 1976) which is adjacent to Scotland. Section 1(1) of the 1976 Act provides that the British fishery limits extend 200 miles from the baselines from which the territorial sea of the United Kingdom is measured. Section 126(2) enables Her Majesty by Order in Council to make provision for determining (among other things) any boundary between waters which are to be treated as sea within the British fishery limits which are adjacent to Scotland and those which are not. Such provision has been made in the Scottish Adjacent Waters Boundary Order 1999 ([S.I. 1999/1126](#)).

This has the effect of providing that the Scottish Parliament can legislate to regulate sea fishing within the Scottish zone, even although it may be outwith Scotland (including the territorial seas adjacent to Scotland).

Exception

There is an exception from the reservation which would enable the Scottish Parliament to regulate sea fishing by Scottish fishing boats even outwith the Scottish zone.

¹¹ The words in brackets were added by Article 4 of [SI 2000/3252](#).

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

The interpretation part defines “Scottish fishing boat” as meaning a fishing vessel which is registered in the register maintained under section 8 of the Merchant Shipping Act 1995 and whose entry in that register specifies a port in Scotland as the port to which the vessel is to be treated as belonging.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1100

Executive Devolution

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Merchant Shipping Act 1995 (c.21), section 10(2)(f).</p>	<p>The function of the Secretary of State, by regulation, to make provision for and in connection with the registration of a fishing vessel as British ships (section 10(2)(f), provide for regulations to be made with respect to (among other matters) the marking of ships registered or to be registered, including marks for identifying the port to which a fishing vessel is to be treated as belonging).</p>
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Agency Arrangements

The Scotland Act 1998 (Agency Arrangements) Order 1999 (S.I. 1999/1512) specified functions under section 4 of the Sea Fish (Conservation) Act 1967 and the Sea Fish Licensing Order 1992 (functions in relation to licensing of fishing boats) for the purpose of section 93 of the Scotland Act.

Section C7: Consumer Protection

Purpose and Effect

This Section reserves various consumer protection and related matters, subject to certain exceptions.

General

This reservation is designed to ensure the reservation of a common United Kingdom system for the regulation of consumer protection and related matters in order to preserve a level playing field for consumers and business.

The DTI is responsible throughout the UK for consumer protection matters such as the sale and supply of goods and services to consumers, and related matters, which may not be restricted to consumers, such as trade descriptions, misleading advertising price indications etc. So that the interests of consumers across the whole UK market can best be protected, the current UK-wide arrangements will be maintained. The Scottish Office was formerly consulted on a non-statutory basis in connection with relevant work programme proposals and various other matters to do with Scottish consumer bodies, which receive funding from, and in some cases are appointed by, the DTI e.g. Scottish Consumer Council and Citizens Advice Scotland. The Scottish Consumer Council,

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

National Consumer Council and the Scottish Association of Citizens Advice Bureaux have been specified as cross-border public authorities.

The Scottish Parliament has legislative power in this area in respect of food safety, because this is integral to the policy areas of agriculture and food which are not reserved, and in respect of advertising which is specific to tobacco and tobacco products in view of its similar linkage to health.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	982
Stage	Date	Column
CR	19-May-98	815
LC	23-Jul-98	1121
L3	9-Nov-98	609

Details of Provisions

Reservation

There are three main groups of reserved matters: the regulation of various matters, the safety of consumer services, and the subject-matter of various enactments.

((i) First Group

The regulation of the following are reserved matters:

- i. *the sale and supply of goods and services to consumers.* This covers the terms on which goods and services are sold and supplied to consumers. There are currently a number of pieces of legislation falling under this heading including the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The scope of most of this legislation goes beyond the reserved matter of protection of consumers. The reservation does not prevent the Scottish Parliament from legislating about these wider matters;
- ii. *guarantees in relation to such goods and services.* Statutory implied terms in relation to the sale and supply of goods and services to consumers are covered by the reservation at (a) above;
- iii. *hire purchase*, including the subject-matter of Part III of the Hire Purchase Act 1964. This currently includes the provisions of the Supply of Goods (Implied Terms) Act 1973. Part III of the Hire Purchase Act 1964 deals with title to motor vehicles which are disposed of while subject to hire purchase agreements;
- iv. *trade descriptions*, except in relation to food. This deals with all matters related to false trade descriptions and is not limited to the protection of consumers. It currently includes the subject-matter of the Trade Descriptions Act 1968. There is an exception made for trade descriptions for food;
- v. *misleading and comparative advertising*, except regulation specifically in relation to food, tobacco and tobacco products. This deals with all matters related to misleading advertising and other regulation of advertising, apart from the specific exemptions. This currently includes the subject-matter of the Control of Misleading Advertisements Regulations 1988 and of the Comparative Advertising Directive 1997;

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

- vi. *price indications*. This deals with all matters related to the regulation of price indications. This currently includes relevant provisions in the Consumer Protection Act 1987 and the EC Directive on Price Indications;
- vii. *trading stamps*. This deals with all matters regulating the issue, use and redemption of trading stamps and similar tokens and the right of holders of such stamps. It currently includes the Trading Stamps Act 1964;
- viii. *auctions and mock auctions of goods and services*. This relates to all matters related to sale of goods and services by auction and the prohibition of mock auctions i.e. sales which purport to be auctions, but in which the right to bid is restricted, goods are sold below the bid price or are given away, and similar trading practices intended to put undue pressure on customers. This currently includes the Auctioneers Act 1845, the Auctions (Bidding Agreements) Act 1969 and the Mock Auctions Act 1961; and
- ix. *hall-marking and gun barrel proofing*. This covers the regulation of hallmarks applied to articles of precious metal. Gun barrel proofing is the process of testing a gun for safety in order to disclose any fault or weakness and is a statutory requirement for all small arms.

(b) Second Group

Matters relating to the safety of, and liability for, services to consumers are reserved. This covers any matters related to the supply of services which reflect similar provisions as those relating to product safety and liability in Section C8.

(c) Third Group

The subject-matter of the following enactments are reserved:

- i. *the Hearing Aid Council Act 1968*. This provides for the establishment of the Hearing Aid Council and its function of ensuring that hearing aid dispensers maintain adequate standards of competence and conduct;
- ii. *the Unsolicited Goods and Services Acts 1971 and 1975*. This provides for protection of people, whether consumers or others who receive unsolicited goods. The Act also provides measures of protection of people who are charged for unsolicited directory entries;
- iii. *Parts I to III and XI of the Fair Trading Act 1973*. Part I of the Fair Trading Act (FTA) deals with the role and functions of the Director General of Fair Trading (DGFT);

Part II of the FTA provides for the establishment of a Consumer Protection Advisory Committee and deals with its functions and the Orders which may be made following its recommendations;

Part III of the FTA sets out the powers of the DGFT to deal with traders who follow a course of conduct which is unfair and detrimental to the interests of consumers;

Part XI of the FTA contains provisions for regulations to be made setting out requirements which the organisers of pyramid selling and similar trading schemes must observe in relation to participants and prospective participants and creates offences related to some pyramid selling activities. While a participant acts in a trading rather than a consumer role, this issue has formed part of the consumer policy area because participants are seen to need protection of a similar nature to that needed by consumers;

- iv. *the Consumer Credit Act 1974*. This regulates the advertising and provision of credit and hire arrangements to individuals (consumers and unincorporated entities) and provides for the licensing of credit providers and hirers;

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

- v. *the Estate Agents Act 1979*. This regulates the activities of estate agents. The 1979 Act does not apply to things done in the course of his profession by a practising solicitor or person employed by him;
- vi. *the Timeshare Act 1992*. This provides for the minimum information which must be given to consumers prior to contract, the minimum contents of contracts and for the cancellation of agreements without penalty within a cooling off period. The Act was amended by the Timeshare Regulations 1997 which implemented the EC Timeshare Directive;
- vii. *the Package Travel, Package Holiday and Package Tours Regulations 1992*. This covers requirements on information given to consumers, in brochures and otherwise, content and form of contracts, provisions which traders must make for the protection of consumers' pre-payments, other obligations of traders and related offences and civil rights of consumers; and
- viii. *the Commercial Agents (Council Directive) Regulations 1993*. This provides for the rights and duties of principals and their agents in relation to each other, the remuneration and commission to which agents are entitled, the right of an agent to a contract and provisions on the termination of contract. While the regulations do not deal with consumers, the issue has been dealt with as part of the consumer policy agenda because of the imbalance of power which often exists between the agent and the principal.

Exceptions

What is excepted from all of these reservations is the subject-matter of section 16 of the Food Safety Act 1990. This is an enabling Act to regulate the safety of food in Great Britain, covering a broad range of commercial activities relating to food. Section 16 provides for regulations to be made which include powers to secure the fitness of food, hygiene conditions and practices in food premises and provision for imposing requirements or prohibitions on the composition, labelling and advertising of food.

There are also specific exceptions mentioned above in relation to:

- (a) the regulation of trade descriptions in relation to food; and
- (b) regulation specific to the advertising of food, tobacco and tobacco products.

Section C8: Product Standards, Safety and Liability

Purpose and Effect

This Section reserves technical standards, safety and labelling of products, and product liability, subject to certain exceptions. It has been amended by [S.I. 2000/3252](#).

General

This reservation covers the regulation and control of the standards of products which are put on the market or into service so as to observe and implement the relevant EC law, notably the European Single Market Harmonisation Directives which have as their purpose the smooth functioning of the single market by removing potential barriers to trade. Also reserved under this heading are product safety and liability and product labelling. These matters too are reserved in order to ensure that a single market is maintained within the UK.

Exceptions from these reservations are made for food, agricultural produce, fish products and certain agricultural products in line with the general devolution of food standards, agriculture and fisheries.

Details of Provisions

Reservation

What is reserved are:

- (a) technical standards and requirements in relation to products in pursuance of an obligation under Community law. This includes the imposition of specified requirements (both minimum and absolute) and technical standards relating to goods. Examples of relevant EC laws include directives concerned with single market harmonisation and with the suitability of packaging for reuse or recycling;
- (b) the national accreditation body and the accreditation of bodies which certify or assess conformity to technical standards in relation to products or environmental management systems¹²;
- (c) product safety and product liability; and
- (d) product labelling.

Exceptions

The following are excepted from the reserved matters:

- (a) food (which includes drink) and, in relation to food safety, materials which come into contact with food (e.g. packaging);
- (b) agricultural and horticultural produce;
- (c) fish and fish products; and
- (d) seeds, animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985)¹³.

These exceptions are necessary for the devolution of agriculture, fisheries and food.

Agency Arrangements

The Scotland Act 1998 (Agency Arrangements) Order 1999 ([S.I. 1999/1512](#)) specified certain functions of a Minister of the Crown in relation to the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 for the purpose of section 93 of the Scotland Act.

Section C9: Weights and Measures

Purpose and Effect

This Section reserves weights and measures.

General

The law on weights and measures is concerned with establishing units and standards of measurement and with the regulation of trade in respect of the weighing and measuring of goods and, in particular circumstances, the quantities or manner in which they may be sold. Article XVII of the Treaty of Union provided for common weights and measures to be used throughout the United Kingdom.

¹² This was added by Article 5 of [SI 2000/3252](#).

¹³ The words in brackets were added by Article 4 of [SI 2000/3252](#).

Details of Provisions

Legislative competence concerning units and standards of weight and measurement, and the regulation of trade so far as involving weighing, measuring and quantities is reserved.

Section C10: Telecommunications and Wireless Telegraphy

Purpose and Effect

This Section reserves telecommunications and wireless telegraphy. It also reserves internet services and electronic encryption.

General

Telecommunications includes telephone systems and all forms of data transmission conveyed through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy. Operation of telecommunication systems is regulated by licensing powers of the Secretary of State and the Director General of Telecommunications under the Telecommunications Act 1984.

Wireless telegraphy is defined in legislation as emitting or receiving (without wires) electromagnetic energy of a frequency not exceeding 3 million megacycles per second. The Secretary of State has the power to make regulations concerning wireless telegraphy and to licence operators. These powers extend to the use of the radio spectrum. There is an overlap with Broadcasting which is regulated under separate legislation which is also reserved.

The reservation extends also to the subject-matter of a number of EC Directives and Regulations dealing with telecommunications and wireless telegraphy which use definitions which have a similar effect to those cited in UK legislation. This includes the regulations concerned with electromagnetic disturbance which is in part concerned with the establishment and regulation of technical standards. Technical standards of goods are also reserved.

Internet services are provided over computer systems linked by national and international telephone system but the services provided go beyond ordinary telecommunications. The reservation extends to all such services provided by electronic means at a distance.

Electronic encryption covers the general use of encryption of communications or data in electronic form for the purposes of commercial confidentiality and authentication.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1125
LR	3-Nov-98	192
LR	3-Nov-98	194

Details of Provisions

The reservation covers all matters relating to telecommunications and wireless telegraphy as described above. In particular this includes the subject-matter of the following legislation:

- (a) *the Telecommunications Act 1984*. This covers the regulatory and licensing regime for telecommunications systems as described above; and

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

- (b) *the Wireless Telegraphy Act 1949, the Wireless Telegraphy Act 1967 and the Marine etc. Broadcasting (offences) Act 1967*. These cover the regulatory and licensing regime for wireless telegraphy. Part II of the 1949 Act regulates the prevention of interference.

The following are also reserved:

- (a) internet services; and
- (b) electronic encryption.

Exception

The subject-matter of Part III of the Police Act 1997 which sets out the circumstances in which the police may be authorised to interfere with property in order to carry out surveillance and other types of investigative work is excepted from the reservation. This is consistent with the exception of the subject-matter of Part III of the 1997 Act from the reservation of National Security, Interception of Communications, Official Secrets and Terrorism - see Section B8.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)), as amended, with effect from 14 December 2000, by Article 4(3)(a) of [S.I. 2000/3253](#)

<p>The Wireless Telegraphy Act 1949 (c.54), section 5(1) (b).</p>	<p>The function of the Secretary of State of authorising persons to use wireless telegraphy apparatus in order to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraphy or not) and to disclose information about the same: but only so far as the function is exercisable for the purpose of preventing or detecting crime (within the meaning of the Regulation of Investigatory Powers Act 2000) or of preventing disorder</p>
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[S.I. 1999/1750](#) also transferred non-statutory functions in relation to the management of the radio spectrum, principally in connection with police, fire and local government civil defence activities.

Section C11: Posts

Purpose and Effect

This Section reserves the subject matter of the [Postal Services Act 2000 \(c.26\)](#) but there is excepted financial assistance for the provision of certain services provided from public post offices. This Section was substituted, with effect from 14 December 2000, by [S.I. 2000/3252](#).

General

Previously, this Section reserved “the Post Office, posts (including postage stamps, postal orders and postal packets) and regulation of postal services”. However, the Postal Services Act 2000 abolished the statutory monopoly enjoyed by the Post Office and provided for postal services to be provided by persons holding a licence from the Postal Services Commission.

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

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1095
LR	3-Nov-98	194

Details of Provisions

The reservation extends to the subject matter of the Postal Services Act 2000, subject to the exception mentioned below.

The interpretation part disapplies paragraph 5(1) of Part III of Schedule 5 to the Scotland Act (which provides that references to the subject matter of an enactment are to be construed as at 1 July 1999). It provides that the reference to the subject matter of the Postal Services Act 2000 is to be read as a reference to the subject matter of that Act as at the date when it received the Royal Assent (28 July 2000).

The Postal Services Act 2000 regulates the provision of postal services by means of licences from the Postal Services Commission and creates offences in relation to postal services (e.g. providing postal services without a licence, interfering with mail etc). It reorganises, and provides for the dissolution of, the Post Office and establish public post offices top provide postal services (and other services) to the public. It also establishes a Consumer Council for Postal Services.

There is excepted from the reservation financial assistance for the provision of services (other than postal services and services relating to money or postal orders) to be provided from public post offices. The expressions “postal services” and “public post offices” have the same meaning as in the Postal Services Act 2000.

Section C12: Research Councils

Purpose and Effect

This Section reserves the Research Councils within the meaning of the Science and Technology Act 1965, including the funding of such Councils. UK Research Councils will continue to provide funds for research in Scotland, on the present basis.

General

Research Councils are established by Royal Charter and are regulated under the 1965 Act. The 1965 Act establishes certain Research Councils for purposes connected with scientific research e.g. the Natural Environment Research Council and the Medical Research Council. Apart from the Research Councils already established by Royal Charter and named in the 1965 Act, a body may be declared a Research Council for the purposes of the 1965 Act by means of an Order in Council. The Research Councils covered by the 1965 Act deal with matters related to research and development in any of the sciences (including the social sciences) and technology. The reservation extends to existing Research Councils or any others that may be established in the field of scientific research within the meaning of the 1965 Act.

The Scottish Parliament is able to legislate for the funding of research, including scientific research, generally and to establish bodies in Scotland to carry out, administer or fund such research. The Scottish Parliament has legislative competence over the Scottish Higher Education Funding Council which grants funds for research to higher education institutions. This reservation simply precludes the Scottish Parliament from establishing Research

Councils within the meaning of the 1965 Act or exercising any direct control over such Councils.

Section 5 of the 1965 Act enables the Secretary of State to fund scientific research. This power is used mainly, but not exclusively, to fund research through Research Councils. It is written in terms of a general power to fund scientific research and so relates to more than is covered by this reservation. Section 5 is reserved only as it relates to the Research Councils. In all other respects powers under section 5, so far as they relate to matters that are not reserved, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act. However, since there are circumstances under which a UK Secretary of State or Minister may wish to fund research in Scotland other than through Research Councils, section 56(1)(d) provides that section 5 of the 1965 Act is a shared power.

Details of Provisions

The first reservation is of Research Councils within the meaning of the 1965 Act. The reservation covers the establishment of and appointments to Research Councils, the functions, powers and duties of such bodies, and the provision of expenses and funds for distribution by them.

The subject-matter of section 5 of the Act is reserved so far as it relates to Research Councils. This reservation reserves to United Kingdom Ministers the power to fund scientific research through the Research Councils.

Section C13: Designation of Assisted Areas

Purpose and Effect

This Section reserves the designation of assisted areas. It does not reserve the matter of determining what financial assistance to industry might apply in such areas.

General

Assisted areas are those areas designated as development and intermediate areas under section 1 of the Industrial Development Act 1982. This power to designate assisted areas is exercised by the Secretary of State for Trade and Industry where for economic, social or other reasons of regional policy, additional measures to promote their economic development are considered appropriate. The designation of such areas applies for the purposes of any other Act which refers to development or intermediate areas (e.g. the Derelict Land Act 1982) as well as for the purposes of the 1982 Act.

The Treaty of Rome prohibits state aids that are incompatible with the Common Market. As part of its guidelines on this the European Commission require that particular areas eligible for differing levels of regional state aid should be agreed with the Commission. As a result of the reservation of International and European relations in Part I, paragraph 7 of Schedule 5 negotiations on defining such areas throughout the UK will be a matter for the UK Government, who will, by virtue of this reservation, also be responsible for giving effect to the areas as approved by the Commission.

The 1982 Act also provides for the provision of financial assistance to industry both within assisted areas and more generally. Financial assistance to industry is not reserved, subject to compliance with European Commission guidelines on state aids. Under section 56(1), however, a Minister of the Crown will continue to be able to exercise powers to provide financial assistance to industry under the Industrial Development Act 1982 and other enactments.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	23-Jul-98	1126

*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	23-Jul-98	1130

Details of Provisions

This Section reserves the subject-matter of section 1 of the Industrial Development Act 1982. This provides for the Secretary of State to designate areas within Great Britain as assisted areas including the power to prescribe different categories of areas (such as development and intermediate areas) and to provide for preferential treatment of these categories.

Section C14: Industrial Development Advisory Board

Purpose and Effect

This Section reserves the Industrial Development Advisory Board.

General

The Industrial Development Advisory Board (IDAB) is a statutory body appointed under section 10 of the Industrial Development Act 1982 which advises the Secretary of State for Trade and Industry about the exercise of certain powers to provide financial assistance to industry. There is already a separate body, the Scottish Industrial Development Board (SIDAB) which is established under section 20 of the Scottish Development Agency Act 1975 to advise in this field.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	Feb-98	221

Details of Provisions

The Industrial Development Advisory Board is reserved.

Section C15: Protection of Trading and Economic Interests

Purpose and Effect

This Section reserves the protection of trading and economic interests.

General

The purpose of legislation on this subject is to protect individuals and businesses from the laws of other states where they purport to have effect outside the country where the laws are made. Provisions under such legislation may prohibit certain actions in the UK in compliance with objectionable foreign laws. For example, legislation may prevent the enforcement in the UK of foreign judgements or provide remedies in UK courts for persons adversely affected by the application abroad of objectionable foreign laws.

In addition, the protection of the UK's economic interests from the actions of Governments or persons resident outside the UK is reserved.

Court procedure, judicial remedies and the reciprocal enforcement of foreign judgements generally is not reserved.

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

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	205
L3	9-Nov-98	609

Details of Provisions

This Section reserves the subject-matter of the following enactments:

- (a) *section 2 of the Emergency Laws (Re-enactments and Repeals) Act 1964*. This section gives the Treasury power to block the transfer of funds, gold or securities where that action is likely to be taken by a person or Government outside the UK to the detriment of the economic position of the UK.
- (b) *part II of the Industry Act 1975*. This deals with powers relating to the transfer of control of important manufacturing undertakings and is intended to cover cases where it is undesirable on wider policy grounds for assets of wider national importance to fall into the hands of non-residents. The Secretary of State for Trade and Industry can prohibit or restrict such change in control of manufacturing operations which appear to be of special importance to the United Kingdom or to any substantial part of the United Kingdom.
- (c) *the Protection of Trading Interests Act 1980*. This Act sets out the main provisions concerning protection of trading or other business interests of persons in the UK from requirements, prohibitions or judgements imposed or made under the laws of other states.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Industry Act 1975 (c.68), Schedule 3, paragraph 24	The function of the Secretary of State in making rules in relation to Scottish proceedings of an Industry Act tribunal.
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Section D1: Electricity

Purpose and Effect

This Section reserves the generation, transmission, distribution and supply of electricity and the regulation of the electricity supply industry. Matters relating to the control of pollution are excepted.

General

This Section reserves the generation, transmission, distribution and supply of electricity in Scotland. The subject-matter of the legislation governing privatisation of the electricity supply industry is also reserved. This is in line with a general reservation of energy matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	1004

Details of Provisions

Reservation

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

The reservation covers the generation, transmission, distribution and supply of electricity. This would include the regulation of the electricity supply industry under Part I of the Electricity Act 1989. That Part gives the Secretary of State and the Director General of Electricity Supply extensive powers to regulate the industry through a system of licensing of generation, transmission and supply, sets out the duties of public electricity suppliers, and imposes further controls for the protection of the public interest and the protection of consumers.

The reservation also covers the subject-matter of Part II of the 1989 Act, which deals with the re-organisation of the industry by privatisation.

Exception

The subject-matter of Part I of the Environmental Protection Act 1990, which makes provision for the control of pollution is excepted from the reservation.

Executive devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Electricity Act 1989 (c.29):	
(a) section 2(2)(b) and (3)(a);	Section 2(2)(b) - The function of the Secretary of State to determine that the area for which a consumers' committee is appointed shall consist of the authorised areas of two or more public electricity suppliers. Section 2(3)(a) - The function of the Secretary of State of being consulted by the Director before appointment of the chairman of a consumers' committee.
(b) section 3;	The duties of the Secretary of State to exercise the functions assigned or transferred to him by Part I of the Act in the manner which he considers is best calculated to achieve certain ends, so far as relating to functions exercisable by the Scottish Ministers under this Order.
(c) sections 32(1) and (9), 33, 34, 35, 36, 37, 39(1)(a) and 58:	Section 32(1) - The function of the Secretary of State after consultation with the Director and the suppliers concerned by order to require each public electricity supplier to make and produce evidence of arrangements for electricity to be available to the supplier from non-fossil fuel sources. Section 32(9) - The function of the Secretary of State by regulations to provide that subsections (5) to (8) shall have effect in relation to certain types of generating station with modifications, and to provide that electricity generated outside the United Kingdom shall be treated as generated by a non-fossil fuel generating station in such circumstances and to such extent as prescribed.

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

	<p>Section 33 (1), (6) and (7) - The function of the Secretary of State by regulations to provide for imposition of a fossil fuel levy on public electricity suppliers and others, for collection of payments in respect of it and prescribe a person to collect them, and to provide for the making to such suppliers of payments out of the payments so collected and to make ancillary provisions; requirements as to the manner of exercise of the functions.</p> <p>Section 34 - The function of the Secretary of State by order to vary the minimum capacity of generating stations to which the section applies; functions of the Secretary of State to give directions to persons operating generating stations as regards fuel stocks etc., and ancillary powers.</p> <p>Section 35 - The functions of the Secretary of State to give a direction requiring a person authorised by licence to transmit electricity to give information or advice for purposes connected with section 34; and to give a direction requiring him to operate his system in a specified manner or to achieve specified objectives; requirement to lay directions before Parliament.</p>
	<p>Section 36 - The function of the Secretary of State to consent to construction, extension or operation of a generating station; functions of the Secretary of State by order to vary the minimum capacity above which the requirement for consent applies and to grant exemptions to the requirement for consent.</p> <p>Section 37 - The function of the Secretary of State to consent to an electric line being installed or kept installed above ground; function to prescribe by regulations cases where the requirement for consent does not apply.</p> <p>Section 39(1)(a) - The functions of the Secretary of State to consent to regulations made by the Director prescribing standards of performance in electricity supply services to tariff customers in individual cases.</p> <p>Section 58 - The function of the Secretary of State to give to persons licensed to transmit electricity directions to secure that neither that person nor any other person obtains unfair commercial advantage from possession of information; requirement upon the</p>

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

	Secretary of State to publish a copy of directions; function of the Secretary of State to enforce compliance with such directions by civil proceedings.
(d) section 60;	The function for regulations made by the Secretary of State to provide for certain matters.
(e) section 61;	The powers to take certain proceedings concurrently, so far as enabling the Secretary of State to exercise his functions in the proceedings concurrently.
(f) Schedule 3, Part I;	Schedule 3, paragraph 1 - The function of the Secretary of State to authorise a licence holder to purchase compulsorily land required for a purpose connected with his activities. Schedule 3, paragraph 2(3) - The function of the Secretary of State by order to amend the period specified in paragraph 2(2)(b) (which relates to the Director's duties in cases where his consent to a compulsory purchase order is required). Schedule 3, paragraph 3(2) - The function of the Secretary of State to authorise a licence holder to purchase land compulsorily for the purpose of exchange of land.
(g) Schedule 3, Part III, paragraphs 15, 16, 17 and 20, including paragraph 11 of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) as applied by those provisions;	The function of the Secretary of State, under paragraph 11 of the First Schedule, Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 as applied by Schedule 3 paragraphs 15, 16, 17 and 20, to certify certain matters, in which case special parliamentary procedure will not apply, and procedural requirements of that paragraph as so applied.
(h) Schedule 4, paragraphs 6, 8, 9 and 10(4)(b);	Schedule 4, para 6(3), (4) & (5) - The function of the Secretary of State to grant necessary wayleaves, and ancillary powers and duties. Schedule 4, para 8(4) & (5) - The functions of the Secretary of State in connection with temporary continuation of wayleaves. Schedule 4, paragraph 9(5) and (6) - The function of the Secretary of State to make orders relating to felling and lopping of trees etc. Schedule 4, paragraph 10(4)(b) - The function of the Secretary of State to consent to works for the purpose of ascertaining the nature of the subsoil.

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

(i) Schedule 5;	All functions of the Secretary of State under Schedule 5 (water rights for hydro-electric generating stations in Scotland), including power by order to authorise persons to abstract and divert and use water, and ancillary powers and duties.
(j) Schedule 8; and	All functions of the Secretary of State under Schedule 8 (consents under sections 36 and 37), including functions by regulations to make provision for determining fees and to provide for various procedural matters, and ancillary powers and duties.
(k) Schedule 9, paragraphs 3 and 5.	Schedule 9, paragraph 3(2) and (3) - All functions of the Secretary of State in considering proposals under sections 36 or 37 to have regard to certain amenity considerations and to avoid, so far as possible, causing injuries to fisheries. Schedule 9, paragraph 5 - The function and duties of the Secretary of State relating to the Fisheries Committee, Scotland.

The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The European Communities Act 1972 (c.68) , section 2(2) and the European Communities (Designation) Order 1988 (S.I. 1988/785).	The function of the Minister of Agriculture, Fisheries and Food, the Treasury and any one or more Secretaries of State to make provision for the purposes specified in section 2(2) in relation to measures relating to the requirement for an assessment of the impact on the environment of projects likely to have significant effects on the environment, so far as relating to the subject matter of Part III (Electricity Applications) of the Environmental Assessment (Scotland) Regulations 1988 (S.I. 1988/1221, amended by S.I. 1990/526, 1994/2012).
The Electricity Act 1989 (c.29) , section 98(1) and (2).	The function of the Secretary of State to serve a notice on a licence holder or exempted person requiring him to supply statistical information.

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Electricity Act 1989 (c.29) , sections 5(1) and 6(1) and (2)	Section 5(1) - The functions of the Secretary of State after consultation with the Director by order to grant exemption from
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	<p>paragraph (a) or (c) of section 4(1) (which prohibits unlicensed generation or supply). Section 6(1) - The functions of the Secretary of State after consultation with the Director to grant a licence authorising generation, transmission or supply of electricity, or to consent to the granting of such a licence by the Director, or to give general authority to the Director to grant such a licence. Section 6(2) - The functions of the Secretary of State after consultation with the Director to grant a licence authorising any person to supply electricity to any premises specified or of a description specified in the licence, or to extend such a licence, or to consent to the Director doing these things, or to give general authority to the Director to do these things.</p>
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The following functions are included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000(S.I. 2000/3253).

<p>Electricity Act 1989 (c. 29) sections 32 and 32A¹⁴</p>	<p>Section 32 - The function of the Secretary of State, by order, to impose upon an electricity supplier a renewables obligation. Section 32A - The function of the Secretary of State to include various matters in such an order.</p>
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Section D2: Oil and Gas

Purpose and Effect

This Section reserves oil and gas and the regulation of the UK oil and gas industry, subject to certain exceptions.

General

Legislative competence to make provision regarding the oil and gas industry is reserved. This covers all the UK Government’s current powers and functions in relation to the oil and gas industry, subject to express exceptions. The manufacture of gas and the conveyance and shipping and supply of gas other than through pipes are not reserved. Land based operations in support of off-shore exploration for, and exploitation of, oil and natural gas are also not reserved. This overall reservation is in line with a general reservation of energy matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	1004
CC	30-Mar-98	1005

¹⁴ Section 32 was substituted by section 62 of the Utilities Act 2000 and section 32A was added by section 63 of the [Utilities Act 2000\(c.27\)](#). They will come into effect when section 62 or, as the case may be, section 63 is commenced.
¹⁴ Section 32 was substituted by section 62 of the Utilities Act 2000 and section 32A was added by section 63 of the [Utilities Act 2000\(c.27\)](#). They will come into effect when section 62 or, as the case may be, section 63 is commenced.

*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	23-Jul-98	1133
LR	3-Nov-98	194
LR	3-Nov-98	195

Details of Provisions

Reservation

Competence to legislate about oil and gas is reserved. The specific list of subjects included in the reservation indicates its scope in more detail. The specific subjects listed are:

- (a) the ownership of, exploration for and exploitation of deposits of oil and natural gas. This covers the subject-matter of the Petroleum (Production) Act 1934 and related legislation, which vests ownership of oil and gas deposits in the Crown and provides for a system of licensing persons to explore for and exploit such deposits;
- (b) *the subject-matter of section 1 of the Mineral Exploration and Investment Grants Act 1972 (contributions in connection with mineral exploration) so far as relating to exploration for oil and gas.* This covers the giving of financial assistance relating to exploration for oil and gas. Financial assistance is generally a devolved matter except for financial assistance specifically in relation to a reserved commercial activity such as oil and gas exploration. Financial assistance in respect of other types of mineral exploration is not reserved. This power is also a “shared power” under section 56 which means that a UK Minister can also exercise this power in or as regards Scotland;
- (c) offshore installations and pipelines. This covers generally the regulation of such installations and pipelines, including the construction or laying and dismantling of them;
- (d) *the subject-matter of the Pipe-lines Act 1962 (including section 5 (deemed planning permission))* so far as relating to pipelines within the meaning of section 65 of that Act. The 1962 Act provides for authorisation of the laying of pipelines on land. In practice it applies mainly to oil and gas pipelines, since section 65 excludes many types of pipe, including water and air pipes and sewers. Section 5 of the Pipelines Act has been mentioned for the avoidance of doubt since deemed planning permission for other types of development is granted under planning legislation and is therefore not reserved;
- (e) the application of Scots law and the jurisdiction of the Scottish courts in relation to offshore activities. Part IV of the Oil and Gas (Enterprise) Act 1982 provides for the application in relation to oil and gas installations on the Continental Shelf of the civil and criminal laws of the different parts of the United Kingdom, and the jurisdiction of their courts;
- (f) *pollution relating to oil and gas exploration and exploitation, but only outside controlled waters (within the meaning of the Control of Pollution Act 1974).* This is the subject-matter of the Prevention of Oil Pollution Act 1971. Pollution from ships, as opposed to installation and pipelines, is now governed by the Merchant Shipping Act 1995, which is also reserved. Pollution in controlled waters - relevant territorial, coastal, inland and ground waters - is not reserved. The marine environment apart from this reservation is generally not reserved;
- (g) *the subject-matter of Part II of the Food and Environment Protection Act 1985* so far as relating to oil and gas exploration and exploitation, but only in relation to activities outside such controlled waters. This is necessary to ensure that the reservation of matters relating to the oil and gas industry covers the regulation under the 1985 Act of activities in the sea, such as the deposit of substances or articles in the sea and incineration and flaring of gas, so far as those activities relate to oil and gas exploration and exploitation. It ensures that the Ministerial powers under the 1985 Act to exempt from the licensing regime under the Food and Environment Protection Act 1985 “operational discharges” from oil and gas

installations and, where compatible with international obligations and where safe to do so, to license the deposit in the sea of oil-related articles such as redundant oil installations are reserved to the UK Government. “Marine dumping” not relating to oil and gas exploration and exploitation is not a reserved matter and to that extent the Scottish Ministers exercise the licensing powers under the Food and Environment Protection Act 1985 within Scottish waters and for operations commencing in Scotland;

- (h) restrictions on navigation, fishing and other activities in connection with offshore activities. Sections 3 to 7 of the Offshore Petroleum Development (Scotland) Act 1975 provide for the designation by the Secretary of State of sea areas within territorial waters where certain activities are restricted. Part III of the Petroleum Act 1987 provides for safety zones where navigation is restricted in the immediate vicinity of installations in territorial waters or the Continental Shelf;
- (i) liquefaction of natural gas. This covers the subject-matter of section 9 of the Energy Act 1976, which regulates the liquefaction of natural gas; and
- (j) the conveyance, shipping and supply of gas through pipes. This covers the subject-matter of the Gas Acts 1986 and 1995, which regulate the industry of conveying, shipping and supplying gas through pipes.

Exceptions from Reservation

The following are excepted from the reservation:

- (a) *the subject-matter of sections 10 to 12 of the Industry Act 1972* (credits and grants for construction of ships and offshore installations). This makes it clear that the giving of financial assistance, in the form of credits and grants, for the construction of ships and offshore installations is not a reserved matter. Paragraph 4 of Part III of Schedule 5 provides that the giving of financial assistance to industry for the purposes of promoting or sustaining economic development or employment is not a reserved matter. This means that the Parliament can make provision of a general nature for assistance to industry including those which operate in reserved areas, but it does not have competence to legislate for such assistance specifically in relation to a reserved commercial activity such as oil and gas exploration. Section 56 also provides for certain powers, including this one, relating to the giving of financial assistance to industry which are not reserved to be “shared powers”, so that a UK Minister can continue to exercise those powers in or as regards Scotland. For example, the power to give financial assistance in relation to mineral exploration (other than for oil and gas which is a reserved matter as explained above) is a shared power under section 56(1)(e);
- (b) *the subject-matter of the Offshore Petroleum Development (Scotland) Act 1975*, other than sections 3 to 7. This ensures that the provision of financial assistance under the 1975 Act for onshore activities in support of offshore activities, for instance construction of installations, are not reserved. This is in line with the fact that assistance to industry generally is not reserved;
- (c) *the subject-matter of Part I of the Environmental Protection Act 1990*, which makes provision for the control of pollution.
- (d) the manufacture of gas. The production of combustible gas other than natural gas is thus not reserved; and
- (e) the conveyance, shipping and supply of gas other than through pipes.

Executive devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Pipelines Act 1962 (c.58) , sections 1, 4, 5, 9, 9A, 10, 11, 12, 13 (except	Sections 1, 4 & 5 - All functions of the Secretary of State as “the Minister” under
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

subsection (7)), 15, 26A, 35, 36, 38, 39(2), 43 and 44 and Schedules 1 and 2 (except paragraph 8).

the sections (control of construction of pipe-lines), so far as relating to pipe-lines beginning and ending in Scotland.

Sections 9, 9A & 10 - All functions of the Secretary of State as “the Minister” under the sections (avoidance of construction of superfluous pipe-lines), so far as relating to pipe-lines beginning and ending in Scotland.

Section 11 - All functions of the Secretary of State as “the Minister” under the section (compulsory acquisition of land for construction of pipe-lines), so far as relating to pipe-lines beginning and ending in Scotland.

Sections 12 & 13 - All functions of the Secretary of State as “the Minister” under the sections (compulsory acquisition of rights over land for construction of pipe-lines), so far as relating to pipe-lines beginning and ending in Scotland.

Section 15 - All functions of the Secretary of State as “the Minister” under the section (power to place pipe-lines in streets), so far as relating to pipe-lines beginning and ending in Scotland.

Section 26A - All functions of the Secretary of State under the section (availability of funds) so far as relating to pipe-lines beginning and ending in Scotland.

Sections 35, 36 & 38 - All functions of the Secretary of State as “the Minister” to receive notices under the sections (information), so far as relating to pipe-lines beginning and ending in Scotland.

Section 39(2) - The function of the Secretary of State to determine certain disputes, so far as relating to pipe-lines beginning and ending in Scotland.

Section 43 - All functions of the Secretary of State as “the Minister” under the section (preservation of amenity), so far as relating to pipe-lines beginning and ending in Scotland.

Section 44 - The duty of the Secretary of State as “the Minister” to have constant regard to the need of protecting certain water against pollution, so far as relating to pipe-lines beginning and ending in Scotland.

Schedule 1 - All functions of the Secretary of State as “the Minister” under the Schedule (applications for grant of pipe-line construction authorisation), so far as relating to pipe-lines beginning and ending in Scotland.

Schedule 2 - All functions of the Secretary of State as “the Minister” under the Schedule (applications for grant of compulsory purchase orders and compulsory rights

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

	orders), so far as relating to pipe-lines beginning and ending in Scotland.
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The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Offshore Petroleum Development (Scotland) Act 1975 (c.8) , section 3.	The function of the Secretary of State by order to declare a part of the sea surrounding Scotland which is within United Kingdom waters to be designated area.
The Food and Environment Protection Act 1985 (c.48) , sections 5, 6, 7 and 10(1) and Schedule 3.	Section 5 - The functions of the Secretary of State as licensing authority in relation to deposits of substances or articles in the sea or under the sea bed, the scuttling of vessels, loading with a view to such deposit and towing or propelling with a view to scuttling. Section 6 - The functions of the Secretary of State as licensing authority in relation to incineration of substances or articles at sea or loading for that purpose. Section 7 - The function of the Ministers of making orders to exempt operations from the requirement to be licensed. Section 10(1) - The function of carrying out operations to protect the marine environment. Schedule 3 - The functions of the Secretary of State as licensing authority of dealing with representations concerning the refusal to grant, the variation or revocation of, or the provisions contained in, a licence.
The Petroleum Act 1998 (c.17) , sections 32(1), 33(1), 34(7), 35(1), 37(1) and 39(1).	Section 32(1) - The function of the Secretary of State of approving an abandonment programme. Section 33(1) - The function of the Secretary of State of preparing his own abandonment programme. Section 34(7) - The functions of the Secretary of State of determining whether a change to an abandonment programme shall be made and of giving notice of his determination. Section 35(1) - The function of the Secretary of State of withdrawing approval for an abandonment programme. Section 37(1) - The function of the Secretary of State of requiring remedial action to be taken where an abandonment programme has not been carried out or where a condition has not been complied with. Section 39(1) - The function of the Secretary of State of making regulations relating to the abandonment of offshore installations and submarine pipelines.

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

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 ([S.I. 2000/3253](#)).

The Gas Act 1986 (c.44), section 9(3)(a) and Schedule 3, Parts I and III	The functions of the Secretary of State in relation to authorising the compulsory purchase of land by a public gas supplier so far as relating to pie-lines beginning and ending in Scotland.
The Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (S.I. 1999/1672)	The functions of the Secretary of State in connection with the making of an environmental determination in relation to pipe-line works proposed to be carried out by a public gas transporter so far as relating to pie-lines beginning and ending in Scotland.
The Pipe-line Works (Environmental Impact Assessment) Regulations 2000 (S.I. 2000/1928)	The functions of the Secretary of State to consider environmental impact before granting a pipe-line construction authorisation so far as relating to pipe-lines beginning and ending in Scotland.

Section D3: Coal

Purpose and Effect

This Section reserves coal, including the regulation of the UK coal industry. The control of pollution and certain other matters are excepted.

General

General legislative and executive competence is reserved in relation to the UK coal industry, including the ownership of coal reserves, regulation of deep and opencast mining, subsidence, the provision of concessionary coal, and the residual responsibilities of British Coal. This overall reservation is in line with a general reservation of energy matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	1006

Details of Provisions

Reservation

The reservation covers all legislation relating to coal, including in particular ownership and exploitation, deep and opencast mining and subsidence. Policy towards the UK coal industry continues to be dealt with on a UK basis by DTI Ministers, in consultation with the Scottish Ministers when appropriate. Operational matters in relation to coal reserves and the issue of mining licences are for the Coal Authority, which is a GB body and which receives grant in aid from DTI.

Exceptions from Reservation

The exceptions to the reservation relate to the subject-matter of:

- (a) *Part I of the Environmental Protection Act 1990*, which makes provision for the control of pollution;

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

- (b) *sections 53 and 54 of the Coal Industry Act 1994* which cover environmental duties in relation to planning approval and obligations to restore land affected by coal-mining operations.

Section D4: Nuclear Energy

Purpose and Effect

This Section reserves nuclear energy and nuclear installations, including the regulation of the nuclear energy industry. This does not include certain environmental responsibilities as they affect nuclear installations.

General

This Section reserves all matters relating to the production and use of nuclear energy and related research. Certain administrative functions in relation to civil nuclear site licences and permits, certain functions regarding liability for nuclear incidents and cover for compensation, and inspection of nuclear sites, which were responsibilities of the Secretary of State for Scotland, are the subject of executive devolution to the Scottish Ministers. Planning for emergencies at civil nuclear sites is also the responsibility of the Scottish Ministers, but is not governed by legislation. The reservation is in line with a general reservation of energy matters.

For the avoidance of doubt the current duties of the Scottish Environment Protection Agency in relation to the keeping and use of radioactive material other than at licensed nuclear sites, the disposal of radioactive waste and the regulation of non-nuclear activities at nuclear installations, are not reserved.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>	
CR	19-May-98	815	
LC	23-Jul-98	1138	

Details of Provisions

Reservation

The reservation is of all matters relating to nuclear energy and nuclear installations, including nuclear safety, nuclear security and safeguards, and liability for nuclear occurrences.

The areas covered by the reservation include the development, production and use of nuclear energy, nuclear site licensing, nuclear safety, nuclear security, liability for nuclear occurrences and insurances in respect of such liability, nuclear safeguards required by international treaties, and the United Kingdom Atomic Energy Authority.

Exceptions

The subject-matter of:

- (a) *Part I of the Environmental Protection Act 1990*;
(b) *the Radioactive Substances Act 1993*.

These enactments deal with the duties of the Scottish Environment Protection Agency and (formerly) the Secretary of State for Scotland in relation to the keeping and use of radioactive material other than at licensed nuclear sites, the disposal of radioactive waste and the regulation of non-nuclear activities at nuclear installations.

Executive devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Nuclear Installations Act 1965 (c.57):	
(a) section 2;	The function of the Secretary of State as “the Minister” to grant permits, and ancillary powers.
(b) sections 6 and 17(1) and (4);	The function of the Secretary of State as “the Minister” to maintain a list of licensed sites. The functions of the Secretary of State as “the Minister” to certify certain matters relating to jurisdiction, shared liability and foreign judgements.
(c) section 19(1), (3) and (4);	The functions of the Secretary of State as “the Minister” in relation to special cover for the licensee’s liability.
(d) section 20; and	The functions of the Secretary of State as “the Minister” in relation to furnishing of information relating to the licensee’s cover.
(e) section 23.	The function of the Secretary of State as “the Minister” to order registration of particulars of a person.

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Nuclear Installations Act 1965 (c.57) , sections 1(1)(b) and (2), 16(1) and (1A), 18(1B), 21(1A) and (3) and 22(1) and (2), and in section 26(1) the definitions of “excepted matter” and “nuclear matter”.	Section 1(1)(b) - The function of the Secretary of State to prescribe a class or description of installation. Section 16(1A) - The function of the Secretary of State with the approval of the Treasury by order to increase or further increase either or both of the amounts specified in section 16(1) (limits on the aggregate amount of compensation).
The Nuclear Installations Act 1965 (c.57) , sections 1(1)(b) and (2), 16(1) and (1A), 18(1B), 21(1A) and (3) and 22(1) and (2), and in section 26(1) the definitions of “excepted matter” and “nuclear matter” (contd.).	Section 18(1B) - The function of the Secretary of State with the approval of the Treasury by order to increase or further increase the sum expressed in special drawing rights in section 18(1A). Section 21(1A) - The function of the Secretary of State with the approval of the Treasury by order to increase or further increase the sum expressed in special drawing rights in section 21(1). Section 22(1) - The function of the Secretary of State to prescribe a class or description of occurrence.

Section 22(2) - The function of the Secretary of State to prescribe persons to whom an occurrence is to be reported. Section 26(1) - The function of the Secretary of State to prescribe exemptions, and to prescribe other fissile material.
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Residual Functions

The functions of the Secretary of State for Scotland under the Nuclear Installations Act 1965 were transferred to the Secretary of State by the Transfer of Functions (Nuclear Installations) Order 1999 (S.I. 1999/2786).

Section D5: Energy Conservation

Purpose and Effect

This Section reserves certain matters relating to the use of energy. This does not, however, preclude the Scottish Parliament from legislating about and/or promoting energy efficiency.

General

The Department of the Environment, Transport and the Regions promotes energy efficiency throughout the United Kingdom, and the Scottish Energy Efficiency Office acts on its behalf in Scotland. The Energy Act 1976 allows measures for control and conservation of energy resources. The reservation of this Act is not meant to prevent the Scottish Parliament from legislating for, or the Scottish Ministers promoting, the efficient use of energy by advice, encouragement, grants and loans. The overall reservation of energy conservation is in line with a general reservation of energy matters.

Details of Provisions

Reservation

The reservation covers the subject-matter of the Energy Act 1976, other than section 9.

The 1976 Act enables the Secretary of State to make orders regulating or prohibiting the use of various fuels, or electricity, where that appears to him desirable for the purpose of conserving energy. It also enables him to make orders regulating or prohibiting the production, supply or acquisition of these things while an Order in Council is in force. When an Order in Council is in force the Secretary of State may also give directions to producers, suppliers and users. An Order in Council may be made where the fuller powers it allows are needed to implement an international obligation or to deal with an actual or threatened emergency. The Act also allows for exemptions from certain legal requirements while an Order in Council is in force. The 1976 Act also enables the Secretary of State to give directions for conserving fuel stocks, and provides for other measures for controlling energy sources and promoting economy.

Section 9 of the 1976 Act covers the use and liquefaction of offshore natural gas and is reserved under the reservation of Oil and Gas at Section D2.

Exception

The exception allows the Scottish Parliament to legislate regarding encouragement of energy efficiency other than by prohibition or regulation. This covers encouragement by advice, publicity, grants and loans, or other positive incentives. The Scottish Ministers are, accordingly, responsible for such encouragement.

Section E1: Road Transport

Purpose and Effect

This Section reserves certain matters relating to road traffic and transport.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1052
CC	31-Mar-98	1067
LC	23-Jul-98	1139
LR	3-Nov-98	195
LR	3-Nov-98	196

Details of Provisions

In general, matters relating to road traffic and road transport are reserved where there is a need to ensure consistency of treatment and approach between Scotland and the rest of the United Kingdom.

The Scottish Parliament has competence to legislate about the promotion of road safety and about payments for hospital treatment of road traffic accident casualties. Bus fuel duty rebate is also not a reserved matter, in line with other aspects of bus policy.

Reservation

This Section provides that the subject-matter of the following Acts are reserved matters:

- (a) *the Motor Vehicles (International Circulation) Act 1952*. This Act deals with the issue of international driving permits and the recognition of foreign permits;
- (b) *the Public Passenger Vehicles Act 1981 and the Transport Act 1985*, so far as relating to the system of public service vehicle operator licensing. The licensing system is administered by the Traffic Commissioner for the Scottish Traffic Area constituted under the 1981 Act;
- (c) *sections 17 and 25 and Parts V and VI of the Road Traffic Regulation Act 1984*. These deal respectively with:
 - i. what traffic can use special roads (which are defined in section 151 of the Roads (Scotland) Act 1984 and can include motorways);
 - ii. the design, layout and operation of pedestrian crossings;
 - iii. the regulation of traffic signs; and
 - iv. speed limits.
- (d) *the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988*. The Road Traffic Offenders Act 1988 deals with the prosecution and punishment of offenders for a range of road traffic offences. The Road Traffic Act 1988 covers a range of matters:
 - i. road safety provisions (Part I), such as the main criminal offences relating to road safety. However, as indicated below, the Scottish Parliament has legislative competence in relation to the promotion of road safety;
 - ii. construction and use of vehicles and equipment (Part II);

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

- iii. licensing of drivers of vehicles, including drivers of large goods vehicles and passenger carrying vehicles (Parts III and IV);
 - iv. driving instruction (Part V). As the provision in the 1988 Act is about paid instruction in the driving of a motor car on a road, this reservation is supplemented by a general reservation for the regulation of the instruction of drivers of other types of motor vehicles;
 - v. third party liabilities (Part VI) - the compulsory insurance of motor vehicles.
- (e) *the Vehicle Excise and Registration Act 1994*. This Act deals with the licensing and registration of vehicles;
- (f) *the Road Traffic (New Drivers) Act 1995*. This Act deals with the revocation of driving licences during the licence-holder's probationary period; and
- (g) *the Goods Vehicle (Licensing of Operators) Act 1995*. This Act provides for the system of licensing of operators of goods vehicles. The licensing system is administered by the Traffic Commissioner for the Scottish Traffic Area constituted under the Public Passenger Vehicles Act 1981.

Various other matters are also reserved:

- (a) regulation of proper hours or periods of work by persons engaged in the carriage of passengers or goods by road;
- (b) the conditions under which international road transport services for passengers or goods may be undertaken; and
- (c) regulation of the instruction of drivers of motor vehicles. As indicated above this provision supplements the reservation of the subject-matter of Part V of the Road Traffic Act 1988 which deals with instruction of motor car drivers to ensure that the reservation covers the paid instruction of drivers of all types of motor vehicles.

Exceptions

The subject-matter of:

- (a) *sections 39 and 40 of the Road Traffic Act 1988 (road safety information and training)*. This means that the Scottish Parliament is able to legislate about matters concerned with the promotion of road safety by local authorities or other bodies and to subsidise bodies other than local authorities to give road safety advice and training. Both the Scottish Ministers and UK Government Ministers will have functions exercisable in or as regards Scotland in relation to the promotion of road safety. This is because section 52(1)(h) of the Act gives them concurrent powers; and
- (b) *sections 157 to 159 of the Road Traffic Act 1988 (payment for treatment of traffic casualties)*. The Scottish Parliament is able to legislate about payments for hospital treatment of road traffic accident casualties. This is consistent with the devolution of other health matters. The National Health Service in Scotland, through Health Boards and NHS Trusts, can recover the costs incurred in treating road traffic casualties from insurance companies.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Road Traffic Regulation Act 1984 (c.27):	
(a) sections 14(1), (2), (3) and (5), 15(2), (3), (5), (6) and (7); and 16(2) and (2A);	Section 14(1) - The function of the Secretary of State as traffic authority by

order to restrict or prohibit temporarily the use of a road, or any part of it, to such extent and subject to such conditions or exceptions as he may consider necessary.

Section 14(2) - The function of the Secretary of State as traffic authority by notice to restrict or prohibit temporarily the use of a road where it appears to him that the restriction or prohibition should come into force without delay.

Section 14(3) - The function of the Secretary of State as traffic authority, when considering the making of an order under section 14(1) or the issue of a notice under section 14(2), to have regard to the existence of alternative routes suitable for the traffic which will be affected by the order or notice.

Section 14(5) - The function of the Secretary of State as traffic authority to make provision in any order made or issued by him any such provision as is mentioned in subsection (4) as respects any alternative road for which he is the traffic authority or to consent to provisions as respects any alternative road for which he is the traffic authority in an order made by a different traffic authority.

Section 15(2) - The function of the Secretary of State as traffic authority, if he is satisfied, and it is stated in the order that he is satisfied, that the execution of the works in question will take longer than eighteen months, to disapply the time-limit of eighteen months; and in any such case to revoke the order as soon as the works are completed.

Section 15(3) - The function of the Secretary of State, where an order subject to the time-limit of eighteen months has not ceased to be in force, from time to time to direct that the order shall continue in force for a further period not exceeding 6 months from the date on which it would otherwise cease to be in force.

Section 15(5) - The function of the Secretary of State, at the request of an authority that has made an order subject to the time-limit of six months in subsection (1), from time to time to direct that the order shall continue in force for a further period from the date on which it would otherwise cease to be in force.

Section 15(6) - The function of the Secretary of State, where he refuses a request under subsection (5) in respect of an order, to consent to the making of a further order.

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

	<p>Section 15(7) - The function of the Secretary of State by regulations to alter the number of days for the time being specified in this subsection.</p> <p>Section 16(2) - The function of the Secretary of State to make regulations with respect to the procedure to be followed in connection with the making of orders and the issue of notices under section 14 including provision for notifying the public of the exercise, or proposed exercise, of the powers conferred by that section and of the effect of orders and notices made or issued in the exercise of those powers, and all functions conferred on him by the Road Traffic (Temporary Restrictions) Procedure Regulations 1992 SI 1992/1215.</p> <p>Section 16(2A) - The function of the Secretary of State by regulations under subsection (2) to make, in relation to such orders as he thinks appropriate, provision:</p> <ul style="list-style-type: none"> (a) for the making and consideration of objections to a proposed order; and (b) for any of the matters mentioned in paragraph 22(1) of Schedule 9.
(b) section 17(2) and (5);	<p>Section 17(2) - The function of the Secretary of State to make regulations with respect to the use of special roads but only to the extent that such regulations can apply to special roads specified in the regulations and not to special roads generally or to all special roads of a particular class.</p> <p>Section 17(5) - The function of the Secretary of State as traffic authority to declare the date on which a special road or part of that road is open for use as a special road.</p>
(c) section 28(4)(a);	<p>Section 28(4)(a) - The function of the Secretary of State to authorise the use by a school crossing patrol of signs of a description not prescribed by regulations.</p>
(d) section 64(1)(b) and (2);	<p>Section 64(1)(b) and (2) -</p> <ul style="list-style-type: none"> (a) The function of the Secretary of State to authorise any object or device so that it becomes a traffic sign within the meaning of subsection (1); (b) The function of the Secretary of State to authorise the size, colour and type of a traffic sign which is not prescribed.
(e) section 65(1);	<p>Section 65(1) - The function of the Secretary of State as Traffic Authority to</p>

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

	cause or permit traffic signs to be placed on or near a road.
(f) section 65(2) and (3A)(b)(ii);	<p>Section 65(2) - The function of the Secretary of State to give directions (but not general directions) to a local traffic authority as to the placing, replacing or converting of a traffic sign of a prescribed type or authorised character.</p> <p>Section 65(3A)(b)(ii) - The function of the Secretary of State to prescribe a body appearing to him to be representative of the interests of road users or any class of road users in relation to the placing of a temporary traffic sign.</p>
(g) sections 69(1), (2) and (3), 70(1), 71(1), 79(1), 82(1)(b), (2) and (3), 83(1) and 84(1), (1A) and (1B);	<p>Section 69(1) - The function of the Secretary of State as traffic authority to give written notice requiring the removal of an object or device for the guidance or direction of persons using the road.</p> <p>Section 69(2) - The function of the Secretary of State as traffic authority to effect the removal required in terms of subsection (1) in the event of default and to recover expenses incurred.</p> <p>Section 69(3) - The function of the Secretary of State to give directions to a local traffic authority requiring the removal of any traffic sign or any object or device mentioned in subsection (1).</p> <p>Section 70(1) - The function of the Secretary of State to be able to carry out work required to comply with any direction given under section 65(2) or section 69 and to recover the expenses incurred.</p> <p>Section 71(1) - The function of the Secretary of State to be able to enter any land and exercise such powers as may be necessary for the purpose of placing, replacing, converting and removing traffic signs or generally for the purposes of the exercise of powers and duties under section 69.</p> <p>Section 79(1) - The function of the Secretary of State to make advances towards expenses incurred by a council in the discharge of any obligations imposed on them by the relevant provisions of the Act in relation to the erection, maintenance, alteration or removal of traffic signs.</p> <p>Section 82(1)(b) - The function of the Secretary of State to make regulations to specify a classification or type of road so as to make it a restricted road for the purposes of section 81.</p>

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

	<p>Section 82(2) - The function of the Secretary of State as traffic authority to direct that a road which is a restricted road for the purposes of section 81 shall cease to be a restricted road or that a road which is not a restricted road for those purposes shall become a restricted road.</p> <p>Section 82(3) - The function of the Secretary of State as traffic authority to declare the date on which a special road or part of that road is open for use as a special road.</p> <p>Section 83(1) - The function of the Secretary of State to make an order so as to give the direction under section 82(2).</p> <p>Section 84(1) - The function of the Secretary of State to make an order as respects any road (except a special road) for which he is the traffic authority to prohibit the driving of motor vehicles at a speed exceeding that specified in the order either generally or during periods specified in the order or for the time being indicated by traffic signs in accordance with the order.</p>
(h) section 85(1) and (3);	<p>Section 85(1) - The function of the Secretary of State to comply with the duty in relation to a road for which he is the traffic authority to erect and maintain traffic signs to secure that adequate guidance is given to drivers of motor vehicles as to the speed limit to be observed on that road.</p> <p>Section 85(3) - The function of the Secretary of State to execute works in the event of default by the local traffic authority to erect, maintain, alter or remove traffic signs and to recover the expense incurred in doing so.</p>
(i) section 85(2); and	<p>Section 85(2) - The function of the Secretary of State to give directions (but not general directions) for the purpose of securing that adequate guidance is given to drivers of motor vehicles as to whether any, and if so what, limit of speed is to be observed on any road.</p>
(j) Schedule 9, Part I, paragraphs 1, 3(1), 4, 7, 8 and 9, Part II, paragraphs 13, 15, 16(1) and (2) and 17 and Part III, paragraphs 21, 24 and 26(1) and (2).	<p>Schedule 9, para 1 - The function of the Secretary of State to give a local authority a direction in relation to specified provisions of the Act.</p> <p>Schedule 9, para 3(1) - The function of the Secretary of State to exercise the power to make an order under any of the provisions specified in paragraph 1 in addition to those powers still being capable of being exercised by the authorised authority.</p>

Schedule 9, para 4 - The function of the Secretary of State to do anything to make effective any order which he has made under paragraph 3 and to recover from the authorised authority any expenses incurred by him in doing so.

Schedule 9, para 7 - The function of the Secretary of State to hold a public inquiry as necessary and to vary or revoke any order made or having effect as if made under or by virtue of any of the provisions of the Act referred to in paragraph 1.

Schedule 9, para 8 - The function of the Secretary of State before giving any direction under paragraph 2 or making any order under paragraph 7 to be satisfied that the duty under section 122(1) is not being satisfactorily discharged by the authorised authority and that the direction or order is necessary to secure compliance.

Schedule 9, para 9 - The function of the Secretary of State to be satisfied that there are special circumstances which make it expedient that an order under paragraph 7 should be made notwithstanding that he is not satisfied in terms of paragraph 8.

Schedule 9, para 13 - The function of the Secretary of State to consent to the inclusion of certain provisions in an order proposed to be made by a local authority under or by virtue of certain provisions of the Act.

Schedule 9, para 15 - The function of the Secretary of State to make an order adding or removing from the orders for which his consent is required by paragraph 13 certain other specified orders made by local authorities for specified purposes and specified circumstances.

Schedule 9, para 16(1) - The function of the Secretary of State to give his consent to an order either in the form submitted or with such modifications as he thinks fit.

Schedule 9, para 16(2) - The function of the Secretary of State to comply with a duty to take sufficient and reasonably practical steps to inform the local authority and other persons likely to be concerned where consent to an order is proposed to be given with modifications which appear to him substantially to affect the character of the order.

Schedule 9, para 17 - The function of the Secretary of State to make an order granting a general consent for the making of orders requiring that consent under this part of the Schedule.

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

	<p>Schedule 9, para 21 - The function of the Secretary of State to make regulations for providing the procedure to be followed by a local authority in relation to the making of orders and any functions conferred on him by the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 S.I. 1999/614.</p> <p>Schedule 9, para 24 - The function of the Secretary of State to make regulations with respect to the procedure in connection with the making by him of any order made by virtue of paragraph 3 or made under paragraph 7 of Schedule 9 or of any order which he is authorised to make with respect to roads for which he is the traffic authority under any of the provisions referred to in paragraph 20(1) and any functions conferred on him by the Secretary of State's Traffic Orders (Procedure) (Scotland) Regulations 1987 S.I. 1987/2244.</p> <p>Schedule 9, para 26(1) - The function of the Secretary of State to consider any objections made to an order under any of the provisions referred to in paragraph 20(1) of the Schedule before giving a direction under paragraph 2.</p> <p>Schedule 9, para 26(2) - The function of the Secretary of State in complying with the duty to take such steps as appear to him to be sufficient and reasonably practical for informing any local authority and any other person likely to be concerned of any modifications which appear to him to affect substantially the character of the order.</p>
<p>The Transport Act 1985 (c.67):</p>	
<p>(a) section 19(7); and</p>	<p>Section 19(7) - The function of the Secretary of State to make an order designating bodies appearing to him to be eligible in accordance with subsection (8) for the purposes of the granting of permits for the use of a small bus in terms of subsection (3) for educational and other bodies; and to make provision for the issues referred to in paragraph (a) to (c) in subsection (7).</p>
<p>(b) Schedule 4, paragraph 15.</p>	<p>Schedule 4, paragraph 15 - The function of the Secretary of State* of being consulted by the Lord Chancellor on appointment of judicial members of the tribunal, retention of a judicial member beyond normal retirement age, removal of a judicial member, and the terms and conditions of service.</p>

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

<p>The Road Traffic Act 1988 (c.52), sections 13(2), 13A(1), 27(6) and 31(2).</p>	<p>Section 13(2) - The function of the Secretary of State to make regulations (generally or as regards any area, class or description of competition or trial or any particular competition or trial) to authorise or provide for authorising the holding on a public way of competitions or trials (other than races or trials of speed) involving the use of motor vehicles; and to impose conditions.</p>
<p>The Road Traffic Act 1988 (c.52), sections 13(2), 13A(1), 27(6) and 31(2).</p>	<p>Section 13A(1) - The function of the Secretary of State to make regulations to authorise a motoring event in a public place other than a road. Section 27(6) - The function of the Secretary of State to make regulations prescribing the procedure to be followed in connection with the making of orders by a local authority dealing with the control of dogs on roads and requiring the publication in a prescribed manner of a notice of the making and effect of the order. Section 31(2) - The function of the Secretary of State to make regulations to authorise or provide for authorising the holding on a public way (other than a bridle way) of races or trials of speed of any class or description or of a particular race or trial of speed involving cycles; and to impose conditions.</p>

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Road Traffic Regulation Act 1984 (c.27):</p>	
<p>(a) section 17(2);</p>	<p>The function of the Secretary of State to make regulations with respect to the use of special roads but only to the extent that such regulations can apply to special roads specified in the regulations and not to special roads generally or to all special roads of a particular class.</p>
<p>(b) section 25(1) and 64(1)(a);</p>	<p>Section 25(1) - The function of the Secretary of State to make regulations with respect to the precedence of vehicles and pedestrians respectively, and generally with respect to the movement of traffic (including pedestrians), at and in the vicinity of crossings. Section 64(1)(a) - The function of the Ministers acting jointly to specify by regulations as a traffic sign an object or</p>

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

	device for conveying to traffic on roads or any specified class of traffic, warnings, information, requirements, restrictions or prohibitions of any description.
(c) section 65(1);	The function of the Secretary of State as Traffic Authority to cause or permit traffic signs to be placed on or near a road.
(d) section 81(2);	Section 81(2) - The function of the Ministers acting jointly by order made by statutory instrument and approved by a resolution of each House of Parliament, to increase or reduce the rate of speed which applies on a restricted road.
(e) section 85(2)(a); and	The function of the Secretary of State to give general directions for the purpose of securing that adequate guidance is given to drivers of motor vehicles as to whether any, and if so what, limit of speed is to be observed on any road.
(f) sections 86(2) and 88(1) and (4).	Section 86(2) - The function of the Secretary of State by regulations to vary the speed limits which apply to specified classes of traffic. Section 88(1) and (4) - The function of the Secretary of State in the interests of safety or for the purpose of facilitating the movement of traffic, by order to set speed limits for a period not exceeding 18 months and of continuing such limits either indefinitely or for a specified period.
The Road Traffic Act 1988 (c.52) , section 36(5).	The function of the Secretary of State for Scotland, acting with the Secretary of State for Transport and the Secretary of State for Wales, by regulations to specify any traffic sign, failure to comply with which carries the penalty of discretionary disqualification.
The Road Traffic Act 1988 (c.52) , section 36(5).	The function of the Secretary of State for Scotland, acting with the Secretary of State for Transport and the Secretary of State for Wales, by regulations to specify any traffic sign, failure to comply with which carries the penalty of discretionary disqualification.

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 ([S.I. 2000/1563](#)).

The Road Traffic Regulation Act 1984 (c.27) , section 88(1)(a) and (4)	Section 88(1)(a) and (4) of the 1984 Act concern temporary speed limits.. Under section 88(1)(a), the Secretary of State can make an Order imposing a maximum speed limit, for periods up to 18 months, on: all roads in an area specified in the Order; all roads of a class specified in the Order; or
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	<p>any particular road specified in the Order.</p> <p>Under section 88(4) such Orders can be continued in force for further periods or indefinitely. This Order transfers the functions under sections 88(1)(a) and (4) in respect of temporary speed limits but only in relation to making orders applying to specified roads.</p>
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Residual Functions

The functions of the Secretary of State for Scotland under sections 64, 65 and 81 of the Road Traffic Regulation Act 1984 and section 36(5) of the Road Traffic Act 1988 (regulations specifying objects or devices as traffic signs; directions as to the placing of traffic signs; orders to increase or reduce speed limit on restricted roads; specifying traffic signs for certain purposes of the 1988 Act) were transferred to the Secretary of State by the Transfer of Functions (Road Traffic) Order 1999 (S.I. 1999/3143).

SECTIONS

Section E2: Rail Transport

Purpose and Effect

This Section reserves the provision and regulation of railway services, including rail safety, rail transport security, the subject-matter of the Channel Tunnel Act 1987 and the Railway Heritage Act 1996. Certain matters are excepted. This section was amended by S.I. 2000/3252.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1052

Details of Provision

Reservation

The provision and regulation of railway services is a reserved matter. This includes rail safety. The interpretation provision at the end of the Section provides that railway services are those defined in section 82 of the Railways Act 1993 but excluding the wider meaning of railway given by section 81(2) of that Act. This means that railway services for the purposes of the reservation include services in relation to the carriage of passengers (including luggage, parcels and mail) and of goods and services in relation to stations, maintenance facilities and the provision and operation of the rail network itself. As the wider meaning of “railway” does not apply (“railway” having the meaning given by section 67(1) of the Transport and Works Act 1992), tramways and guided transport systems are not included, therefore the Scottish Parliament has legislative competence in regard to those matters.

The following are also reserved:

- (a) rail transport security;
- (b) the subject-matter of the *Channel Tunnel Act 1987*; and
- (c) the subject-matter of the *Railway Heritage Act 1996* which provides powers to make a railway heritage scheme.

Exceptions

As amended by [S.I. 2000/3252](#) there are four main exceptions from the reservation:

- (a) Grants so far as relating to railway services. However, certain grant provisions noted below continue to be reserved by way of exceptions to the general exception. This means that the Scottish Parliament is able to legislate about capital and revenue grants for services relating to the carriage of passengers, stations, maintenance facilities and the rail network itself. Legislative and executive competence includes, without the need for express mention, powers in relation to special grants to local authorities under section 108A of the Local Government Finance Act 1992 and grants for public passenger transport services under section 56 of the Transport Act 1968, where the grants relate to railway services.

The matters which are not within this exception and thus continue to be reserved are:

- i. *the subject-matter of section 63 of the Railways Act 1993*. This section provides for government financial assistance where railway administration orders are made;
 - ii. *grants in relation to railway services as defined in section 82(1)(b) of the Railways Act 1993* (carriage of goods by railway); and
 - iii. *the subject-matter of section 136 of the Railways Act 1993*. This section deals with compensation payable to a passenger service operator who is required to run a passenger service which would not be commercially viable in accordance with a public service obligation under Council Regulation ([EEC](#)) 1191/69 as amended.
- (b) Imposing requirements about the preparation and submission of strategies relating to the provision of rail services on Scottish public authorities with mixed functions relating to such services. The purpose of this exception which was added by [S.I. 2000/3252](#), was to enable the Scottish Parliament to legislate in the [Transport \(Scotland\) Act 2001 \(asp 2\)](#) to empower the Scottish Ministers to require Scottish public authorities with mixed functions to produce joint transport strategies specifically covering the provision of rail services.
- (c) The transfer of functions of passenger transport executives or passenger transport authorities relating to the provision and regulation of rail services conferred by Part II of the [Transport Act 1968\(c.73\)](#) and sections 32 to 36 of the [Railways Act 1993\(c.43\)](#) to, and the allocation of such functions among, Scottish public authorities (other than cross-border public authorities and public authorities exercising functions solely in relation to reserved matters) which may be set up wholly or mainly to exercise functions relating to transport. The purpose of this exception, which was added by [S.I. 2000/3252](#), was to enable the Scottish Parliament to legislate in the [Transport \(Scotland\) Act 2001 \(asp 2\)](#) to confer on, or allocate among, certain Scottish public authorities the same rail responsibilities as any other passenger transport executive. It does not, however, enable the Scottish Parliament to create new types of passenger transport executive rail functions.

Executive Devolution

The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Railways Act 1993 (c.43) :	
(a) section 74(1) and (3);	Section 74(1) - The function of receiving from the Rail Regulator his annual report on his activities during each financial year and the activities of the Monopolies and Mergers Commission during the same year so far as relating to references made to the Commission by the Regulator. Section 74(3) - The function of the Secretary of State to comply with

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

	the duty to lay before Parliament a copy of every report made by the Rail Regulator under section 74(1) and to arrange for publication of every such report.
(b) section 75(1) and (2);	Section 75(1) - The function of the Secretary of State to receive from the Director of Passenger Rail Franchising his annual report of his activities during each financial year and the general performance of franchisees during that year in carrying out their functions under franchise agreements. Section 75(2) - The function of the Secretary of State to comply with the duty to lay before each House of Parliament a copy of every report made to him by the Franchising Director under section 75(1) and to arrange for the publication of every such report.
(c) section 76(6)(a);	The function of the Secretary of State to receive a report of the findings of the Central Rail Users' Consultative Committee where it has investigated any matter.
(d) section 79(1);	The function of the Secretary of State of receiving the annual report of the Central Rail Users Consultative Committee and the duty to lay a copy of those reports before each House of Parliament.
(e) section 137; and	Section 137(1) - The function of the Secretary of State to enter into agreements with goods service operators for the making of payments in respect of track access charges. Section 137(2) - The function of the Secretary of State to be satisfied that certain benefits are likely to result from the provision of services under an agreement. Section 137(3) - The function of the Secretary of State for making payments under agreements entered into under this section shall be paid out of money provided by Parliament. Section 137(4) - The definition of "goods service operator" and "track access charge".
(f) section 139(1), (2), (3), (5) and (6).	Section 139(1) - The function of the Secretary of State to make grants towards the provision of facilities for or in connection with the carriage of goods by railway or the loading or unloading of such goods.

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

	<p>Section 139(2) - The function of the Secretary of State to be satisfied as to the matters set out in paragraphs (a) to (c).</p> <p>Section 139(3) - The function of the Secretary of State to take a view as to the nature and purpose of the expenditure to be grant aided.</p> <p>Section 139(5) - The function of the Secretary of State to consider an application under that subsection and to require supporting evidence with respect to the matters set out in paragraphs (a) to (c).</p> <p>Section 139(6) - The function of the Secretary of State to impose terms and conditions.</p>
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Section E3: Marine Transport

Purpose and Effect

This Section reserves certain matters relating to international and UK shipping including marine safety and security, navigational rights, regulation of the British merchant fleet and all matters relating to the employment of seafarers.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1067
LC	23-Jul-98	1141
LC	23-Jul-98	1145

Details of Provisions

Reservation

In general, matters relating to marine transport are reserved where there is a need for consistent provision across the UK, for example in order to comply with international obligations or agreements (such as those relating to vessel safety or the employment of seafarers) or for practical reasons (e.g. regarding coastguards and lighthouses).

The Section provides that the subject-matter of the following Acts are reserved matters:

- (a) *the Coastguard Act 1925*. This Act defines the activities and powers of HM Coastguard;
- (b) *the Hovercraft Act 1968*, except so far as relating to the regulation of noise and vibration caused by hovercraft. This is to ensure that matters relating to marine safety in relation to hovercraft are reserved;
- (c) *the Carriage of Goods by Sea Act 1971*. This Act incorporates into UK law international agreements (the Hague-Visby rules) which set out the circumstances in which the carrier or the cargo owner are liable for the loss or damage of goods at sea;
- (d) *section 2 of the Protection of Wrecks Act 1973* (prohibition on approaching dangerous wrecks). This deals with the designation of protected areas around dangerous wrecks;
- (e) *the Merchant Shipping (Liner Conferences) Act 1982*. This Act makes provision for the exemption from normal competition regulations of 'liner conferences', i.e. cartels of deep sea container shipping operators concerned to prevent over-capacity and damaging price

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

competition on certain specified routes. The Act also incorporates into UK law the United Nations Convention on a Code of Conduct for Liner Conferences;

- (f) *the Dangerous Vessels Act 1985*. This deals with the powers of harbour masters and the Secretary of State in relation to dangerous vessels;
- (g) *the Aviation and Maritime Security Act 1990*, other than Part I (Aviation Security). This Act covers matters of maritime security;
- (h) *the Carriage of Goods by Sea Act 1992*. This Act makes provision about bills of lading and deals with rights and liabilities under shipping contracts;
- (i) *the Merchant Shipping Act 1995*. This Act deals with a wide range of marine matters. It specifies what constitutes British ships, and deals with their registration. It also deals with such matters as masters and seamen in seagoing ships, marine safety, fishing vessels, marine pollution from ships, liability for oil pollution from ships, lighthouses, salvage and wreck, and enforcement officers;
- (j) *the Shipping and Trading Interests (Protection) Act 1995*. This Act gives powers in relation to measures to be taken in response to discriminatory foreign action against UK shipping and trade interests. This reservation is consistent with the reservation of the general area of protection of trading interests (Section C15); and
- (k) *sections 24 and 26 to 28 of the Merchant Shipping and Maritime Security Act 1997*. These sections make provision about wrecks, piracy and international maritime bodies.

The following matters are also reserved:

Navigational rights and freedoms. These derive from international law. Coastal states, such as the UK, have a duty not to impose requirements on foreign ships which would have the practical effect of denying or impairing these rights or freedoms. Uniform treatment of passing shipping traffic all around the UK is necessary to ensure compliance with the UK's international obligations.

Financial assistance for shipping services which start or finish or both outside Scotland. With one exception about bulk freight services (noted below), the Scottish Parliament is not able to legislate about financial assistance to shipping services between Scotland and other parts of the UK or Europe since differing approaches might distort the market for shipping services. The Scottish Parliament is, however, able to legislate about financial assistance to shipping services operating wholly within Scotland.

Exceptions

The following matters are excepted from the reservation:

Ports, harbours, piers and boatslips, except in relation to the matters reserved by virtue of paragraph (d), (f), (g) or (i). The Scottish Parliament therefore has legislative competence over ports, harbours, piers and boatslips in Scotland. The exception does not, however, extend to the reserved matters of maritime security and safety.

Regulation of works which may obstruct or endanger navigation. This exception gives the Scottish Parliament legislative competence over the regulation of works which may obstruct or endanger the exercise of navigational rights and freedoms. The general reservations relating to oil and gas (Section D2) and telecommunications (Section C10) mean, however, that consents for works related to those industries will be reserved matters.

The subject-matter of the Highlands and Islands Shipping Services Act 1960 in relation to financial assistance for bulk freight services. The 1960 Act allows for financial assistance to shipping services serving the Highlands and Islands from any port of embarkation. The exception allows the Scottish Parliament, to continue to subsidise bulk freight shipping services between the Highlands and Islands and locations outside Scotland which are necessary for the social and economic well-being of island communities.

Executive Devolution

The following functions were included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750), as amended by S.I. 2000/1563.

The Merchant Shipping (Formal Investigations) Rules 1985 (S.I. 1985/1001), rule 4(1) ¹⁵	The function of the Secretary of State to appoint assessor
The Merchant Shipping (Section 63 inquiries) Rules 1997 (S.I. 1997/347), rule 5(1)	The function of the Secretary of State to appoint assessor

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Food and Environment Protection Act 1985 (c.48) , sections 5, 6, 7 and 10(1) and Schedule 3.	Section 5 - The functions of the Secretary of State as licensing authority in relation to deposits of substances or articles in the sea or under the sea bed, the scuttling of vessels, loading with a view to such deposit and towing or propelling with a view to scuttling. Section 6 - The functions of the Secretary of State as licensing authority in relation to incineration of substances or articles at sea or loading for that purpose. Section 7 - The function of the Ministers of making orders to exempt operations from the requirement to be licensed. Section 10(1) - The function of carrying out operations to protect the marine environment. Schedule 3 - The functions of the Secretary of State as licensing authority of dealing with representations concerning the refusal to grant, the variation or revocation of, or the provisions contained in, a licence.
The Merchant Shipping Act 1995 (c.21) , section 10(2)(f).	The function of the Secretary of State, by regulation, to make provision for and in connection with the registration of a fishing vessel as British ships (section 10(2)(f), provide for regulations to be made with respect to (among other matters) the marking of ships registered or to be registered, including marks for identifying the port to which a fishing vessel is to be treated as belonging).

The Lord Advocate and the Solicitor General for Scotland continue to be Commissioners for the Northern Lighthouse Board.

¹⁵ This entry was omitted as from 16 June 2000 by Article 6 of S.I. 2000/1563.

¹⁵ This entry was omitted as from 16 June 2000 by Article 6 of S.I. 2000/1563.

Section E4: Air Transport

Purpose and Effect

This Section reserves the regulation of aviation and air transport (including air safety and security) and the arrangements for compensation and repatriation of passengers on an operator's insolvency. It was amended by [S.I. 2000/3252](#).

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1067

Details of Provisions

Reservation

The regulation of aviation and air transport is a reserved matter. That includes the subject-matter of the following Acts:

- ((a)- *the Carriage by Air Act 1961; the Carriage by Air (Supplementary Provisions) Act 1962;*
(c) *the Carriage by Air and Road Act 1979* (so far as it relates to carriage by air).

These three Acts implement the provisions of the Warsaw Convention (as amended at the Hague and Montreal) which applies to all international carriage by aircraft of persons, baggage or cargo for reward;

- ((d) *the Civil Aviation Act 1982*. This Act deals with such matters as the constitution and functions of the Civil Aviation Authority, aerodromes, the regulation of civil aviation, aircraft and related matters;
- ((e) *the Aviation Security Act 1982*. This Act deals with offences against the safety of aircraft and the protection of aircraft, aerodromes and air navigation installations against acts of violence;
- ((f) *the Airports Act 1986*. This Act deals with the transfer of airport undertakings of local authorities, the regulation of the use of airports and the economic regulation of airports, the status of airport operators as statutory undertakers and related matters; and
- ((g) *sections 1 and 48 of the Aviation and Maritime Security Act 1990*. These sections relate to endangering safety at aerodromes and powers in relation to certain aircraft.

In addition, arrangements to compensate and repatriate passengers where an air transport operator becomes insolvent are reserved. At present the non-statutory Air Travel Trust Fund, which operates in conjunction with the Air Travel Organisers' Licence Scheme, provides funds for the repatriation and compensation of passengers where an air transport operator becomes insolvent.

Exceptions

The following exceptions from the reservation are made, as amended by [S.I. 2000/3252](#):

- (a) *The subject-matter of the following sections of the Civil Aviation Act 1982:*
- i. section 25 (the power of the Secretary of State to provide aerodromes);
 - ii. section 30 (the provision of aerodromes and facilities at aerodromes by local authorities);
 - iii. section 31 (power to carry on ancillary business in connection with local authority aerodromes);
 - iv. section 34 (financial assistance for certain aerodromes);

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

- v. section 35 (facilities for consultation at certain aerodromes);
 - vi. section 36 (health controls at certain aerodromes); and
 - vii. sections 41 to 43 and 50 (powers in relation to land) where land is to be or was acquired for airport development or expansion.
- (b) *The subject-matter of Part II and sections 63, 64 and 66 of the Airports Act 1986.* These relate to the transfer of airport undertakings of local authorities, airport bylaws, and functions of operators of designated airports in respect of abandoned vehicles.
- (c) *The subject-matter of sections 59 and 60 (acquisition and disposal of land) of the Airports Act 1986* where land is to be or was acquired for the purpose of airport development or expansion; and
- (d) Imposing requirements about the preparation and submission of strategies relating to the provision of air services on Scottish public authorities with mixed functions relating to such services. The purpose of this exception which was added by [S.I. 2000/3252](#), was to enable the Scottish Parliament to legislate in the [Transport \(Scotland\) Act 2001 \(asp 2\)](#) to empower the Scottish Ministers to require Scottish public authorities with mixed functions to produce joint transport strategies specifically covering the provision of air services.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Civil Aviation Act 1982 (c.16) sections 38(2), 42(1), 50(2), 78, 79(1), 80 and 88(10) and (11).</p>	<p>Section 38(2) - The function of the Secretary of State to make an order directing specified aerodrome authorities to fix charges for the use of an aerodrome by reference among other things to any fact or matter relevant to aircraft noise or the extent or nature of any inconvenience resulting from such noise; and in such order to give directions as to the manner in which charges are to be fixed.</p> <p>Section 42(1) - The function of the Secretary of State to authorise the Civil Aviation Authority to acquire land compulsorily in Scotland.</p> <p>Section 50(2) - The function of the Secretary of State to give written authorisation to any person to enter upon land to make a relevant survey where section 50 applies.</p> <p>Section 78(1) - The function of the Secretary of State to publish a notice imposing a duty on an aircraft operator to comply with requirements specified in the notice so as to limit or mitigate the effect of noise and vibration connected with the taking off or landing of an aircraft at an aerodrome.</p> <p>Section 78(2) - The function of the Secretary of State to take a view that requirements mentioned in subsection (1) have not been complied with, to afford to the aircraft operator an opportunity of</p>
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	<p>making representations and to consider those representations and thereafter to give the person managing the aerodrome concerned a direction requiring that facilities for using the aerodrome are withheld to a specified extent from the aircraft operator.</p> <p>Section 78(3) - The function of the Secretary of State, by publishing a notice, to prohibit specified aircraft from taking off or landing at an aerodrome, to specify the maximum number of occasions on which specified aircraft may take off or land and to determine the persons who are to be entitled to make the appropriate arrangements for aircraft of which they are the operators.</p> <p>Section 78(4)(a) - The function of the Secretary of State, by notice, to specify the circumstances in which the take off or landing of an aircraft can be disregarded for the purposes of a notice under subsection (3).</p> <p>Section 78(5)(a) - The function of the Secretary of State to comply with the duty to consult before making a determination in respect of an aerodrome in pursuance of subsection (3)(c).</p>
<p>The Civil Aviation Act 1982 (c.16) sections 38(2), 42(1), 50(2), 78, 79(1), 80 and 88(10) and (11) (contd.).</p>	<p>Section 78(5)(c) - The function of the Secretary of State to authorise any person to detain an aircraft where it appears to the Secretary of State that it is about to take off in contravention of any prohibition or restriction imposed in pursuance of subsection (3).</p> <p>Section 78(5)(f) - The function of the Secretary of State, by notice to the person managing an aerodrome, to determine that a particular occasion or series of occasions on which aircraft take off or land at an aerodrome are to be disregarded for the purposes of a notice under subsection (3).</p> <p>Section 78(6) - The function of the Secretary of State to give to a person managing a designated aerodrome appropriate directions so as to avoid, limit or mitigate the effect of noise and vibration connected with the take off or landing of an aircraft.</p> <p>Section 78(7) - The function of the Secretary of State to apply for an order of the Court of Session under section 45(b) of the Court of Session Act 1988.</p> <p>Section 78(8) - The function of the Secretary of State to make an order after consultation requiring a person managing</p>

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

	<p>a designated aerodrome to provide specified noise measuring equipment, to produce specified reports and to allow inspection of the equipment.</p> <p>Section 78(8) - The function of the Secretary of State also under this subsection of receiving the specified reports and authorising any person to inspect noise measuring equipment.</p> <p>Section 78(9) - The function of the Secretary of State to afford to a person upon whom a duty has been imposed by subsection (8) an opportunity to make representations with respect to any failure to perform that duty, to consider any such representations and thereafter to take appropriate steps to remedy the failure and to recover in court any expenses incurred by the Secretary of State.</p> <p>Section 78(11) - The function of the Secretary of State after consultation to make an order repealing any provision of a local Act which he considers is unnecessary.</p> <p>Section 78(12) - The function of the Secretary of State to consider what incidental or supplementary provisions may be appropriate in respect of any notice published in pursuance of subsections (1), (3) or (4) and the function also of varying or revoking an existing notice.</p>
<p>The Civil Aviation Act 1982 (c.16) sections 38(2), 42(1), 50(2), 78, 79(1), 80 and 88(10) and (11) (contd.).</p>	<p>Section 79(1) - The function of the Secretary of State to make a scheme requiring the person managing an aerodrome to make grants towards the insulation against noise of such classes of buildings as the Secretary of State thinks fit.</p> <p>Section 80 - The function of the Secretary of State to designate an aerodrome for the purposes of sections 78 and 79.</p> <p>Section 88(10) - The function of the Secretary of State to make an order designating an airport for the purposes of section 88.</p> <p>Section 88(11) - The function of the Secretary of State after consultation to make an order repealing any enactment in a local Act which appears to him to be unnecessary.</p>
<p>The Airports Act 1986 (c.32), sections 37(5), 65(2) and (6) and 68(1).</p>	<p>Section 37(5) - The function of the Secretary of State after consultation to determine that an airport should cease to be subject to economic regulation under Part IV of the Act.</p>

Section 65(2) - The function of the Secretary of State to make an order directing that the road traffic enactments (as defined in subsection (6)) shall have effect in relation to an airport subject to such modifications as appear to him necessary or expedient for the purposes set out in paragraphs (a) and (b).
Section 65(6) - The function of the Secretary of State to make an order designating an airport for the purposes of Section 65.
Section 68(1) - The function of the Secretary of State after consultation to make an order requiring an airport operator to provide maintain and operate equipment for monitoring aircraft movement and to make specified reports and to permit an authorised person to inspect the equipment. In addition, the function of the Secretary of State under paragraph (b) to receive specified reports and to authorise any person to inspect equipment.

Section E5: Miscellaneous Transport Matters

Purpose and Effect

This Section reserves the transport of radioactive material, technical specifications for public passenger transport for disabled people, and regulation of the carriage of dangerous goods.

Details of Provisions

Reservation

This Section provides that the following are reserved matters:

- (a) *Transport of radioactive material.* Radioactive material is defined by reference to section 1(1) of the Radioactive Material (Road Transport) Act 1991 as material having a specific activity in excess of 70 kilobecquerels per kilogram or any lesser specific activity specified in an order made by the Secretary of State.
- (b) Technical specifications for public passenger transport for disabled persons including the subject-matter of:
 - i. *section 125(7) and (8) of the Transport Act 1985* which together require the Secretary of State to consult the Disabled Persons Transport Advisory Committee before issuing guidance as to measures with a view to making access to public transport services by road easier for disabled persons and making such transport better adapted to the needs of disabled people; and
 - ii. *Part V of the Disability Discrimination Act 1995 (public transport)* which makes provision about standards of accessibility for the transport of disabled people by taxi, bus or train and sets out measures to require the adoption of such standards by the relevant operators;
- (c) Regulation of the carriage of dangerous goods.

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

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Civic Government (Scotland) Act 1982 (c.45), section 20.</p>	<p>Section 20(1) - The function of the Secretary of State to make regulations to prescribe conditions which are to be imposed or not imposed by licensing authorities in relation to taxi and private hire car licences and driver licences but only in so far as necessary to implement in Scotland any relevant requirements of Part V of the Disability Discrimination Act 1995.</p> <p>Section 20(2) - The function of the Secretary of State to make regulations to prescribe types, sizes and designs of vehicles for the purposes of section 10(4) of the 1982 Act but only in so far as necessary to implement in Scotland any relevant requirements of Part V of the Disability Discrimination Act 1995.</p>
<p>The Civic Government (Scotland) Act 1982 (c.45), section 20.</p>	<p>Section 20(2A) - The function of the Secretary of State to consider what provisions may be necessary or expedient in regulations made under sub-section (1) or (2) in relation to the carrying in taxis of disabled persons and the function of prescribing such other categories of dog trained to assist disabled persons together with the function of prescribing kinds of disabilities in relation to such disabled persons.</p>
<p>The Disability Discrimination Act 1995 (c.50), section 33.</p>	<p>Section 33(2) - The function of the Secretary of State to make regulations to provide for the application of any taxi provision (as defined in sub-section (4)) in relation to certain vehicles or drivers.</p> <p>Section 33(3) - The function of the Secretary of State to consider what modifications may be appropriate in the application of any taxi provision by regulations made under sub-section (2).</p> <p>Section 33(4) - The function of the Secretary of State to make an order designating certain transport facilities forming part of any port, airport, railway station or bus station for the purposes of section 33.</p>

Section F1: Social Security Schemes

Purpose and Effect

This Section reserves social security matters.

General

The reservation describes social security not in terms of benefits for specific purposes but in terms of the power and responsibilities which underlie any type of social security provision as follows:

- (a) the establishment and financing from central or local government expenditure of general or specific schemes of assistance to or in respect of individuals by way of benefits (which includes pensions, allowances, grants or loans) for social security purposes;
- (b) requiring persons (such as employers or individuals or local authorities) to set up or administer schemes for social security purposes or to make contributions or payments towards them and to keep records and supply information in connection with all aspects of scheme administration, including verification of claims and investigating fraud; and
- (c) the establishment of a liability for a person to maintain himself or another for social security and child support purposes.

The reservation has been cast in this way to make allowance for changes over time in the exact scope and coverage of the UK-wide social security system, and the way in which benefits are delivered. For example, in recent years some benefits previously provided directly by central government (such as sickness or maternity benefit) have been replaced by a structure of requirements on employers to make defined payments to their employees. Similarly some new benefits (such as Disability Living Allowance) have been established. The reservation, which needs to be read together with the definition of social security purposes in the interpretation paragraph, makes allowance for changes of this kind.

The provision of compensation for injury resulting from vaccination, as provided for by the Vaccine Damage Payment Scheme, which are paid through the same channels as social security, is also reserved.

The current law on social security covers the following matters, some of which are given as examples in the illustrations paragraph (which is not intended to be exhaustive of all the matters covered by the reservation):

- (a) National Insurance contributions and contributory National Insurance benefits such as the state retirement pension. The Secretary of State for Social Security has specific responsibility for the NI Fund;
- (b) other social security benefits of all kinds, including employment-related benefits (such as Job Seekers Allowance);
- (c) payments in respect of industrial accidents, injuries and diseases;
- (d) statutory sick pay and statutory maternity pay;
- (e) the liability to maintain oneself, a spouse and dependent children under 19, or any person in respect of whom an undertaking to maintain has been made under the Immigration Act 1971;
- (f) grants and loans for special needs payable through the Social Fund and the Independent Living Funds;
- (g) the administration of the social security and employment benefits system whether carried out by the Department of Social Security, other government departments or others;
- (h) decision-making and appeals arrangements;
- (i) the funding of resettlement provision for persons without a settled way of life under section 30 of the Jobseekers Act 1995;
- (j) payments under the vaccine damage payments scheme;

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

- (k) the recovery of benefits where compensation is paid in consequence of accident, injury or disease and the recovery of benefits from earnings, and deductions from benefits to meet an individual's debts; and
- (l) public bodies whether tribunal, executive, advisory or regulatory dealing with these issues.

Section 110 provides the Secretary of State (for Social Security) the power to take account of the implications of varied Scottish rates of income tax (as may be provided for under Part IV of the Scotland Act) for social security, child support and pensions purposes and to determine whether a person is 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 purpose of these provisions is primarily 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.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1068
LC	23-Jul-98	1070
LC	23-Jul-98	1145
LR	3-Nov-98	200
LR	3-Nov-98	201

Details of Provisions

First Reservation

This reserves legislative competence in respect of schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. This relates to social security benefits (such as retirement pension, income support or housing and council tax benefit) which are directly administered and funded by central or local government in whole or in part. The reservation covers all aspects of the establishment, financing and administration of such benefits and activity connected with them (such as, decision-making and appeals and anti-fraud activity). The Scottish Parliament does not have competence to set up or finance benefit schemes where these are for social security purposes (for example, by seeking to provide benefits for social security purposes to people who are not entitled to claim certain social security benefits), but the reservation does not prevent it from providing benefits or allowances for other purposes within its competence, for example education maintenance grants or fosterage allowances. A non-exhaustive definition of social security purposes is in the interpretation paragraph.

Second Reservation

This reserves competence to require persons (including companies and authorities) to establish and administer schemes for social security purposes, to make payments to or in respect of those schemes and to keep records and supply information in connection with them. The reservation is intended to cover activities to do with National Insurance, such as the requirement on individuals to pay and employers to collect National Insurance contributions; and to cover those types of social security provision which operate through requirements on employers or others to make payments in accordance with a regulatory framework (such as statutory sick pay and statutory maternity pay) rather than by direct central or local government delivery. The funding of social security schemes and the requirement for others such as local authorities to provide them (e.g. housing and council tax benefit) is also reserved.

Social security legislation also imposes requirements on employers to make payments of a minimum amount of sick pay or maternity pay in prescribed circumstances. This reservation also covers such arrangements.

Third Reservation

This reserves legislative competence over the circumstances in which a person is liable to maintain himself or another for the purposes of social security legislation and the Child Support Acts 1991 to 1995. Social security legislation places a legal duty on an individual to maintain himself and his spouse and dependant children or any person in respect of whom he has given an undertaking to maintain under the Immigration Act 1971. This requirement applies generally but it only becomes relevant when a person makes a claim to an income related social security benefit. When this happens the Secretary of State may seek an order from the sheriff in Scotland for the recovery of the benefit from the liable person. So far as the maintenance of a dependant child is concerned, that legislation is largely superseded by the Child Support Acts 1991 and 1995 (the subject-matter of which is separately reserved under Section F2).

Fourth reservation

This reserves the subject-matter of the Vaccine Damage Payment Scheme. The Vaccine Damage Payment Scheme provides for compensation for injury resulting from vaccination. Vaccine damage payments are determined and paid through the same channels as social security.

Illustrations of reservation

The illustrations provide a non-exhaustive list of some of the types of matter falling within the reservation:

- (a) National Insurance. This covers National Insurance contributions as well as contributory National Insurance benefits such as the state retirement pension;
- (b) Social Fund. This covers grants and loans for special needs;
- (c) administration and funding of housing benefit and council tax benefit;
- (d) recovery of benefits paid because of accident, injury or disease from persons paying damages and deductions from benefits for the purpose of meeting an individual's debts;
- (e) sharing information between government departments for the purposes of the enactments relating to social security; and
- (f) making decisions for the purposes of schemes mentioned in the reservation and appeals against such decisions.

Exceptions from reservation

This provides for the subject-matter of following enactments which might otherwise fall within the reservation, but which relate to devolved matters, to be excepted from the reservation:

- (a) *Part II of the Social Work (Scotland) Act 1968*, which provides for the promotion of social welfare by local authorities. This includes provision in exceptional circumstances for payments to persons in need and other social welfare services such as the provision of home-help and residential nursing accommodation;
- (b) *section 2 of the Chronically Sick and Disabled Persons Act 1970*, which relates to the provision of various welfare services by local authorities to persons resident in their area;
- (c) *section 50 of the Children Act 1975*, which gives local authorities the power to make payments towards maintenance for children;
- (d) *section 15 of the Enterprise and New Towns (Scotland) Act 1990 (industrial injuries benefit)*, which deals with payments to persons undergoing training who have injured themselves at work; and

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

- (e) *sections 22, 29 and 30 of the Children (Scotland) Act 1995*, which provide for payments to be made or other assistance to be provided to children or their families. Section 22 imposes a duty on local authorities to safeguard and promote the welfare of children who are in need by providing a range and level of services appropriate to their needs. In exceptional circumstances cash payments can be made. Section 29 imposes a duty on local authorities to assist young persons, who they formerly looked after, at school leaving age or subsequently through the provision of advice or other assistance including financial assistance. Section 30 authorises local authorities to give financial assistance to such young persons to meet the cost of education and training.

Interpretation

For the purposes of the reservation, “benefits” includes pensions, allowances, grants, loans and any other form of financial assistance. This ensures that all the various types of financial assistance provided as part of social security are covered.

Providing assistance for social security purposes to or in respect of individuals includes, among other things, providing assistance to or in respect of individuals:

- (a) who qualify by reason of old age, survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care;
- (b) who qualify by reason of low income; or
- (c) in relation to their housing costs or liabilities for local taxes. This includes all the main purposes of social security provision. It also includes assistance in relation to housing costs or liabilities for local taxes, as described above.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Social Security Administration Act 1992 (c.5), sections 51(1), 52(3) and 189(10) and Schedule 2, paragraph 1(5).</p>	<p>The functions of the Secretary of State of being consulted by the Lord Chancellor on appointments of the President or a chairman of tribunals and deputy Social Security Commissioners; on regulations under the Act generally; and on removal of Social Security Commissioners or the President or a chairman of tribunals.</p>
<p>The Social Security Act 1998 (c.14), sections 5(1) and 79(2), Schedule 1, paragraph 1(4) and Schedule 4, paragraph 8.</p>	<p>Section 5(1) - The function of the Secretary of State of being consulted by the Lord Chancellor regarding appointment of a President of appeal tribunals. Section 79(2) - The function of the Secretary of State of being consulted by the Lord Chancellor regarding regulations with respect to proceeding before the Commissioners. Schedule 1, paragraph 1(4) - The function of the Secretary of State of being consulted by the Lord Chancellor regarding removal of the President of appeal tribunals. Schedule 4, paragraph 8 - The function of the Secretary of State of being consulted by the Lord Chancellor regarding exercise of powers under paragraphs 1(2), 5(1) or 6 of Schedule 4.</p>

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

The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Social Security Administration Act 1992 (c.5) , paragraph 7(1)(b) of Schedule 2.	The function of the Secretary of State to pay allowances to persons attending proceedings under the Act.
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The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 ([S.I. 2000/1563](#)).

The Tax Credits Act 1999 (c.10) section 15	The function of the Secretary of State under section 15 of the Tax Credits Act 1999 to make regulations, so far as it is exercisable by him in or as regards Scotland, is to be exercisable by him only with the agreement of the Scottish Ministers. Section 15 provides for these regulations to put in place a scheme establishing a new category of persons whose charges for providing child care are to be taken into account for the purposes of eligibility for the childcare element of the Working Families Tax Credit and Disabled Persons Tax Credit.
The Tax Credits Act 1999 (c.10) section 15 (contd.).	The scheme is to provide that a person shall not fall within the new category unless he is approved by an accredited organisation in accordance with such criteria as may be determined by or under the scheme. The scheme is also to authorise the making of grants or loans to, and the charging of reasonable fees by, accredited organisations. Section 15(3) enables the Secretary of State to accredit organisations who may approve childcare providers for the purposes of eligibility for the childcare element of the Working Families Tax Credit and Disabled Persons Tax Credit. S.I. 2000/1563 provides that the function of accrediting organisations is to be treated as exercisable in or as regards Scotland in so far as accreditation is for the purpose of the application of a scheme in relation to child care providers in Scotland. The function is then executively devolved to the Scottish Ministers to that extent by article 3 and the Schedule.

[S.I. 1999/1750](#) also transferred non-statutory functions in relation to the provision of premises and support staff for the purposes of carrying out the functions of the Social Security Commissioners.

Section F2: Child Support

Purpose and Effect

This Section reserves the subject-matter of the Child Support Acts 1991 and 1995.

General

The provisions of the Child Support Acts give the Secretary of State for Social Security a duty to determine whether there is a liability to pay maintenance in respect of a child not living with both parents, to require an application for maintenance to be made for the child (when benefit is claimed), to assess and collect any amounts due and to enforce payment. In order to give effect to these responsibilities, the Secretary of State is given powers where necessary to establish or assume paternity. The Acts limit the jurisdiction of the courts to make individual decisions on child maintenance in circumstances covered by the Acts. The Acts apply - and supersede Scots family law - where a person responsible for a child who is not living with both parents makes a claim to an income-related benefit and in certain other limited circumstances. In Scotland the Acts also permit an application for maintenance by the child personally, if aged 12 or more.

The Scottish Parliament is, however, able to legislate on issues concerning the maintenance of dependent children, as part of Scots family law, in circumstances or cases which are not covered by the subject-matter of the Child Support Acts. For example, aliment is excepted from the reservation because it is that part of Scots private law which deals with the obligations of one person to pay maintenance in respect of children and others. The Parliament is not able to legislate, for instance, to remove or exempt child maintenance provision from the jurisdiction of the Acts. Nor can the Parliament establish different formulae for the calculation of maintenance for child support purposes under the Acts as they apply in Scotland. But the Parliament could for example establish general criteria for the presumption of paternity, since this is a matter about which the Child Support Act provisions rest on general civil law.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	201

Details of Provisions

The reservation refers to the subject-matter of the Child Support Acts 1991 and 1995.

Exception

The subject-matter of sections 1 to 7 of the Family Law (Scotland) Act 1985, which deal with aliment, is excepted from the reservation. Without a specific exception it may have been doubtful whether or not aliment was a reserved matter. Aliment, as explained above, is that part of Scots private law which deals with the obligations of one person to pay maintenance in respect of children and others. Without the specific exception, the reservation of the Child Support Acts may have restricted unduly the Scottish Parliament's competence to legislate in relation to the law on aliment because those Acts confer powers on the Secretary of State to collect the Scottish form of maintenance such as aliment, as well as child support maintenance. However, the reservation of child support does not prevent the Scottish Parliament from having competence to legislate about aliment.

The interpretation section ensures that if section 30(2) of the Child Support Act 1991, which deals with the collection of payments other than child support maintenance, is not in force on the principal appointed day (1 July 1999), then it is nevertheless to be treated as if it were a part of the subject-matter of the 1991 Act and therefore a reserved matter. Section 30(2) was not in force on 1 July 1999.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Child Support Act 1991 (c.48):	
(a) sections 22(3), 24(9), 25(6) and 45(1) and (6) and Schedule 4, paragraph 7; and	Section 22(3) and Schedule 4 paragraph 7 - The function of the Secretary of State of being consulted by the Lord Chancellor on regulations with respect to proceedings before Child Support Commissioners and in respect of the exercise of functions under paragraphs 1(2), 4(1) or (2)(b) of Schedule 4. Section 24(9) - The function of the Secretary of State of being consulted by the Lord Chancellor on regulations under section 24(6) or (7). Section 25(6) - The function of the Secretary of State of being consulted by the Lord Chancellor on regulations under section 25(2), (3) or (5).
The Child Support Act 1991 (c.48) (contd.):	Section 45(1) and (6) - The functions of the Secretary of State* to make orders sending specified appeals to courts rather than appeal tribunals and of being consulted by the Lord Chancellor as to the abolition of such tribunals.
(b) Schedule 4, paragraph 2A.	The function of the Secretary of State to pay allowances to persons attending any proceedings before a Child Support Commissioner.

[S.I. 1999/1750](#) also transferred non-statutory functions in relation to the provision of premises and support staff for the purposes of carrying out the functions of the Child Support Commissioners appointed under section 22 of the Child Support Act 1991.

Section F3: Occupational and Personal Pensions

Purpose and Effect

This Section reserves occupational and personal pension schemes, including public service pension schemes.

General

This Section reserves matters relating to occupational and personal pensions including public service pensions. Most of the statutory provisions concerning occupational and personal pensions are contained in the Pension Schemes Act 1993 and Part I of the Pensions Act 1995. Section 1 of the 1993 Act provides definitions of “occupational pension scheme”, “personal pension scheme” and “public service pension scheme” which are applied with modifications here. Section 126(1) makes clear that these definitions apply but as if the reference to employed earners in the definition of personal pension schemes were to any earners.

Occupational pensions are usually payable under trusts set up by an employer, or more rarely a group of employers, in respect of their employees. The trust deed sets out the

rules as to how the scheme is to operate, e.g. the rates of contributions and benefits, who is liable to pay the contributions and when and to whom benefits are payable. Some employers operate a number of separate schemes, some a single scheme for all their employees, while others may provide a scheme for only certain of their employees e.g. by restricting pension arrangements to executives or salaried staff or to employees who have worked for the company for at least 2 years. The occupational pension scheme will be administered by the trustees appointed under the trust deed in accordance with the rules as to the operation of the scheme. The scheme rules must, however, comply with legislative requirements and can be overridden when a conflict arises.

Public service pension schemes are a particular category of occupational pension schemes. They are generally established under legislation and cover a wide range of public service employees. A definition of public service schemes is set out in section 1 of the Pension Schemes Act 1993. There is no statutory obligation on an employer in the United Kingdom to establish an occupational pension scheme or to participate in a scheme established for an industry in which he operates. However, if an employer or group of employers sets up such a scheme then certain statutory requirements must be met. These fall into three main headings:

- (a) requirements affecting the administration of schemes, and the duties of trustees and professional advisors;
- (b) financial management of schemes, including rules on investments, contributions and solvency, and the conditions under which schemes can contract out of the State Earnings Related Pension Scheme; and
- (c) the right of individual scheme members, including preservation of the pension rights of people leaving the scheme before pension age, the transfer of rights from one non-State pension scheme to another, the indexation of rights before and after pension age, requirements for the equal treatment of men and women and rules on the disclosure of information to scheme members.

In addition, most schemes seek to comply with conditions for tax approval, which determine whether the scheme can benefit from advantageous tax treatment, particularly in relation to income and corporation taxes.

Personal pension schemes are established by financial institutions, principally insurance companies. They are essentially contracts between individuals and pensions providers, though groupings of individual pensions may be administered together for convenience. Contributions, which may also include contributions from an employer, are paid into the scheme and invested. Personal pension schemes attract a range of tax concessions and their marketing is regulated under the Financial Services Act 1986.

Provision about pensions payable to any person is also reserved except in relation to former members (and office-holders) of the Scottish Parliament and Ministers. Also excepted from the reservation is legislative competence in relation to allowing or requiring any devolved public body to provide for pensions for its members or staff. In all these cases the provision made will be subject to the general requirements of the Pensions Acts.

The reservation of matters relating to occupational and personal pensions interacts with areas of Scots private law which are being devolved, for example trust law and family law. In particular, so far as family law is concerned, Scots law has, since 1985, required pension rights accrued during the marriage to be taken into account by a court making financial provision on divorce. The law relating to what financial provision is made on divorce and the question as to whether and to what extent pension rights are taken into account by the court will in general be a matter of Scots law within the legislative competence of the Scottish Parliament.

However, although the Scottish Parliament has legislative competence over Scottish trust law and family law, its competence will be subject to the reservation in respect of

pensions. In particular, the obligations of the trustees or managers of occupational and personal pension schemes are a reserved matter.

Section 12A of the Family Law (Scotland) Act 1985 (as amended by section 167 of the Pensions Act 1995) allows the court to order the trustees or managers of a pension scheme to pay the whole or part of a lump sum due to or in respect of a member to his or her divorcing spouse when it becomes due. These are known as earmarking/attachment rules. Parts III and IV of, and Schedules 3 to 6 and part of Schedule 12 to, the [Welfare Reform and Pensions Act 1999 \(c.30\)](#) deal with pension sharing on divorce. They also amend the earmarking provisions in section 12A of the 1985 Act. Accordingly, although the Scottish Parliament can legislate, for example, to require pension rights accrued during the marriage to be taken into account on divorce, it could not legislate to impose obligations upon trustees or managers of occupational or personal pension schemes to earmark or make provision for pension sharing.

This effect is achieved partly by this reservation and partly by paragraph 2 of Schedule 4 to the Scotland Act, as amended by the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 ([S.I. 2000/1831](#)). Paragraph 2(3), as so amended, ensures that the Scottish Parliament cannot modify the obligations of trustees or managers in relation to occupational or personal pension schemes or of persons responsible for other pension arrangements in relation to the sharing of rights under pension arrangements on divorce. See that paragraph for more details.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1068
LC	23-Jul-98	1146
LC	23-Jul-98	1147
LC	23-Jul-98	1148
LR	2-Nov-98	11

Details of Provisions

First reservation

This provides that the regulation of occupational pension schemes and personal pension schemes, including the obligations of trustees and managers of pension schemes, is a reserved matter.

“Occupational pension scheme”, “personal pension scheme” and “public service pension scheme” are defined in section 126(1) as having the meanings given by section 1 of the Pension Schemes Act 1993 but as if the reference to employed earners in the definition of personal pension schemes were to any earners.

Second reservation

This reserves provision about pensions payable to, or in respect of, any persons. This covers matters such as the payment of pensions, the manner of provision and contribution in respect of pensions. This is subject to an exception which permits the Scottish Parliament to make provision about pensions payable to or in respect of:

- (a) the persons referred to in section 81(3) of the Act. That section provides that the Parliament may make provision (whether by an ASP or a resolution) for the payment of pensions to ex- members and office-holders of the Parliament or of the Scottish Executive. The reservation should not prevent the Parliament making such provision; and
- (b) in a Scottish public authority with mixed functions or no reserved functions (as defined in Part III of Schedule 5), persons who are or have been a member of the public body, the

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

holder of a public office or a member of the staff of the body, holder or office. This would permit the Parliament, for example, when legislating to establish a new Scottish public authority, to require it to provide pensions for its members and staff. It also enables any ministerial functions in relation to the pensions of existing Scottish public authorities to transfer to the Scottish Ministers.

Third reservation

This reserves the subject-matter of the Pensions (Increase) Act 1971, which provides for index-linking of a wide range of public service pensions.

Fourth reservation

This reserves schemes for payment of pensions which are listed in Schedule 2 to the Pensions (Increase) Act 1971. This includes pension schemes for local authorities, police, fire, teachers and the NHS. Many of the functions in relation to these schemes have, however, been executively devolved to the Scottish Ministers. Two exceptions are made from the reservation of these schemes which tie in with the exceptions mentioned under the Second Reservation above. These are for pensions schemes for MSPs and members of the Scottish Executive provided by the Parliament under section 81 and the pension schemes for employees of Scottish Enterprise and Highlands and Islands Enterprise, which are the only Scottish non-departmental public bodies whose pensions are listed in the 1971 Act.

Fifth reservation

This reservation covers, as regards classes of persons to whom public service pension schemes apply, statutory provision for compensation for loss of office or employment, for loss or diminution of emoluments, or employment being affected by constitutional changes in an overseas territory, and also covers as regards these classes of persons statutory provision for death or injury benefit. The reservation will accordingly cover the statutory compensation schemes which exist for public employees such as local government employees, teachers and NHS employees who lose their employment or suffer diminution of emoluments as a result, for instance, of redundancy or reorganisation.

Interpretation

Pensions are defined as including gratuities and allowances.

Executive Devolution

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750) provides for widespread executive devolution in the area of public service pensions, reflecting the former responsibility of the Secretary of State for Scotland for such pensions. The powers of the Secretary of State under the Superannuation Act 1972 to make regulations establishing and maintaining pension schemes for local government employees, teachers and NHS employees have been transferred to the Scottish Ministers, who thus have policy responsibility for the content of these schemes. In the case of teachers and NHS employees the consent of the Treasury to the making of the regulations is still required as before. The powers of the Secretary of State under the Fire Services Act 1947 and the Police Pensions Act 1976 to make subordinate legislation governing pensions of fire-fighters and police officers have similarly been transferred to the Scottish Ministers. The power of the Secretary of State under section 24 of the Superannuation Act 1972 to make regulations providing for compensation for local government employees, teachers, NHS employees, fire-fighters and police officers have also been transferred to the Scottish Ministers, who thus have policy responsibility for such compensation. The function under section 4 of the Small Landholders (Scotland) Act 1911 has also been transferred, as it is used in practice to provide for pensions. The function of paying remuneration to members of a Pensions Appeal Tribunal (para 2 of the Schedule to the Pensions Appeal Tribunals Act 1943) is also executively devolved.

Apart from these powers to make subordinate legislation, all executive powers of the Secretary of State under primary or subordinate legislation in respect of pensions or compensation for local government employees, teachers, NHS employees, fire-fighters or police officers and functions exercisable in respect of the Firemen's Pension Scheme and the Police Pensions Appeal Tribunals have been transferred to the Scottish Ministers.

[S.I. 1999/1750](#) also transferred non-statutory functions in relation to the provision of premises and support staff for the purposes of carrying out the functions of the Pensions Appeal Tribunal and of funding of payments made by a Pensions Appeal Tribunal under rules 26 to 28 of the Pensions Appeal Tribunals (Scotland) Rules 1981.

Section F4: War Pensions

Purpose and Effect

This Section reserves war pensions.

General

The current law on war pensions is contained in a mixture of statute law and a variety of Orders made under the Royal Prerogative. War pensions are payments made in respect of death or disablement of ex servicemen and a wide range of auxiliary, reserve and analogous personnel including in certain circumstances civilians. Basic entitlement to a war pension arises where disablement or death of a member of the armed forces has occurred or arisen in consequence of service at any time since the First World War. War pensions are distinct from state pensions paid from the National Insurance Fund (which are in any case reserved under Section F1 (Social Security Schemes)). Service pensions for those in the armed forces, which are analogous to public service occupational pensions, are also distinct from war pensions, but these are reserved in any case under Section F3 (Occupational and Personal Pensions). War pensions are paid by the Department of Social Security.

Schemes for the payment of war pensions also contain powers to make a variety of other payments. For example, the Secretary of State has a discretionary power under Article 26 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 to meet necessary medical expenses arising from war disablement that are not otherwise provided for under UK legislation.

The reservation includes the provision and administration of such pensions, and the establishment and regulation of public bodies, including tribunals and advisory and executive bodies, with functions in connection with these matters. Thus the establishment and functions of the Pensions Appeal Tribunal, the Central Advisory Committee on War Pensions and the local War Pensions Committees are all reserved.

Details of Provisions

Reservation

The first part of the reservation reserves schemes for the payment of pensions, as defined, for or in respect of persons who have a disablement or who have died as a consequence of service as members of the armed forces of the Crown.

The second part of the reservation reserves the subject-matter of a number of particular schemes made under the following enactments which enable provision to be made, which is analogous to war pensions, in respect of persons other than ex-servicemen. These are:

- (a) *the Personal Injuries (Emergency Provisions) Act 1939*. The 1939 Act makes provision for a scheme for making payments in respect of certain personal injuries to civil defence volunteers and civilians during World War II;

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

- (b) *the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939, sections 3 to 5 and 7.* Section 3 makes provision for the payment of awards to or in respect of mariners in British ships who have suffered war related injury or detention. Section 4 makes similar provision for pilots, crews of pilot boats, lighthouses etc., section 5 for certain persons serving on naval ships and section 7 makes general provision for these schemes; and
- (c) *the Polish Resettlement Act 1947.* The 1947 Act makes provision for war pensions and other payments and assistance to be given to Polish naval and armed forces under British command during the Second World War and Polish resettlement forces and their dependants.

Illustrations of reservation

The provision of pensions under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 is given as an illustration of the scope of the reservation. The 1983 Order provides the power for payment of a range of pensions, grants, allowances, supplements and gratuities in respect of persons disabled or who have died through service in HM Forces.

Interpretation

For the purposes of this Section, ‘pensions’ include grants, allowances, supplements and gratuities. This encompasses all of the various means by which compensation in respect of war injuries is given.

Section G1: Architects

Purpose and Effect

This Section reserves the regulation of the profession of architect.

General

This is one of several reservations in Head G which covers the regulation of certain professions.

Details of Provisions

This reserves regulation of the profession of architect. The matters reserved include professional qualifications, eligibility to practice as an architect, and control over the professional competence and conduct of architects.

Section G2: Health Professions

Purpose and Effect

This Section reserves the regulation of the health professions.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	2-Nov-98	11
CC	31-Mar-98	1080

Details of Provisions

Reservation

This reserves the regulation of the health professions. This includes professional qualifications, eligibility to practice and control over standards of professional competence and conduct. This does not reserve matters such as the pay and conditions

of service of the health professions within the National Health Service in Scotland or their deployment and management.

Health professions are defined for the purposes of this reservation in the *interpretation* paragraph as meaning the professions regulated by various enactments. The professions regulated by the specified enactments include doctors, dentists, dental auxiliaries, opticians, pharmacists, nurses, midwives, health visitors, chiropodists, dieticians, physiotherapists, medical laboratory scientific officers, orthoptists, prosthetists and orthotists, arts therapists, occupational therapists, radiographers, osteopaths, chiropractors and veterinary surgeons.

Exceptions

There is excepted from the reservation, the subject matter of:

- (a) *section 21 of the National Health Service (Scotland) Act 1978*. This enables the Scottish Parliament to legislate about the matter of what vocational training and experience is required to be possessed by doctors before they can provide general medical services in the NHS. This is a matter which is regulated by section 21 This exception is in line with the overall devolution of Health Service matters; and
- (b) *section 25 of that Act*. Similarly, this section gives the Scottish Parliament legislative competence to regulate the provision of general dental services for the NHS so far as that relates to vocational training and disciplinary proceedings. This is part of the subject-matter of section 25.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Medical Act 1983 (c.54), Schedule 4, paragraph 7.</p>	<p>The function of the Secretary of State of making rules as to the functions of assessors appointed to advise the Professional Conduct Committee, the Health Committee and the Preliminary Proceedings Committee.</p>
<p>The Nurses, Midwives and Health Visitors Act 1997 (c.24):</p>	
<p>(a) section 19(5); and</p>	<p>The function of the Secretary of State* and the Lord Chancellor to approve, by order, rules under section 10 which apply to proceedings in Scotland.</p>
<p>(b) Schedule 2, paragraph 4.</p>	<p>The function of the Secretary of State and the Lord Chancellor to make, by order, provision with regard to the functions of assessors relative to proceedings in Scotland.</p>

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 ([S.I. 2000/1563](#)).

<p>The Nurses, Midwives and Health Visitors Act 1997 (c.24). Sections 5(2), (3), (5), (6), (7), (8) and (9), 6(1)(e), 17(1) and (3), 18(1) and (6) and 24(4).</p>	<p>All Ministerial functions under the Nurses, Midwives and Health Visitors Act 1997 in relation to the National Board for Nursing, Midwifery and Health Visiting for Scotland are transferred. The functions concerned are:-</p>
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	<p>Section 5(2) and (3) - appointment of Chairman and members; specification of number of members of Board; forming an opinion of which qualifications/ experience will be of value to the Board in relation to the appointment of members.</p> <p>Section 5(5) and (6) - Payment of remuneration to members; providing for pensions, allowances etc.; Determining travelling and other allowances for chairman, members and persons appointed to committees.</p> <p>Section 5(7), (8) and (9) - Specifying officers to be appointed by the Board; making “further provision with respect to the constitution and administration of the Board”, including provision for payments etc. to employees and for issuing directions to the Board in respect of its powers to appoint staff.</p> <p>Section 6(1)(e) - Prescribing other functions relating to nurses, midwives or health visitors which are to be performed by the Board.</p> <p>Section 17(1) and (3) - Approval for the Board to charge fees in respect of certain matters including training, qualification, examination and certification of nurses, midwives and health visitors; making grants to the Boards towards approved expenses.</p> <p>Section 18(1) and (6) - Directing the Board to keep accounts and records in relation to the accounts; determining form of annual report, and time limit for Board to submit annual report on the performance of their functions; (see also article 8 of the Order)</p> <p>Section 24(4) - Appointing a day for section 5(6) (Board to pay travelling and other allowances to chairman, members etc.) to cease to have effect.</p> <p>Audit arrangements were also amended by article 8 of S.I. 2000/1563</p>
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Advice to The Queen

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library.

Under the Professions Supplementary to Medicine Act 1960, the Privy Council makes a determination approving courses and qualifications for state registration purposes in the fields of professions supplementary to medicine. By convention the Secretary of State for Scotland was one of the three Privy Counsellors required by the Act to approve courses run by Scottish institutions. The role of the Secretary of State for Scotland in relation to such courses has passed to the First Minister.

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

The Secretary of State for Scotland also had a role in relation to nominating Privy Council appointments of Scottish representatives to various statutory bodies relating to the health professions, such as the General Medical Council, the General Dental Council and the General Optical Council. The First Minister has taken over the Secretary of State for Scotland's role in nominating Privy Council appointments of Scottish representatives to these bodies. Advice and nominations for the other Privy Council appointments to these bodies comes from the Secretary of State for Health. Administrative arrangements have been put in place to provide for consultation between the Scottish Ministers and the Secretary of State for Health before either party puts forward nominations to the Privy Council.

Section G3: Auditors

Purpose and Effect

This Section reserves the regulation of the profession of auditor.

Details of Provisions

The reservation covers regulation of the profession of auditor. The reserved matter includes in particular professional qualifications, eligibility to practice and control over standards of professional competence and conduct.

Section H1: Employment and Industrial Relations

Purpose and Effect

This Section reserves employment rights and duties and industrial relations, except for the setting of wages for agricultural workers insofar as this is dealt with by the Agricultural Wages (Scotland) Act 1949.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1082
LC	23-Jul-98	1070
LC	27-Jul-98	1277

Details of Provisions

Reservation

What are reserved are employment rights and duties and industrial relations, including the subject-matter of the following:

- (a) *the Employers' Liability (Compulsory Insurance) Act 1969* which requires employers to insure against liability for injury or disease sustained by employees and arising out of and in the course of their employment;
- (b) *the Employment Agencies Act 1973* which regulates employment agencies and employment businesses;
- (c) *the Pneumoconiosis etc. (Workers' Compensation) Act 1979* which makes provision for lump sum payments to be paid by the State to or in respect of persons disabled by industrial lung diseases caused by various kinds of noxious dust at work;
- (d) *the Transfer of Undertaking (Protection of Employment) Regulations 1981* which provide for the protection of employees' rights on the transfer of an undertaking, such as the sale or disposal of a business;

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

- (e) *the Trade Union and Labour Relations (Consolidation) Act 1992*. This Act covers a wide range of matters to do with trade unions and labour relations including such matters as employers' associations, collective bargaining, procedures for handling redundancies, industrial action, and the role of ACAS, the Certification Officer, the Central Arbitration Committee and the Commissioner of Rights of Trade Union members;
- (f) *the Industrial Tribunals Act 1996*¹⁶ which is about industrial tribunals and the Employment Appeal Tribunal;
- (g) *the Employment Rights Act 1996*. This Act consolidates enactments about employment rights and covers matters such as protection of wages, suspension from work, rights to time off work and to notice, maternity rights, unfair dismissal, redundancy, and employees' rights on the insolvency of an employer; and
- (h) *the National Minimum Wage Act 1998*. This Act provides for the setting of minimum wages in almost all sectors of employment.

Exception

The subject-matter of the Agricultural Wages (Scotland) Act 1949 is excepted from the reservation. This Act establishes the Scottish Agricultural Wages Board which has the power to fix minimum wages, holiday entitlements and other terms and conditions of employment for agricultural workers. Apart from this exception about the wages of agricultural workers, matters relating to wages will fall within the reservation. So, for example, the Scottish Parliament is not able to legislate to set a national minimum wage.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Criminal Justice and Public Order Act 1994 (c.33), section 128.</p>	<p>The function of the Secretary of State of making regulations for the establishment, maintenance and operation of procedures for the determination of rates of pay and allowances to prison officers in Scotland and such other terms and conditions of employment as the Secretary of State considers fall to be determined in association with the determination of rates of pay and allowances.</p>
<p>The Employment Tribunals Act 1996 (c.17), section 3.</p>	<p>The function of the Secretary of State* to provide, by order, that certain proceedings may be brought before an employment tribunal.</p>
<p>The Employment Rights Act 1996 (c.18), section 63A(1)(c) and (2)</p>	<p>The functions of the Secretary of State to prescribe a standard of achievement and specify qualification awarding bodies for the purpose of an employee's who ordinarily work in Scotland.</p>

¹⁶ This Act was renamed the Employment Tribunals Act 1996 by section 1 of the Employment Rights (Dispute Resolution) Act 1998.

Section H2: Health and Safety

Purpose and Effect

This Section reserves health and safety at work. It was largely replaced by article 6 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

General

This Section is part of Head H which reserves a number of matters relating to employment.

Details of Provisions

Reservation

The reserved matters are:

- (a) *the subject-matter of Part I of the Health & Safety at Work etc. Act 1974*. That Part makes provision for the general purposes of securing the health, safety and welfare of persons at work, protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work, and controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the lawful acquisition, possession and use of such substances; and
- (b) *the Health and Safety Commission (HSC), the Health and Safety Executive (HSE) and the Employment Medical Advisory Service (EMAS)*. By virtue of paragraph 3 of Part III of Schedule 5, this has the effect of reserving the constitutions of these bodies, the conferral or removal of their functions, and the conferral or removal of any functions specifically exercisable in relation to them. HSC and HSE are primarily concerned with matters which are reserved as part of the subject-matter of Part I of the 1974 Act. However, they have certain functions which are exercisable in relation to matters which are not otherwise reserved. For example, the Commission has powers to direct investigations into fires. The reservation of the Commission by name has the effect of preventing the Scottish Parliament from modifying that function, but not from legislating about general fire safety. EMAS is established by Part II of the 1974 Act. It has functions of advising Ministers, the HSC, employers and employees on health in relation to employment. The effect of its reservation by name is that the Scottish Parliament is not able to legislate about EMAS's functions, but may, for example, legislate about promoting health in the work place.

Interpretation

The interpretation provisions provide that:

- (a) the expressions “work” and “at work” in Part I of the 1974 Act are to be taken to have the meanings they have on the principal appointed day (1 July 1999). This is consistent with paragraph 5(1) of Part III of Schedule 5 which provides that references to the subject matter of an enactment are to be read as references to the subject matter of that enactment as it has effect on the principal appointed day. However the subject-matter of Part I of the 1974 Act is not fixed because it includes a power for the Secretary of State to extend the definition of “work” for the purposes of health and safety regulations. This interpretation provision ensures that this power cannot be used to extend the scope of the reservation beyond that which it had on the principal appointed day; and
- (b) the subject matter of Part I of the 1974 Act includes certain specified aspects of fire safety but not any other aspects of fire safety. Those specified aspects are those which are, in practice, regulated under health and safety legislation.

Agency arrangements

Article 6(2) of [S.I. 1999/1749](#) provides for certain references in section 13 of the 1974 Act to Ministers to include a reference to the Scottish Ministers. This allows the HSC and the Scottish Ministers to make arrangements for the HSC to perform functions on behalf of the Scottish Ministers (provided that the Secretary of State considers that they can appropriately be performed by the HSC). In that section, “functions” does not include the making of regulations or legislative instruments.

Section H3: Job Search and Support

Purpose and Effect

This Section reserves the provision of advice and support to assist people to select, obtain and retain employment or to assist people to obtain suitable employees, including such assistance for disabled persons. Excepted from the reservation is legislative competence in respect of training for employment. Matters relating to careers services are also excepted from the reservation.

General

The intention behind this reservation is to reserve the matters for which the Employment Service is currently responsible under the Disabled Persons (Employment) Act 1944 and the Employment and Training Act 1973.

Section 56(1)(g) provides for certain devolved functions under the 1973 Act to be shared powers so that the UK Ministers can continue after 1 July 1999 to provide, through the Employment Service, the kind of programmes of employment training assistance being provided by the Employment Service in Scotland prior to 1 July 1999.

Scottish Enterprise (SE) and Highlands and Islands Enterprise (HIE) also have duties to assist people seeking work to obtain training for work which to some extent run parallel with the activities of the Employment Service. In order to allow the Scottish Parliament to have legislative competence over these activities of SE and HIE, and to accord with the general devolution of matters relating to economic development and training, training for employment is excepted from the reservation of the Employment and Training Act 1973.

The Scottish Parliament is able to legislate about careers guidance services. Provision for these services is made in sections 8-10A of the Employment and Training Act 1973, as inserted by sections 45 and 46 of the Trade Union Reform and Employment Rights Act 1993. These sections confer a duty on the Secretary of State to secure the provision of careers services for school and certain college students and a power to arrange provision of such services for other persons. The duty also extends to assisting such persons ceasing to undergo education to obtain appropriate employment, training or additional education. That duty, so far as extends to Scotland, has transferred to the Scottish Ministers by virtue of section 53 of the Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1082
LR	3-Nov-98	201

Details of Provisions

This Section reserves the subject matter of:

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

- (a) *the Disabled Persons (Employment) Act 1944*. Under this Act the Secretary of State for Education and Employment through the Employment Service makes arrangements to facilitate disabled people to obtain employment or work on their own account and to train for such employment or work; and
- (b) *the Employment and Training Act 1973*, except so far as relating to training for employment. The main provisions of this Act enable the Secretary of State to make arrangements for the purpose of assisting persons to select, obtain training for, obtain and retain employment or for the purposes of assisting persons to obtain suitable employees. The subject-matter of the Act so far as relating to training for employment is not reserved.

Exceptions

There is also excepted from the reservation, the subject-matter of:

- (a) *sections 8 to 10A of the Employment and Training Act 1973*. These sections concern the provision of careers guidance services, as indicated above; and
- (b) *sections 2(3)(c) and 12 of Enterprise and New Towns (Scotland) Act 1990*. They deal with the provision of assistance by the provision of Scottish Enterprise and Highlands and Islands Enterprise to persons seeking to establish themselves as self-employed persons. The net result of this part of the exception is that it ensures that matters relating to the activities of Scottish Enterprise and Highlands and Islands Enterprise to assist people to obtain training for employment and also assist people to establish their own businesses, are within the competence of the Scottish Parliament.

Executive Devolution

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Employment and Training Act 1973 (c.50), section 2(3A).</p>	<p>The function of the Secretary of State to authorise or direct Scottish Enterprise or Highlands and Islands Enterprise to act on his behalf in making arrangements under section 2.</p>
<p>The Enterprise and New Towns (Scotland) Act 1990 (c.35), section 14A.</p>	<p>The functions of a Minister of the Crown to confer powers or impose duties on Scottish Enterprise and Highlands and Islands Enterprise to do anything in connection with unemployment, training for employment or unemployment.</p>
<p>The Welfare Reform and Pensions Act 1999 (c.30)</p>	<p>Section 60 of the Welfare Reform and Pensions Act 1999 contains provisions for implementing Employment Zones. Prototype Employment Zones have been operating under earlier legislation. The new powers in the Act enable schemes to be set up in designated areas where special benefit rules can apply. In order to help participants back to work, the schemes allow them to anticipate funding for up to 6 months' worth of spending on training and jobsearch, combined with money equivalent to the payments they would normally receive from the jobseeker's</p>

	<p>allowance. The powers in the Act also enable the Secretary of State to provide a wider range of support for activities within the Zones which help people to get and keep work, including support for unemployed people who are seeking to become self-employed. Section 60(5)(c)(i) enables the Secretary of State to make payments to persons providing facilities which are designed to assist claimants for jobseeker's allowance to obtain sustainable employment. S.I. 2000/1563 enables the Scottish Ministers to make payments under section 60(5)(c)(i), if they wish to do so, in so far as they consider that the facilities are capable of supporting training of persons for employment. If that criterion is satisfied, the Scottish Ministers will be able to fund any eligible activity within an employment zone in Scotland. This function is to be exercisable by the Scottish Ministers concurrently with the Secretary of State for Education and Employment.</p>
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Section 11: Abortion

Purpose and Effect

This Section reserves matters relating to abortion.

General

In Scotland the law relating to abortion, both civil and criminal, is mostly common law, with the exception of the Abortion Act 1967 (as amended). At common law in Scotland it is a crime to procure or attempt to procure an abortion. Certain exceptions or defences were provided by the common law but these are now superseded by the 1967 Act which sets out the circumstances in which it is lawful, for the purposes of the law relating to abortion, to carry out an abortion. The 1967 Act introduces in effect a similar regime for the whole of Great Britain.

The 1967 Act also makes provision for the approval of places where terminations of pregnancies may lawfully be carried out and for the making of regulations to require certification and notification of doctors opinions before a termination is carried out.

Attempts have been made to seek civil law remedies in Scotland to prevent abortions being carried out under the 1967 Act but these were unsuccessful.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1093
LC	27-Jul-98	1284
LR	3-Nov-98	202

Details of Provisions

Legislative competence relating to abortion is reserved. This means that the Scottish Parliament cannot make statutory provisions to alter the criminal law relating to abortion

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

in Scotland or provision in the Abortion Act 1967, such as to alter the circumstances in which an abortion may be lawfully carried out. Subject to what is said below, it also could not legislate to modify any other provision, whether of the civil or criminal law, which relates to the matter of abortion.

The effect of sections 29(4) and 35 of the Act is that, while the Parliament could legislate to modify a provision of Scots private law (concerning, say, the date of acquisition of human personality, and its consequences, for the purposes of Scots private law) which affected abortion, it could only do so in order to achieve consistency in the application of Scots private law in relation to devolved and reserved matters; and if such a provision were adversely to affect the operation of the law as it applies to abortion the Secretary of State would have the power to intervene.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Abortion Act 1967 (c.87) , sections 1(3) and 2.	Section 1(3) - The function of the Secretary of State to approve places where a termination of pregnancy may be carried out. Section 2(1) - The function of the Secretary of State to make regulations to prescribe the arrangements for certifying of medical opinions; the related confidentiality provisions. Section 2(2) - a requirement to notify terminations to the Chief Medical Officer in Scotland.
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Section J2: Xenotransplantation

Purpose and Effect

This Section reserves matters relating to xenotransplantation.

General

Xenotransplantation is the transplantation of viable organs or other tissues (e.g. bone or cells) from animals to humans, or the use of viable animal tissue extra-corporeally, perhaps as part of a medical device.

There is currently no legislation which specifically regulates xenotransplantation, but there are other statutory provisions which touch upon it. For example, the welfare of animals which have been genetically modified for xenotransplantation purposes is covered by the Animals (Scientific Procedures) Act 1986. The subject-matter of that Act, which regulates the use of animals for experimental or scientific purposes (including vivisection), is reserved by Section B7. A non-statutory body, the UK Xenotransplantation Interim Regulatory Authority (UKXIRA) exists to monitor and regulate developments in the xenotransplantation field.

The Scottish Parliament has legislative competence over the regulation of other types of transplantation, notably the removal and therapeutic use of human organs and tissues for the purposes of transplantation into other humans, and in dealing in such organs and tissues.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1093
LC	27-Jul-98	1284

Details of Provisions

The whole area of xenotransplantation is reserved including the regulation of any activities connected with xenotransplantation.

Section J3: Embryology, Surrogacy and Genetics

Purpose and Effect

This Section reserves surrogacy arrangements, human fertilisation and embryology and genetics.

General

Certain other matters in the health field which raise major ethical issues and/or which require expertise to be pooled at a United Kingdom level for them to be satisfactorily regulated (abortion, xenotransplantation) are also reserved. With the exception of the matters which are reserved in this Head, the Scottish Parliament has legislative competence over matters of sexual behaviour, whether as a health or social issue, involving civil or criminal law.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1093

Details of Provisions

First reservation

This reserves surrogacy arrangements, as defined by the Surrogacy Arrangements Act 1985, including the subject-matter of the 1985 Act.

The 1985 Act defines surrogacy arrangements by reference to a 'surrogate mother' who is a woman who carries a child in pursuance of an arrangement made before she began to carry the child and made with a view to that child being handed over to, and the parental rights being exercised by, another person. The arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

The Act makes provision prohibiting third parties from initiating or negotiating any surrogacy arrangements on a commercial basis, receiving any payments from the surrogate mother or the person for whom she is carrying the child and advertising in connection with surrogacy arrangements.

The Act does not however deal with the legality under the common law of surrogacy arrangements. It is not an offence in the criminal law of Scotland to enter into a surrogacy arrangement and it is not an offence under the common law or the 1985 Act for persons to enter into a private arrangement. Section 36(1) of the Human Fertilisation and Embryology Act 1990 amended the 1985 Act to the effect that no surrogacy arrangement is enforceable and the 1990 Act also makes provision as to the parentage of children born as the result of surrogacy arrangements.

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

The Scottish Parliament is not able to legislate in respect of any matter relating to surrogacy arrangements within the meaning of the 1985 Act, including the legality of surrogacy arrangements for the purposes of the criminal law or the enforceability of any such arrangements for the purposes of the civil law nor will it be able to amend the provisions of the 1985 Act, except as permitted by paragraph 3 of Schedule 4.

Second reservation

This reserves the subject-matter of the Human Fertilisation and Embryology Act 1990 which deals principally with:

the regulation of the creation, keeping or using of human embryos or gametes outside the body;

the regulation or prohibition of any activities involving the creation, keeping or using of human embryos or gametes outside the body, including research and the provision of infertility treatment services; and

the definition of the parents of any child being or having been carried by a woman as the result of the placing in her of an embryo or of eggs and sperm or her artificial insemination.

The Act also established the Human Fertilisation and Embryology Authority which regulates research or treatment which involves the creation, keeping and using of human embryos outside the body, or the storage or donation of human eggs and sperm.

The 1990 Act also makes provision regarding the parentage of children born as a result of surrogacy arrangements and confers a power on the Courts to make an Order providing for a child born as a result of a surrogacy arrangement to be treated in law as the child of the couple who commissioned the surrogate mother to carry the child. Whilst parentage is usually a matter for Scots private law, the Scottish Parliament is not able to make provision amending section 30 in relation to surrogacy arrangements or the other matters covered by the 1990 Act.

Third reservation

All matters relating to human genetics not already reserved by the reservation of the subject-matter of the Human Fertilisation and Embryology Act 1990 will be reserved. This includes research, testing or treatment concerning the human genome or genetic disorders including gene therapy research and all matters relating to the social, ethical and economic consequences of human genetics, such as providing genetic tests for insurance or employment purposes or patenting genetic material.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

[The Human Fertilisation and Embryology Act 1990 \(c.37\)](#), section 30(9).

The function of the Secretary of State to make regulations under section 30(9), as read with section 45 to provide (a) for any provision of the enactments about adoption to have effect with or without modifications in relation to orders under section 30 and applications for such orders as it has effect in relation to adoption, and applications for adoption orders, and (b) for references to adoption in any enactment to be read in the way specified in section 30(9).
These orders are considered to have effect similar to adoption orders.

Section J4: Medicines and Poisons

Purpose and Effect

This Section reserves legislative competence over matters relating to the regulation and control of medicines (for both humans and animals), medicinal products, poisons and biological substances and the regulation of prices of medicines supplied to the National Health Service.

General

The reservation of the control and safety of medicines is intended to cover medicines for both human and animal use.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1113

Details of Provisions

First reservation

This reserves the subject-matter of the following enactments:

- (a) *The Medicines Act 1968*. This regulates the manufacture, distribution and importation of medicines for human use, medicines for administration to animals and medicated animal feeding stuffs. It establishes the Medicines Commission and provides for committees to be established to assist Ministers; those established include the Committee on Safety of Medicines and the Veterinary Products Committee. The Commission and the Committees advise Ministers on matters under the Act and on other matters relating to medicinal products. The 1968 Act also provides for the regulation of the sale and supply of medicinal products, the registration of pharmacies in the community and the conduct of these businesses, the advertising and promotion of sales of medicinal products, establishment of the *British Pharmacopoeia* and other compendia, and powers of enforcement.
- (b) *The Medicines for Human Use (Marketing Authorisations etc.) Regulations 1994* and *the Marketing Authorisations for Veterinary Medicinal Products Regulations 1994*. These regulations govern the licensing of the marketing of medicines for human and veterinary use respectively.
- (c) *The Poisons Act 1972*. This Act is concerned with the regulation of the sale and storage of non-medicinal poisons within Great Britain. It makes provision for the categorisation of poisons and determination of the persons (either pharmacists only or pharmacists and others on a local authority list) who may sell different categories of non-medicinal poisons. The Secretary of State determines how a poison is categorised for the purposes of the Act, acting on the recommendation of the Poisons Board. The 1972 Act also provides for inspection and enforcement to be carried out by the Pharmaceutical Society of Great Britain.
- (d) *The Biological Standards Act 1975*. This Act provides for the establishment of the National Biological Standards Board whose main duties are to set standards for and to test the purity and potency of biological substances such as vaccines, antibodies, hormones and blood products.

Second reservation

This reserves the regulation of prices charged for medical supplies or medicinal products supplied for the purposes of the National Health Service in Scotland, which is the health service established under section 1 of the National Health Service (Scotland) Act 1978.

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

The existing statutory powers to control the maximum prices to be charged for medical supplies and medicinal products required by the National Health Service in the National Health Service Act 1977 (for England and Wales) and the National Health Service (Scotland) Act 1978 (for Scotland) have never been used. Instead there is a voluntary agreement made with the pharmaceutical industry known as the Pharmaceutical Price Regulation Scheme (the PPRS) which is wider than the statutory powers. The reservation of this matter is not therefore restricted to the subject-matter of the existing statutory provisions but is intended to cover the matter as regulated in the PPRS.

Under section 27 of the 1978 Act the Secretary of State for Scotland has a power to make regulations regarding the provision of pharmaceutical services. As part of those regulations he sets a drug tariff which is used for the purposes of reimbursing pharmacists for the cost of supplying medicines. The reservation of the regulation of prices charged for medicines supplied to the Health Service does not cover the regulation of provision of pharmaceutical services (including the drug tariff) except in respect of the price of supplying medicines by way of providing those services.

“Medical supplies” and “medicinal products” are defined by reference to section 49(3) of the National Health Service (Scotland) 1978 and section 130(1) of the Medicines Act 1968 respectively.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Pharmacy Act 1954 (c.61), Schedule 1C, paragraph 3(4)(b).</p>	<p>The function of the Secretary of State* to approve appointment of persons as chairman or deputy chairman of panel of persons eligible for membership of appeals tribunals.</p>
<p>The Medicines Act 1968 (c.67), section 109.</p>	<p>Section 109(1) and (2) - The function of the Secretary of State to enforce in Scotland, or to secure the enforcement in Scotland of, the provisions of the Act and of any regulation or orders made under it. Section 109(3) - The function of the Secretary of State to make regulations providing for the Pharmaceutical Society of Great Britain to have a power to enforce any regulations made under Section 66 of the Act relating to medicinal products.</p>

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The Medicines Act 1968 (c.67), sections 2(2) and (4) and 4(5).</p>	<p>Section 2(2) and (4) - the function of appointing the members and chairman of the Medicines Commission. Section 4(5) - the function of appointing members of committees.</p>
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Residual Functions

The functions of the Secretary of State for Scotland (as “Secretary of State concerned with health in Scotland” or as “Secretary of State concerned with agriculture in Scotland”) under the Medicines Act 1968, the Medicines Act 1971, the Marketing Authorisations for Veterinary Medicinal Products Regulations 1994 and the Registration of Homeopathic Veterinary Medicinal Products Regulations 1997, and the Poisons Act 1972 were transferred to the Secretary of State for Health, the Secretary of State for the Home Department and the Minister for Agriculture, Fisheries and Food, as appropriate, by the Transfer of Functions (Medicines and Poisons) Order 1999 (S.I. 1999/3142).

Section J5: Welfare Foods

Purpose and Effect

This Section reserves schemes for the distribution of welfare foods made under regulations under section 13 of the Social Security Act 1988.

General

Schemes for the distribution of welfare foods made by regulations under section 13 of the

Social Security Act 1988 provide nutritional supplements for expectant and breast-feeding mothers and children under the age of five. This is done by providing, free or at a reduced rate, liquid cow’s milk, dried milk, vitamin tablets and vitamin drops. Eligibility for this part of the scheme is dependent upon entitlement to certain income-related benefits and so is closely linked to social security schemes, which are reserved under Section F1. There is also provision for children under the age of 5 years and in day care for two hours or more per day to receive, free of charge, liquid cow’s milk or dried milk, and other children aged 5 and over but under the age of 16 who are unable because of a physical or mental disability to attend school, to receive liquid cow’s milk.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	27-Jul-98	1284
LR	3-Nov-98	202

Details of Provisions

This reservation ensures that the Scottish Parliament has no legislative competence to make provision about the matters which are or could be covered by welfare food schemes as described above. The 1988 Act amends the law relating to social security in a number of ways; section 13 is only concerned with making provision for welfare food schemes.

Executive Devolution

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750) transferred non-statutory functions in relation to the welfare foods scheme.

Agency Arrangements

The Scotland Act 1998 (Agency Arrangements) Order 1999 ([S.I. 1999/1512](#)) specified certain functions exercisable by the Scottish Ministers in relation to the welfare foods scheme for the purpose of section 93 of the Scotland Act.

Section K1: Broadcasting

Purpose and Effect

This Section reserves broadcasting. All regulatory responsibilities relating to television and radio broadcasting will be reserved including the functions of the regulatory bodies. The functions and regulation of the BBC will also be a reserved matter.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1095
CC	4-Mar-98	1096
LC	27-Jul-98	1308
LR	3-Nov-98	234

Details of Provisions

Reservation

The subject-matter of the Broadcasting Acts 1990 and 1996 and the BBC, are reserved matters.

The regulatory framework for broadcasting is an important aspect of the single market in the UK. The management of the airwaves and of competition in the independent television sector will therefore continue to be carried out on a UK-wide basis.

The Broadcasting Acts 1990 and 1996 broadly cover:

- (a) the Independent Television Commission and the Radio Authority, the regulation of the provision of television and sound programme services and related services, including provision by means of broadcasting, telecommunications systems, satellite or any other means, the issue of licences to independent television companies and control of the activities of licence holders;
- (b) the control of material in television and sound programmes and related services; and
- (c) the regulation of standards in the provision of such services including the functions of the Broadcasting Standards Commission.

The BBC operates under its Royal Charter, and is also subject to some of the provisions of the Broadcasting Acts.

The reservation does not prevent the Scottish Parliament from discussing broadcasting in Scotland. It is able (without any special provision in the Act) to invite the BBC, the ITC and other broadcasting bodies to attend hearings of its committees and to discuss broadcasting priorities but it cannot require them to attend or give evidence.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

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

<p>The Broadcasting Act 1990 (c.42), section 183.</p>	<p>The function of the Secretary of State to pay to the Independent Television Commission for each financial year such amount as he may, with the approval of the Treasury, determine to be appropriate for the purposes of the section which is the financing of television and sound programmes in Gaelic out of the Gaelic Broadcasting Fund.</p>
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The following functions have been made concurrently exercisable by a Minister of the Crown and the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Broadcasting Act 1990 (c.42), Schedule 1, paragraph 15(1), Schedule 8, paragraph 15(1) and Schedule 19, paragraph 12(3).</p>	<p>Schedule 1, paragraph 15(1) - The functions of the Secretary of State:</p> <ul style="list-style-type: none"> (a) of receiving from the Independent Television Commission a general report of their proceedings during each financial year; and (b) of laying copies of each such report before each House of Parliament. <p>Schedule 8, paragraph 15(1) - The functions of the Secretary of State:</p> <ul style="list-style-type: none"> (a) of receiving from the Radio Authority a general report of their proceedings during each financial year; and (b) of laying copies of each such report before each House of Parliament. <p>Schedule 19, paragraph 12(3) The functions of the Secretary of State of receiving the Gaelic Television Committee's annual report and of laying a copy of the report before Parliament.</p>
<p>The Broadcasting Act 1996 (c.55), section 125(1).</p>	<p>The functions of the Secretary of State:</p> <ul style="list-style-type: none"> (a) of receiving from the Broadcasting Standards Commission a report of their proceedings during each financial year; and (b) of laying copies of each such report before each House of Parliament.

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Broadcasting Act 1990(c.42):</p> <ul style="list-style-type: none"> (a) section 1(2)(b), as read with paragraph 2(3) of Schedule 1; 	<p>Section 1(2)(b), as read with paragraph 2(3) of Schedule 1 - the function of the Secretary of State of appointing a member of the Independent Television Commission suited to make the interest of Scotland his special care.</p>
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

(b) section 83(2)(b), as read with paragraph 2(1A) of Schedule 8.	Section 83(2)(b) as read with paragraph 2(1A) of Schedule 8 - The function of the Secretary of State, in appointing members of the Radio Authority under section 83, to appoint a member who appears to him to be suited to make the interests of Scotland his special care.
The Broadcasting Act 1996 (c.55) , section 106(2)(c), as read with paragraph 3(1A) of Schedule 3.	Section 106(2)(c), as read with paragraph 3(1A) of Schedule 3 - the function of the Secretary of State of appointing members of the Broadcasting Standards Commission, but only so far as relating to appointment of a member suited to make the interests of Scotland his special care.

Advice to The Queen

Special arrangements for giving advice to The Queen were described in a written answer by the Prime Minister on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library.

The National Governor for Scotland of the BBC is appointed under the provisions of the Royal Charter. The Secretary of State for Culture, Media and Sport will consult the Scottish Ministers about the appointment of the National Governor for Scotland

Section K2: Public Lending Right

Purpose and Effect

This Section reserves the public lending right.

General

The Public Lending Right Scheme is a scheme for payments to authors in respect of copies of their books which are lent out to the public by public libraries. Annual payments to authors are based on loans of their books in a sample of UK library authorities. The scheme and the central fund provided by Parliament to pay for it are administered by a Registrar of Public Lending Right.

Details of Provisions

Reservation

Legislative competence in regard to the public lending right is reserved by reference to the subject-matter of the Public Lending Right Act 1979. The 1979 Act establishes the framework for the scheme, the details of which are set out in rules made under sections 1 and 3 of the Act, and provides for the appointment of the Registrar of Public Lending Right.

Section K3: Government Indemnity Scheme

Purpose and Effect

This Section reserves the Government Scheme under which libraries, museums, art galleries and other bodies or person may be indemnified in respect of loss of or damage to works of art lent to other institutions, bodies or persons.

General

In order to encourage public access to works of art and other objects on loan, the Government encourages loans of works to museums, galleries, libraries etc. by relieving them of the cost of commercial insurance by undertaking to indemnify the lender for the loss of, or damage to, the object loaned. This is known as the “Government Indemnity Scheme”, which is established under powers conferred on Ministers by the National Heritage Act 1980.

Details of Provisions

Legislative competence in respect of the subject-matter of sections 16 and 16A of the National Heritage Act 1980 is reserved. Section 16 sets out the conditions under which Ministers may undertake to give indemnities and section 16A requires them to make reports to Parliament.

Section K4: Property Accepted in Satisfaction of Tax

Purpose and Effect

This Section reserves the acceptance of property and works of art in satisfaction of tax.

General

This Section concerns the ability of the Commissioners of Inland Revenue under the Inheritance Tax Act 1984 to accept land, books, works of art and certain other items in satisfaction of liability to inheritance tax or interest thereon. That matter is reserved by the general reservation of fiscal matters, with certain exceptions, by Section A1. The present Section reserves legislative competence in respect of the ability of Ministers to direct how the property accepted by the Inland Revenue should be disposed of, and to pay the Commissioners sums equal to the amounts of tax concerned.

Details of Provisions

Reservation

The subject-matter of the following is reserved:

- (a) *section 8 of the National Heritage Act 1980*, which covers Ministerial powers to pay the Commissioners of the Inland Revenue; and
- (b) *section 9 of the same Act*, which empowers Ministers to direct how the property accepted by the Inland Revenue should be disposed of.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The National Heritage Act 1980 (c.17), section 9(1) to (6), as read with section 9(8) and (9)(a), (b) and (c), and sections 16 and 16A.</p>	<p>Section 9:</p> <ul style="list-style-type: none">(a) The functions conferred on Secretary of State to direct the disposal of property accepted in satisfaction of tax, so far as concerns certain property in which there is a Scottish interest.(b) The function of the Secretary of State to lay before Parliament an annual statement giving particulars of any disposal or transfer made in pursuance of directions given under
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	<p>this section., so far as concerns any disposal or transfer of property in which there is a Scottish interest.</p> <p>Section 16 - The functions of the Secretary of State (as “Minister” under the Act) to undertake to indemnify any institution, body or person for the loss of, or damage to, any object belonging to that institution, body or person while on loan to any other institution, body or person in Scotland falling within section 16(2).</p> <p>(Note: the Secretary of State is the sole remaining Minister for the purposes of the 1980 Act by virtue of a Transfer of Functions Order - S.I. 1992/1311).</p> <p>Section 16A - The function of the Secretary of State to lay before Parliament a report under section 16A(1) on undertakings given by him (and on outstanding contingent liabilities in respect of such undertakings) in respect of objects loaned to institutions, bodies or persons in Scotland.</p>
<p>The Inheritance Tax Act 1984 (c.51), section 230.</p>	<p>The function conferred on the Secretary of State to agree to the Commissioners’ accepting in satisfaction of tax or interest payable under section 233 any property to which section 230 applies, so far as relates to property in which there is a Scottish interest.</p>

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<p>The National Heritage Act 1980 (c.17), section 9(1) to (5), as read with section 9(8) and (9)(d).</p>	<p>The functions of the Secretary of State to direct the disposal of property accepted in satisfaction of tax, so far as concerns property which an institution in Scotland and an institution elsewhere have both expressed an interest in acquiring.</p>
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Section L1: Judicial Remuneration

Purpose and Effect

This Section reserves the determination of the salaries of certain senior judicial posts in Scotland. The payment of judicial salaries, however, is a matter for the Scottish Ministers as are recommendations on judicial appointments.

General

This Section reserves only the determination of the level of the salaries of the holders of certain specified judicial posts in Scotland. The responsibility for determining their level rests with the UK Government. Payment of salaries is not covered by the

reservation. The Scottish Ministers are therefore responsible for paying the salaries, which are charged on the Scottish Consolidated Fund. The determination of judicial pensions is a reserved matter as a consequence of the reservation of occupational and personal pensions at Section F3 and the UK Ministers will therefore retain their current statutory responsibilities for pensions in respect of the specified posts as well as others.

The reservation should be read with section 95 of the Act which provides for the appointment and dismissal of judges of the Court of Session.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1113
CC	31-Mar-98	1114
LC	27-Jul-98	1318

Details of Provisions

Reservation

This Section reserves the determination of the salaries of the following:

- (a) Judges of the Court of Session. This covers all the judges of the Court of Session including the Lord President of the Court of Session and the Lord Justice Clerk. The salaries of judges of the Court of Session are currently determined by the Secretary of State with the consent of the Treasury under section 9(1) of the Administration of Justice Act 1973. The salaries were formerly charged on the UK Consolidated Fund. This was modified by virtue of section 119(3) of the Scotland Act so that these salaries are charged on the Scottish Consolidated Fund, thus allowing them to be paid without requiring the prior annual approval of the Scottish Parliament. This maintains the previous position whereby they were paid without requiring Parliamentary approval;
- (b) Sheriffs Principal and Sheriffs. Again these salaries are determined by the Treasury under the Sheriff Courts (Scotland) Act 1907. They are now charged on the Scottish Consolidated Fund by virtue of section 119(3);
- (c) Members of the Lands Tribunal for Scotland. These are determined by the Secretary of State with the approval of the Treasury under the Lands Tribunal Act 1949, sections 2(6) and (9). Paragraph 9 of Schedule 8 to the Act provides for the remuneration of members of the Lands Tribunal to be charged on the Scottish Consolidated Fund (prior to devolution they were paid out of monies provided by Parliament). Travel and subsistence allowances for members of the Lands Tribunals for Scotland, which are also determined under section 2(6) of the 1949 Act, are not a reserved matter and are now determined by the Scottish Ministers; and
- (d) The Chairman of the Scottish Land Court. Paragraph 3 of Schedule 1 to the Scottish Land Court Act 1993 provides for the determination of the salary payable to the Chairman and members of the Land Court by the Treasury and for the salary to be paid out of the Consolidated Fund. Only the salary of the Chairman of the Land Court is to be a reserved matter. Accordingly, his salary continues to be determined by the Treasury while the salary payable to the other members is a devolved matter determined by the Scottish Ministers. The salaries of both the Chairman and the other members are charged on and paid out of the Scottish Consolidated Fund by virtue of section 119(3).

Paragraph 5(a) of Schedule 4 to the Act prevents the Scottish Parliament from modifying the effect of section 119(3) in relation to any provision of an Act of Parliament relating to judicial salaries, namely the effect of section 119(3) upon those provisions mentioned above which provide for the judicial salaries to be charged on the Scottish Consolidated Fund.

Section L2: Equal Opportunities

Purpose and Effect

The Section reserves equal opportunities, subject to certain exceptions.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1114
LC	27-Jul-98	1322
LC	27-Jul-98	1324
LR	2-Nov-98	11

Reservation

There is no current statutory definition of “equal opportunities”. For the purposes of this reservation, the interpretation provision at the end of the Section states that “equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

Current legislation makes provision in relation to the prevention or elimination of discrimination on grounds of sex, marital status, race or disability. There is no current domestic legislation dealing with discrimination on grounds such as age or sexual orientation. All these matters are, however, reserved.

The reservation refers to equal opportunities, including the subject-matter of:

- (a) *the Equal Pay Act 1970*. This makes provision for the elimination of discrimination on the grounds of sex in relation to the terms and conditions of employment, including pay;
- (b) *the Sex Discrimination Act 1975*. This makes provision for the prevention or elimination of discrimination on the grounds of sex or marital status. It covers sex discrimination against women, sex discrimination against men and also sex discrimination against transsexuals in relation to employment, training, education and the provision of goods, facilities, or services to the public or a sector of the public. The Act established the Equal Opportunities Commission which is charged with working towards the elimination of discrimination, the promotion of equality of opportunity between men and women generally, and the enforcement of its provisions. It is also required to keep under review the workings of the 1970 Act and the 1975 Act;
- (c) *the Race Relations Act 1976*. This makes provision for the elimination of discrimination on racial grounds. It made provision in relation to administration and enforcement similar to that provided in relation to sex discrimination by the 1975 Act. The 1976 Act also established the Commission for Racial Equality which has duties similar to those of the Equal Opportunities Commission; and
- (d) *the Disability Discrimination Act 1995*. This makes provision for the elimination of discrimination against disabled persons in connection with employment and the provision of goods, facilities and services and the disposal or management of premises. Part V of this Act, the subject-matter of which is expressly reserved under Section E5, is about standards for public passenger transport of disabled people. The Act covers persons suffering either physical or mental disability. The 1995 Act also established the National Disability Council which advised the Secretary of State on matters relevant to the elimination of discrimination against disabled persons. The NDC has now been replaced by the Disability

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

Rights Commission, which was established by the Disability Rights Commission Act 1999.

The reservation of the subject matter of these enactments also includes the bodies established by them, namely the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. However, in view of the existence of the exceptions to the equal opportunities reservation, it may be questionable whether or to what extent the Scottish Parliament might have been able to legislate with respect to them, such a to confer functions upon them, Paragraph 3(2)(c) of Part III of Schedule 5 also provides that these 3 bodies are included among the “reserved bodies” for the purposes of paragraph 3(1) of Part III of Schedule 5. That paragraph makes it clear that the Scottish Parliament cannot legislate about the constitution of such bodies or to confer functions on it or functions which are specifically exercisable in relation to them.

Exceptions

The exceptions from the reservation mean that the Scottish Parliament has competence over:

- (a) The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements. “Equal opportunity requirements” are defined in the interpretation section as the requirements of the law for the time being relating to equal opportunities so that it can expand to include any new categories of prohibited anti-discriminatory behaviour. This allows the Parliament to exhort public authorities and others to adopt equal opportunity policies, and to allocate financial and other resources to the encouragement of equal opportunities; and
- (b) Imposing duties on:
 - i. any office-holder in the Scottish Administration, or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements; or
 - ii. any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.

These exceptions from the reservation will allow the Scottish Parliament for example to develop schemes to secure better provision of services to groups who may be the subject of discrimination or to legislate to require certain public authorities and office-holders to have due regard to equal opportunity requirements. “Scottish functions” are defined in the interpretation paragraph as meaning functions which are exercisable in or as regards Scotland and which do not relate to reserved matters.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<p>The Race Relations Act 1976 (c.74), sections 19(5) and 57(5).</p>	<p>Section 19(5) - The function of the Secretary of State to cause a local inquiry to be held under section 67 of the Education (Scotland) Act 1980 into any matter arising from section 19(3) of the 1976 Act.</p> <p>Section 57(5) - Where a person has given notice to the Secretary of State of a claim that he has been discriminated against in</p>
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*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	contravention of section 17 or 18 of the 1976 Act by a body to which section 19(1) of the Act applies, the function of the Secretary of State to give notice informing the claimant that the does not require further time to consider the matter.
The Education (Scotland) Act 1980 (c.44) , section 70 as applied by the Race Relations Act 1976 (c.74) , section 19(3).	Section 70 - The functions of the Secretary of State under section 70 of the Education (Scotland) Act 1980, as applied by section 19(3) of the 1976 Act, to enforce the duties imposed by sections 17, 18 and 19(1) of the 1976 Act on a body to which section 19(1) of the 1976 Act applies.

The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

The Sex Discrimination Act 1975 (c.65) , section 53(1), as read with section 53(1A).	The function of the Secretary of State of appointing commissioners of the Equal Opportunities Commission, but only so far as relating to appointment of a commissioner with special knowledge of Scotland.
The Race Relations Act 1976 (c.74) , section 43(1), as read with section 43(1A).	The function of the Secretary of State of appointing commissioners of the Commission for Racial Equality, but only so far as relating to appointment of a commissioner with special knowledge of Scotland.
The Disability Discrimination Act 1995 (c.50) , paragraph 3(3), as read with paragraph 3(3A) of Schedule 5.	The function of the Secretary of State of appointing members of the National Disability Council, but only so far as relating to the appointment of a member with special knowledge of Scotland.

Section L3: Control of Weapons

Purpose and Effect

This Section reserves the control of weapons of mass destruction.

General

There are three existing enactments dealing with matters covered by this reservation: the Biological Weapons Act 1974, which prohibits the development, production, acquisition and possession of certain biological agents and toxins and of biological weapons; the Chemical Weapons Act 1996, which is concerned with the control of chemical weapons and certain toxic chemicals; and the Nuclear Explosions (Prohibition and Inspections) Act 1998. Certain matters relating to firearms are also reserved.

Details of Provisions

This reserves the control of nuclear, biological, chemical and any other weapon of mass destruction, as distinct from other weapons, such as firearms.

Section L4: Ordnance Survey

Purpose and Effect

This Section reserves the Ordnance Survey.

General

The Ordnance Survey (OS) is the national mapping organisation for Great Britain and the Isle of Man. The Ordnance Survey Department is currently responsible to the Secretary of State for the Environment, Transport and the Regions.

Details of Provisions

This reserves the subject-matter of the Ordnance Survey Act 1841, which confers functions on the Secretary of State in respect of the survey of Great Britain and the Isle of Man by virtue of which the OS Department prepares the OS maps.

Section L5: Time

Purpose and Effect

This Section reserves the establishment of timescales and time-zones, the calendar and other matters related to time.

General

The reservation covers certain matters relating to the determination of time and dates generally. It does not, extend to the calculation of periods of time for the purposes of the civil law such as the expiry of obligations, or for any other purpose related to devolved matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1132
CC	31-Mar-98	1133
LC	27-Jul-98	1326
LR	3-Nov-98	242
L3	9-Nov-98	580

Details of Provisions

The reservation covers the designation of the timescale and time zones used in the UK and matters related to them, such as Greenwich Mean Time or Co-ordinated Universal Time; the determination of units of time such as minutes, hours, days, months and years and the calendar generally; the determination of the date of Easter, such as, by the Easter Act 1928; and the determination of summer time, under the Summer Time Act 1972.

Exception from Reservation

There are two exceptions from this reservation:

- (a) the computation of periods of time for any purpose such as whether particular days are to be included when periods of time are calculated and determining when obligations expire or become unenforceable for the purposes of the civil law; and

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

(b) the subject-matter of:

- i. *section 1 of the Banking and Financial Dealings Act 1971*. The dates for bank holidays are determined under this section. The Scottish Parliament is thus able to determine the dates of bank holidays in Scotland and also any public and local holidays in Scotland; and
- ii. *the Term and Quarter Days (Scotland) Act 1990*. This sets out for Scotland the dates of term days, Whitsunday and Martinmas: 28 May and 28 November respectively, and the other quarter days, Candlemas and Lammas: 28 February and 28 August. These days are used in various legal documents made under Scots law, such as leases, agreements and undertakings.

Advice to The Queen

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library. The Secretary of State for Scotland's role in providing advice to the Privy Council on Proclamations by Her Majesty in Council under section 1 of the Banking and Financial Dealings Act 1971 altering statutory bank holidays in Scotland etc. has passed to the First Minister.

Section L6: Outer Space

Purpose and Effect

This reserves activities in outer space.

General

Under the Outer Space Act 1986 the Secretary of State is responsible for the granting of licences to any UK body or person intending to engage in activities in outer space. This relates to the fact that the UK Government has potential liability under international law for damage caused through such activities. The licensing of such activities, and all other matters relating to the regulation of such activities is reserved.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	27-Jul-98	1333
LR	3-Nov-98	247

Details of Provisions

The reservation extends to all matters related to the regulation of activities in outer space. In addition the negotiation of international agreements relating to outer space would fall within the reservation of foreign affairs under Paragraph 7 of Part I of Schedule 5.

Part III: General provisions

Purpose and Effect

This Part contains general provisions about Scottish public authorities, reserved bodies and financial assistance to industry. It also contains a general interpretation provision.

Detail of Provisions

Paragraphs 1 and 2: Scottish public authorities

These paragraphs clarify the extent to which the Scottish Parliament can legislate with regard to a Scottish public authority with mixed functions and a Scottish public authority with no reserved functions. There are other provisions in the Act which refer to such authorities - see sections 91, 92, 118, 119, Schedule 5, Part II, Sections B13 and L2.

Paragraph 1(1) provides that the Schedule does not reserve any Scottish public authority if some of its functions relate to reserved matters and some do not, unless it is a cross-border public authority. This is referred to as a Scottish public authority with mixed functions. A Scottish local authority is an example of such an authority.

The expression “Scottish public authority” is defined in section 126(1) as meaning any public body (except the Scottish Parliamentary Corporate Body), public office or holder of such an office whose functions are exercisable in or as regards Scotland. Section 126(3) makes provision for determining whether any function of a public body etc relates to reserved matters. A cross-border public authority is defined in section 88.

Paragraphs 1(2) and (3) make it clear that paragraph 1(1) means that the Scottish Parliament can legislate as regards the constitution of the authority (including its establishment and dissolution, its assets and liabilities and its funding and receipts) and as regards conferring or removing any function specifically exercisable in relation to the authority, but not where that function is specifically exercisable in relation to a particular function of the authority if that particular function relates to reserved matters.

Paragraph 2 provides that paragraph 1 of Part I of the Schedule (which reserves aspects of the Constitution) does not reserve any Scottish public authority with functions none of which relate to reserved matters. This ensures that such authorities are not caught by the reservation of the Crown. This type of authority is referred to as a Scottish public authority with no reserved functions.

Paragraph 3: Reserved bodies

This paragraph makes clear what is meant by the reservation of certain bodies to which it applies which are referred to in the cross heading as “reserved bodies”.

Paragraph 3(1) provides that the reservation of a “reserved body” has effect to reserve the following key aspects of it:

- (a) its constitution, including its establishment and dissolution, its assets and liabilities and its funding and receipts;
- (b) conferring functions on it or removing functions from it; and
- (c) conferring or removing any functions specifically exercisable in relation to it.

Paragraph 3(2) provides that paragraph 3 applies to the following bodies:

- (a) bodies reserved by name in Part 11 of Schedule 5. These are¹⁷:
 - the Bank of England (Section A1);
 - the Industrial Development Advisory Board (Section C14);
 - the Health and Safety Commission, the Health and Safety Executive and the Employment Medical Advisory Service (Section H2, as inserted by [S.I. 1999/1749](#), article 6);
 - the BBC (Section K1);

¹⁷ This list also used to include the Post Office which was reserved by C11. However that Section was amended by [S.I. 2000/3252](#) and there is no longer any reference to the Post Office.

- (b) each of the councils reserved by Section C12 in Part 11. These are the Research Councils;
- (c) the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission¹⁸.

Paragraph 4: Financial Assistance to Industry

Paragraph 4 clarifies the extent to which the Scottish Parliament can legislate about financial assistance to industry.

Paragraph 4(1) provides that the giving of financial assistance to commercial activities is not reserved where it is for the purpose of promoting or sustaining economic development or employment. This would include provision of a general nature which permits assistance to industries whose regulation is a reserved matter.

However, provision is made by paragraph 4(2) for certain exceptions. These are as follows:

- (a) the giving of financial assistance to any activities in pursuance of a power exercisable only in relation to activities which are reserved. This means that the Parliament cannot legislate for such assistance specifically in relation to a reserved commercial activity such as coal mining;
- (b) the giving of financial assistance in relation to matters covered in Part I of Schedule 5 (such as the Constitution, the Crown, foreign affairs, etc.), except for the matters in paragraph 9 (defence). The Parliament could therefore give financial assistance of a general nature to the defence industry in Scotland; and
- (c) the giving of financial assistance to the “reserved bodies” to which paragraph 3 of Part III of Schedule 5 applies (see list above).

Paragraph 4(2)(c) clarifies that paragraph 4(1) does not prejudice the non-reservation of specific types of financial assistance to industry in Sections C11¹⁹, E2 and E3 of Part II of Schedule 5, such as financial assistance for certain types of rail and shipping services or the provision of certain services at public post offices.

Paragraph 4(3) clarifies that paragraph 4(1) does not affect the question whether any matter other than financial assistance to which it applies is reserved..

The provisions in Schedule 5 relating to financial assistance should be read in conjunction with section 56. This provides for a number of “devolved” functions relating to the giving of specific types of financial assistance to be shared powers. This means that a UK Minister can also exercise those listed functions in or as regards Scotland.

Paragraph 5: Interpretation

Paragraph 5 makes provision as to how references to the subject matter of any enactment are to be construed.

Many reservations (or exceptions from reservations) in Schedule 5 are expressed by reference to the subject matter of particular enactments. Paragraph 5(1) provides that references in Schedule 5 to enactments are to be read as references to that enactment as it has effect on the principal appointed day (1 July 1999) or, if it ceased to have effect at any time within the period ending with that day and beginning with the day on which the Scotland Act was passed (17 November 1999), as it had effect immediately before that time. Accordingly, it does not matter if those enactments are amended or even

¹⁸ The reference to the Disability Rights Commission was substituted for a reference to the National Disability Council by paragraph 4 of Schedule 4 to the Disability Rights Commission Act 1999.

¹⁹ This was added by Article 2(2) of [SI 2000/3252](#).

repealed after that time: the references to them in the Schedule will continue to be read as they have effect on 1 July 1999.

“Principal appointed day” is defined in section 126(1) to mean the day which is designated as such in a commencement order under section 130. This day is 1 July 1999 by virtue of [S.I. 1998/3178](#).

Paragraph 5(1) is disapplied by Section C11 in Part II of Schedule 5, as amended by [S.I. 2000/3252](#). This is because it refers to the subject matter of the Postal Services Act 2000. Instead that Section provides that this reference falls to be read by reference to the subject matter of that Act at the date when it received Royal Assent (28 July 2000).

Paragraph 5(2) provides for the making of transitional provision in relation to the operation of Schedule 5 at any time before 1 July 1999.

SCHEDULE 6: Devolution Issues

Purpose and Effect

This Schedule is given effect to by section 98. The Schedule defines devolution issues and provides for special procedures to apply to them when they arise in legal proceedings in Scotland, England and Wales and Northern Ireland. It also makes provision for proceedings in the House of Lords and for direct references to the Judicial Committee.

General

A number of legal questions may be raised as a result of the Scotland Act and the establishment of the Scottish Parliament and the Scottish Executive. There may, for example, be questions as to whether an Act of the Scottish Parliament is within the legislative competence of the Parliament or whether some function has transferred from a Minister of the Crown to the Scottish Ministers or whether a member of the Scottish Executive has acted or failed to act compatibly with the Convention rights or with Community law.

These important questions affect the boundary of the devolution settlement and are called “devolution issues”. This Schedule defines what they are and provides special procedures to apply to them when they arise in legal proceedings. This Schedule does not confer jurisdiction upon the courts to deal with such questions. It assumes that such questions may arise in legal proceedings whether before a court or a tribunal in Scotland, England and Wales and Northern Ireland and then provides for certain procedures to apply.

The main aspects of the special procedures which apply in the case of proceedings in Scotland are:

- (a) that the Advocate General and the Lord Advocate may institute proceedings for the determination of a devolution issue and the Lord Advocate may defend any such proceedings;
- (b) that, where a devolution issue arises in proceedings before a court or tribunal, intimation of the issue has to be given to the Advocate General and the Lord Advocate and they are then entitled to take part in the proceedings, so far as they relate to the devolution issue;
- (c) that, where a devolution issue arises in a court below the level of the Inner House of the Court of Session or the High Court (sitting as a court of Criminal Appeal), the court may refer it to the Inner House or, as the case may be, the High Court. A tribunal may refer such an issue to the Inner House and must do so if there is no appeal from their decision;
- (d) that the Inner House of the Court of Session or the High Court (sitting as a court of Criminal Appeal) may refer a devolution issue to the Judicial Committee - except where the issue has been referred to them;

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

- (e) that there is an appeal against the determination of a devolution issue by the Inner House or the High Court (sitting as a court of Criminal Appeal) to the Judicial Committee. Leave to appeal from the court concerned or special leave from the Judicial Committee is required in the case of the High Court or the Court of Session where there is no appeal to the House of Lords;
- (f) that any devolution issue which arises in the House of Lords must be referred to the Judicial Committee unless the House of Lords considers that it would be more appropriate, having regard to all the circumstances, that it should determine the issue;
- (g) that any of the Law Officers may require any court or tribunal to refer any devolution issue to the Judicial Committee; and
- (h) that any of the Law Officers may refer a devolution issue directly into the Judicial Committee provided it is not the subject of proceedings.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1160
CR	12-May-98	203
CR	12-May-98	204
LC	8-Oct-98	578
LC	8-Oct-98	581
LC	8-Oct-98	582
LC	8-Oct-98	585
LC	8-Oct-98	586
LC	8-Oct-98	588
LC	8-Oct-98	589
LC	8-Oct-98	590

Details of Provisions

Part 1 - Preliminary

Part 1 (paragraphs 1 and 2) defines “devolution issue” for the purposes of this Schedule as meaning one of a series of questions in the following sub-paragraphs:

sub-paragraph (a), a question whether an Act of the Scottish Parliament or any provision of such an Act is within the Parliament’s legislative competence;

sub-paragraph (b), a question whether any function which any person purported or is proposing to exercise is a function of the Scottish Ministers, the First Minister or the Lord Advocate. This would include any question as to whether the function has transferred to the Scottish Ministers under section 53 or has remained with a Minister of the Crown;

sub-paragraph (c), a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is or would be within devolved competence. This is relevant, for example, as to whether a function is exercisable by the Scottish Ministers by virtue of section 53;

sub-paragraph (d), a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is incompatible with any of the Convention Rights or with Community law;

sub-paragraph (e), a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention Rights or with Community law;

sub-paragraph (f), any other question about whether a function is exercisable within devolved competence or in or as regards Scotland, and any other question arising by virtue of the Scotland Act about reserved matters. The questions swept up into this sub-paragraph can arise in various circumstances. For example, there could be a question whether Her Majesty is making an Order in Council within devolved competence (see note on section 118) or whether a function is exercisable “in or as regards Scotland” so that it may transfer by an order under section 63 or whether a public body is a Scottish public authority whose functions are exercisable only “in or as regards Scotland” (see definition in section 126(1)) or whether the functions of a body relate to a reserved matter (see section 126(3)).

Paragraph 2 provides that a devolution issue should not be taken to arise in proceedings before a court or tribunal merely because a party argues that there is such a question if the court or tribunal considers the argument to be frivolous or vexatious.

Part 2: Proceedings in Scotland

Part 2 of the Schedule provides for proceedings about devolution issues in Scotland.

Paragraph 3 provides that Part 2 applies in relation to devolution issues in proceedings in Scotland.

Paragraph 4 provides that either the Lord Advocate or the Advocate General may raise proceedings for the determination of a devolution issue. It also specifically provides that when such proceedings are raised by the Advocate General then the Lord Advocate has the right to defend them. Paragraph 4 also provides that these powers do not prejudice any other powers which may be exercisable by any person.

Paragraph 5 provides that when a devolution issue arises in proceedings before a court or tribunal, intimation of it must be given to the Advocate General and Lord Advocate (if they are not already a party to the proceedings).

Paragraph 6 provides that, if the Advocate General and/or Lord Advocate are given intimation of a devolution issue in any case, they will be able to participate in that case as a party in relation to that issue.

Paragraph 7 provides for references of devolution issues from courts in Scottish civil proceedings (other than the House of Lords or a court of 3 or more judges of the Court of Session) to the Inner House of the Court of Session. In effect this section allows reference of devolution issues that arise in civil proceedings in the Sheriff Court and in the Outer House of the Court of Session to the Inner House. Such references are not mandatory.

Paragraph 8 provides that when a devolution issue arises in a tribunal in Scotland from which there is no appeal the issue must be referred to the Inner House. It further provides that any tribunal from which there is an appeal may make such a reference.

Paragraph 9 provides for references of devolution issues from criminal courts in Scotland to the High Court of Justiciary sitting as a court of Criminal Appeal. It allows reference of devolution issues that arise in proceedings in the District Courts; in criminal proceedings in the Sheriff Court; and High Court proceedings before one judge to a larger bench of judges in the High Court.

Paragraph 10 provides that a court consisting of 3 or more judges of the Court of Session may refer a devolution issue that arises in a case before it to the Judicial Committee. The court is not empowered to make such references where the devolution issue has been referred to the court by another court or tribunal under paragraphs 7 and 8. Accordingly, when the Inner House is acting as a court of first instance or as the court of appeal in

ordinary course it will be able to refer a devolution issue that arises before it to the Judicial Committee.

Paragraph 11 provides that a court consisting of 2 or more judges of the High Court of Justiciary may refer a devolution issue that arises in a case before it to the Judicial Committee. The court is not empowered to make such references where the devolution issue has itself been referred to it by another court under paragraph 9. Accordingly, when a bench of 2 or more judges is acting as the court of criminal appeal it will be able to refer a devolution issue that arises before it to the Judicial Committee.

Paragraph 12 provides that an appeal against a determination of a devolution issue by the Inner House of the Court of Session, where that issue has been referred to the Inner House by another court or tribunal under paragraphs 7 or 8, will lie to the Judicial Committee.

Paragraph 13 provides that an appeal against a determination of a devolution issue by a court of 2 or more judges of the High Court of Justiciary (sitting in ordinary course or on a reference from another court under paragraph 9) or a court of three or more judges of the Court of Session from which there is no appeal to the House of Lords (in effect the Lands Valuation Appeal Court) will lie to the Judicial Committee. However, such an appeal could only be made with the leave of the relevant court or, if that leave is refused, with special leave of the Judicial Committee itself.

Part 3: Proceedings in England and Wales

Part 3 (paragraphs 14-23) make similar provisions to Part 2 but for proceedings in England and Wales.

Part 4: Proceedings in Northern Ireland

Part 4 (paragraphs 24-31) make similar provisions to Part 2 but for proceedings in Northern Ireland.

Part 5: General

Paragraph 32 provides that where a devolution issue arises in judicial proceedings in the House of Lords the issue will normally be referred to the Judicial Committee. However, if the House of Lords considers that it would be more appropriate in the circumstances of any case that it determines the issue it will be able to do so.

Paragraph 33 provides that the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland (i.e. all the principal Law Officers) may require any court or tribunal to refer to the Judicial Committee any devolution issue that has arisen in proceedings to which he is a party.

Paragraph 34 provides that all the principal Law Officers may refer to the Judicial Committee any devolution issue which is not the subject of proceedings. This power enables the Law Officers to refer any vires question to the Judicial Committee if it is not already the subject of a judicial dispute.

Paragraph 35 provides the procedure that must be followed when one of the principal Law Officers has made a reference to the Judicial Committee under paragraph 34 relating to the proposed exercise of a function by member of the Scottish Executive. The Law Officer making the reference must notify a member of the Scottish Executive that he is doing so. Having been so notified, no member of the Scottish Executive shall exercise the function as proposed until the reference has been disposed of. If a member of the Scottish Executive does attempt to exercise the function the Advocate General will be able to raise proceedings against him.

Paragraph 36 enables a court where a devolution issue has arisen in a case, to take account of any additional expenses incurred because of the participation of a Law

Officer who was not previously party to the proceedings in deciding any question as to costs or expenses in the case.

Paragraph 37 provides that any power to regulate the procedures by which courts and tribunals conduct their business will include the power to make provision for the purposes of this Schedule including when a devolution issue is to be raised or referred; the procedure for sisting or staying (holding a case in abeyance); and the manner and timescale in which notice or intimation must be given.

Rules for the Court of Session, High Court of Justiciary and the Sheriff Court are provided by:

Act of Sederunt (Devolution Issues Rules) 1999 (S.I. 1999/1345);

Act of Adjournment (Devolution Issues Rules) 1999 (S.I. 1999/1346); and

Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999 (S.I. 1999/1347).

Paragraph 38 provides that any power or duty to refer a devolution issue to a court shall be interpreted as a power or, as the case may be duty, to refer the issue to the court for a decision i.e. a binding decision upon that issue.

SCHEDULE 7: Procedure for Subordinate Legislation

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	624
LR	28-Oct-98	2039
Stage	Date	Column
LR	2-Nov-98	16
LR	2-Nov-98	122
LR	2-Nov-98	123
LR	2-Nov-98	125
L3	9-Nov-98	542
LCCCLA	17-Nov-98	1201

Details of Provisions

The Table in paragraph 1 sets out the type of parliamentary procedure to which subordinate legislation under the various powers provided by the Scotland Act is to be subject. For each power specified in the left-hand column, the appropriate type of procedure is normally that in the corresponding entry in the right-hand column. The parliamentary procedure is designated by a letter from A to K, with these being explained in paragraph 2. This is subject to the special cases set out in paragraphs 3 and 4, where the procedure is altered in certain circumstances. Two other special cases are provided for in the notes at the foot of the table.

Where a power to make subordinate legislation does not appear in the table (e.g. the power in section 103(3)(c)), such subordinate legislation is not subject to any parliamentary procedure.

Paragraph 2 explains each of the types of procedure ("Type A" to "Type K"). These differ as to:

- (a) whether the instrument is to be subject to procedure in:

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

the Houses of Commons and Lords only (Types B, C, G and I);

the House of Commons only (Type E and K);

the Scottish Parliament only (Types D and J); or

both Parliaments (Types A, F and H).

(b) whether the instrument is to be:

laid in draft and approved (Types A to E);

subject to annulment (unless laid in draft and approved) (Types F and G); or

subject to annulment (Types H to K).

In relation to the United Kingdom Parliament, references to orders being laid in draft and approved or being subject to annulment are to be interpreted with reference to the Statutory Instruments Act 1946 and the standing orders of each House. In relation to the Scottish Parliament, such references are to be interpreted with reference to the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 (S.I. 1999/1096) and to the Standing Orders of the Parliament.

Paragraph 3 alters the procedure to which an instrument would be subject where it contains provisions which "add to, replace or omit any part of the text of an Act". In any such case, the type of procedure is changed to one which requires the instrument to be laid in draft and approved by the Parliament or Parliaments concerned. Thus, if an order under paragraph 7 of Schedule 2 (normally subject to Type H - annulment by either Parliament) were to amend primary legislation, then it would instead be subject to Type A (laid in draft and approved by both Parliaments). This paragraph gives effect to the report of the Delegated Powers and Deregulation Committee of the House of Lords (24th report 1997/98) which recommended that any "Henry VIII power" used to amend primary legislation should be subject to affirmative resolution procedure.

Paragraph 4 provides that, where the general power to make transitory or transitional provision conferred by section 129(1) is used to appropriate sums from the Scottish Consolidated Fund or for sums to be appropriated in aid, then the instrument is to be laid in draft and approved by the Scottish Parliament. The use of the power in this way is also constrained by section 112(2), which requires it to be exercised by Her Majesty in Council. The use of section 129(1) in this way is necessary to put in place the transitional financial arrangements for the year 1999-2000. Note that the procedure for such orders was further amended by article 5 of the Scotland Act 1998 (Transitory and Transitional Provision) (Subordinate Legislation under the Act) Order 1998 (S.I. 1998/3216) for the period up to the principal appointed day.

Paragraph 5 provides that subordinate legislation made under an open power (or by Order in Council under section 89 or 90) which revokes, amends or re-enacts subordinate legislation under that power may be subject to a different procedure from the original subordinate legislation. For example, the original subordinate legislation may be made by Order in Council subject to affirmative resolution procedure, but this may be revoked by an order subject to annulment.

SCHEDULE 8, *Paragraph 1: Public Revenue (Scotland) Act 1833*

Purpose and Effect

Provides for the Scottish Ministers rather than the Treasury to regulate the activities of the Queen's and Lord Treasurer's Remembrancer (Q<R) in Scotland and to issue direction to him in respect of the exercise of his powers.

General

The QLTR is responsible for the collection of certain hereditary revenues of the Crown which are excepted from the general reservation of the Crown. The Crown is reserved under Schedule 5, Part I, paragraph 1(a). The hereditary revenues in question are those from bona vacantia, ultimis haeres and treasure trove which are excepted under Schedule 5, Part I, paragraph 3(3)(a).

The 1833 Act provides for the regulation of and the power to issue directions to the Q<R in respect of the performance of these duties in Scotland. The modification provides for these powers over the Q<R to be exercised by the Scottish Ministers.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Substitutes the “Treasury” in both places where it appears in section 2 of the 1833 Act with the “Scottish Ministers”.

SCHEDULE 8, Paragraph 2: Crown Suits (Scotland) Act 1857

Purpose and Effect

This paragraph makes amendments to the Crown Suits (Scotland) Act 1857 consequential to the establishment of the Scottish Administration and of the post of Advocate General for Scotland. It amends the 1857 Act to enable actions by or against the Scottish Administration to run in the name of the Lord Advocate while actions by or against the UK Government may be brought by or against the Advocate General.

General

The Crown Suits (Scotland) Act 1857 regulates the institution of suits at the instance of, and against, the Crown and public Departments in the Scottish courts. In particular it provides that every action, suit, or proceeding to be instituted in Scotland on the behalf of or against Her Majesty, or in the interest of the Crown, or on behalf of or against any public department, may be lawfully raised in the name and at the instance of or directed against Her Majesty's Advocate for the time being as acting under the 1857 Act, provided always, that before instituting or defending any such action, suit, or proceeding, Her Majesty's Advocate shall have the authority of Her Majesty or of the public department respectively on whose behalf or against whom such action, suit, or proceeding shall be instituted, to the institution or defence thereof.

The modifications listed in paragraph 2 of Schedule 8 add the Scottish Administration to the references to the Crown and public departments as appropriate, to extend the application of the 1857 Act to every action, suit or proceeding to be instituted in Scotland on behalf of or against the Scottish Administration. They further amend references to “Her Majesty’s Advocate” to refer instead to “the appropriate Law Officer” and insert a definition of “appropriate Law Officer” to mean:

- (a) the Lord Advocate, where the action, suit or proceeding is on behalf of or against any part of the Scottish Administration; and
- (b) the Advocate General for Scotland, in any other case.

Details of Provisions

Paragraph 2(1) provides that the Crown Suits (Scotland) Act 1857 shall be amended.

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

Paragraph 2(2) provides that in section 1 (Crown Suits may be brought by or against the Lord Advocate):

- (a) after “Crown” there is inserted “(including the Scottish Administration)”, and
- (b) for “Her Majesty’s Advocate for the time being” there is substituted “the appropriate Law Officer”.

Paragraph 2(3) provides that in section 2 (authority of Crown required):

- (a) for “Her Majesty’s Advocate” there is substituted “the appropriate Law Officer”; and
- (b) after “Majesty” there is inserted “of the part of the Scottish Administration”.

Paragraph 2(4) provides that in section 3 (absence of authority cannot be founded upon):

- (a) for “Her Majesty’s Advocate” there is substituted “the appropriate Law Officer”.

Paragraph 2(5) inserts into the 1857 Act a new section 4A which provides that in the 1857 Act, “the appropriate Law Officer” means:

- (a) the Lord Advocate, where the action, suit or proceeding is on behalf of or against any part of the Scottish Administration; and
- (b) the Advocate General for Scotland, in any other case.

Paragraph 2(6) provides that in section 5 of the 1857 Act (change of Lord Advocate not to affect proceedings):

- (a) for “Her Majesty’s Advocate” there is substituted “the Lord Advocate or the Advocate General for Scotland”; and
- (b) for “the office of Her Majesty’s Advocate” there is substituted “that office”.

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.

SCHEDULE 8, Paragraph 3: Sheriff Courts and Legal Officers (Scotland) Act 1927

Purpose and Effect

Part I of the Sheriff Courts and Legal Officers (Scotland) Act 1927 makes provision as to the appointment of sheriff clerks, procurators fiscal and their deputies.

The provisions of Part I of the 1927 are, by virtue of paragraph 8(2)(a) of Part I of Schedule 5, not reserved and some Ministerial functions conferred by Part I of that Act transferred to the Scottish Ministers under section 53, and section 55(1) of the Scotland Act will provide for Treasury consent requirements not to apply to the exercise of those functions by the Scottish Ministers.

However, this does not apply in relation the functions conferred by Part I of the 1927 Act on the Lord Advocate in relation to the appointment of procurators fiscal and their deputies. These will remain part of the retained functions of the Lord Advocate but it is not intended that the Lord Advocate should have to exercise them subject to consultation with the Treasury. Therefore, this paragraph removes the need for consultation with the Treasury on decisions about the appointment, numbers and salary levels of procurators fiscal and their deputies. The amendments will, however, as a consequence also repeal such Treasury consent requirements in relation to the appointment, numbers and salary levels of sheriff clerks and their deputies.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 3(1) provides that the Sheriff Courts and Legal Officers (Scotland) Act 1927 is to be amended.

Paragraph 3(2) provides that in section 1(2) (appointment etc. of procurator fiscal), “with the consent of the Treasury” is omitted. The effect is that Treasury consent is not required for the fixing by the Lord Advocate of the number of procurators fiscal in Scotland or the limits of the districts for which they act.

Paragraph 3(3) provides that in section 2 (appointment of sheriff clerk and procurator fiscal deputes), “with the consent of the Treasury as to numbers and salaries” is omitted. The effect is that Treasury consent is not required as to the numbers and salaries of sheriff clerk deputes appointed by the Secretary of State or of procurator fiscal deputes by the Lord Advocate.

Paragraph 3(4) provides that in section 3 (whole-time sheriff clerks and procurators fiscal and deputes), “and either case with the consent of the Treasury” is omitted. The effect is that Treasury consent is not required to determinations by the Scottish Ministers (in the case of a sheriff clerk or sheriff clerk depute) or the Lord Advocate (in the case of a procurator fiscal or a procurator fiscal depute) that such an office shall be a whole-time office, thereby preventing the person from engaging in certain other employments.

Paragraph 3(5) provides that in section 5 (whole-time clerks), “with the consent of the Treasury as to numbers and salaries” is omitted. The effect is that Treasury consent as to numbers and salaries is not required to the appointment by the Scottish Ministers or Lord Advocate of whole-time clerks or whole-time assistants to sheriff clerks or procurators fiscal.

Paragraph 3(6) provides that in section 12 (prosecution at instance of procurator fiscal), “after consultation with the Treasury” is omitted. The effect is that Treasury consent is not required to the making of an order by the Lord Advocate directing that certain proceedings in the sheriff court are to be taken by and at the instance of the procurator fiscal.

See also paragraph 14 of Schedule 2 to the Scotland Act 1998 (Consequential Modifications)(No.2) Order 1999 (S.I. 1999/1820) which makes amendments to sections 6, 12 and 13.

SCHEDULE 8, Paragraph 4: Administration of Justice (Scotland) Act 1933

Purpose and Effect

This paragraph amends provisions which give the Secretary of State power of appointment to certain posts in the Supreme Courts on the nomination of the Lord Advocate. The amendment removes the power of the Lord Advocate to nominate candidates.

General

Section 24(7) provides for the Secretary of State to appoint to the office of Macer, on nomination by the Lord Advocate.

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

Section 25 provides for the Secretary of State to appoint to the offices of Principal Clerk of Justiciary, Accountant of Court and Auditor of the Court of Session on nomination of the Lord Advocate.

The provisions requiring the Lord Advocate to nominate candidates for posts in the service of the High Court, including macers, date from a period when the more senior posts in the Supreme Courts were often filled on a part-time basis by members of the legal profession and other prominent figures.

Posts in the service of the Court of Session and the High Court are now filled by members of the Scottish Court Service, who may be promoted or transferred to these posts in the course of their career. In addition, posts in the High Court and the Court of Session are frequently combined (the posts of Principal Clerk of Session and Principal Clerk of Justiciary are nowadays filled by a single appointment) or filled on rotation by Court Service officers serving for a period of time in the Supreme Courts. In the case of the Auditor of Court (who is not a member of the Scottish Court Service) the practice now is to advertise the post. In practice, such posts are filled after consultation with the Lord President/Lord Justice-General; and the requirement for the Lord Advocate formally to nominate to these posts is therefore otiose, particularly in the case of the appointment of macers.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 4 provides that, in the Administration of Justice (Scotland) Act 1933, in sections 24(7) and 25 (officers of Court of Session, etc.), “and shall be exercised on nomination by the Lord Advocate” is omitted.

SCHEDULE 8, Paragraph 5: Private Legislation Procedure (Scotland) Act 1936

Purpose and Effect

This amendment is intended to ensure that a promoter of private legislation may not apply for a provisional order under the Private Legislation Procedure (Scotland) Act 1936 where the powers sought are wholly within the competence of the Scottish Parliament. Such powers should be sought from the Scottish Parliament under whatever private legislation procedure it provides.

General

Section 53 transfers powers to the Scottish Ministers to make, confirm or approve subordinate legislation including certain types of subordinate legislation in the nature of private legislation, namely, special procedure orders and provisional orders. Section 94 modifies existing enactments for those purposes, and also ensures that the powers to make or confirm provisional orders conferred by the 1936 Act are not transferred.

Section 28 gives the Scottish Parliament power to make laws for Scotland to be known as Acts of the Scottish Parliament. It is inherent in this power that the Scottish Parliament is able to pass private Acts as well as public and general Acts, section 36(3) allows the Parliament to provide a modified Bill procedure for private Bills and section 94(2) allows the Parliament to make provision for special procedure orders. The Scottish Parliament has now made provision for Private Bills in its Standing Orders.

Details of Provisions

The 1936 Act provides a procedure by way of provisional order, rather than a private Bill in the UK Parliament, by which any public authority or person may obtain parliamentary powers in relation to certain matters in Scotland. This paragraph amends section 1 of that Act so as to ensure that it does not apply where the powers sought are wholly within the competence of the Scottish Parliament. Such powers would have to be sought from the Scottish Parliament under its private legislation procedures, or from the UK Parliament by other means, such as the promotion of a private Bill.

The 1936 Act procedure could still be used where the powers sought relate to both devolved and reserved matters.

See also article 13 of the Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999 (S.I. 1999/901) (inserted by article 4 of S.I. 1999/1334), which provides that the amendment made by paragraph 5 of Schedule 8 to the Scotland Act does not affect the operation of the Private Legislation Procedure (Scotland) Act 1936 in relation to any petition for a Provision Order presented to the Secretary of State before the principal appointed day. This provision ensures that those applications which were already in progress on the principal appointed day were not affected by the amendment.

SCHEDULE 8, Paragraph 6: United Nations Act 1946

Purpose and Effect

This paragraph amends the wording of subsection (4) of section 1 of the United Nations Act 1946 to provide that any Order in Council made under that section will be laid before the Scottish Parliament as well as before Westminster if any provision in the Order would be within the legislative competence of the Scottish Parliament.

General

Despite the devolution of the implementation and observation of international obligations in relation to devolved matters, it should be possible for the UK Government to use section 1 of the United Nations Act 1946 to implement sanctions on a UK-wide basis. Section 56(1)(b) of the Scotland Act enables existing sanctions licensing to continue on a UK-wide basis by making the relevant Ministerial functions exercisable concurrently by the Scottish Ministers and a Minister of the Crown.

Section 1 of the 1946 Act deals with the implementation of any Security Council resolution. It is used most often to implement UN sanctions by means of licensing of exports and other trade. For the most part they make provision about reserved matters, but certain devolved matters may be covered such as limitations on the provision of training. On occasion, too, the power would be used to implement a resolution which would have a major impact upon a devolved matter. For instance, a recent Order under the 1946 Act enabled the High Court of Justiciary to sit in the Netherlands for the Lockerbie case.

Orders in Council under the 1946 Act require to be laid before Parliament. In the light of the Lockerbie order in particular, it is right that the Scottish Parliament should have a role in relation to an Order in Council under the 1946 Act which makes provision about devolved matters in Scotland. Accordingly, this paragraph amends the 1946 Act to provide that Orders in Council made under it are always to be laid before the UK Parliament even where they relate only to devolved matters, and that they are to be laid also before the Scottish Parliament except in those cases where they relate only to reserved matters.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	252

SCHEDULE 8, Paragraph 7: Crown Proceedings Act 1947

Purpose and Effect

This paragraph makes amendments to the Crown Proceedings Act 1947 consequential to the establishment of the Scottish Administration, to the inclusion of the Lord Advocate in the Scottish Executive and to the establishment of the post of Advocate General for Scotland.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	649

General

The amendments made in this paragraph should be read alongside the amendments made in paragraph 2 to the Crown Suits (Scotland) Act 1857. These Acts make provision about court actions in Scotland which involve the Crown.

The Crown Proceedings Act 1947 makes provision about the civil liabilities and rights of the Crown and about civil proceedings by and against the Crown, and related matters. Part V of the Act provides for the application of the Act in Scotland.

The amendments add the Scottish Administration to the references to the Crown and public departments as appropriate. They further amend references to “the Lord Advocate” to refer instead to the Advocate General for Scotland or to “the appropriate Law Officer” as appropriate, and insert a definition of “appropriate Law Officer” to mean:

- (a) the Lord Advocate, where the proceedings are against the Scottish Administration; and
- (b) the Advocate General for Scotland, in any other case.

The paragraph also modifies those provisions in the Crown Proceedings Act 1947 which refer to Her Majesty’s Government in the United Kingdom so as to include also the Scottish Administration.

Details of Provisions

Paragraph 7(1) provides that the Crown Proceedings Act 1947 shall be amended.

Paragraph 7(2) amends section 38(2) of the 1947 Act consequential on the establishment of the Scottish Administration, which will be a new part of the Crown (the “Crown in right of the Scottish Administration”) separate from the UK Government.

The phrase the “Crown in right of the Scottish Administration” draws a clear distinction between the Scottish Administration and the UK Government in Scotland.

The amendments ensure that certain provisions in the Act relating to the Crown in right of Her Majesty’s Government in the United Kingdom (the UK Government) also apply to the Crown in right of the Scottish Administration.

Section 38(2) of the 1947 Act provides that the references in the Act to “Her Majesty’s aircraft” do not include aircraft belonging to Her Majesty otherwise in right of Her Government in the United Kingdom. There is also a provision in the definition of “Her Majesty’s ships” excepting from that expression any ship in which Her Majesty is interested in otherwise than in right of Her Government in the United Kingdom unless that ship is for the time being demised or sub-demised to Her Majesty in right of Her said Government or in the exclusive possession of Her Majesty in that right. The amendments ensure that the definitions also cover aircraft and ships belonging to the Crown or in which the Crown has an interest in right of the Scottish Administration. Sub-paragraph (c) also provides that the definition of “officer” in relation to the Crown includes a member of the Scottish Executive as well as a Minister of the Crown.

Paragraph 7(3) amends section 40(2) of the 1947 Act, which provides savings in respect of certain Crown liabilities and proceedings so that they apply to Crown liabilities in respect of, and Crown proceedings in right of, the Scottish Administration as well as the UK Government.

It also provides that the Scottish Ministers can provide a certificate to the effect that any alleged liability of the Crown arises otherwise than in respect of the Scottish Administration or that any proceedings by the Crown are otherwise than in right of the Scottish Administration. Section 40(3) already provides that the Secretary of State can issue a certificate to the effect that any alleged liability of the Crown arises otherwise than in respect of Her Majesty’s Government in the UK or to the effect that any proceedings by the Crown are proceedings otherwise in right of Her Majesty’s Government in the UK.

Paragraph 7(4) amends section 44 of the 1947 Act. Section 44 provides that proceedings against the Crown may be instituted in the Sheriff Court. A proviso to the section provides that the proceedings must be remitted to the Court of Session if the Lord Advocate certifies that the proceedings may involve an important question of law or may be decisive of other cases or are for other reasons more fit for trial in the Court of Session.

This amendment provides that in the proviso to section 44 (remit from sheriff court to Court of Session on Lord Advocate’s certificate):

- (a) for “Lord Advocate” there is substituted “appropriate Law Officer”; and
- (b) at the end there is inserted:

“In this proviso, “the appropriate Law Officer” means:

- (a) the Lord Advocate, where proceedings are against the Scottish Administration;
and
- (b) the Advocate General for Scotland, in any other case.”

This has the effect that, where proceedings in the sheriff court are against the Scottish Administration, the Lord Advocate may produce a certificate that the proceedings may involve an important question of law, or may be decisive of other cases, or are for other reasons more fit for trial in the Court of Session, in which case the proceedings would be remitted to the Court of Session. In relation to proceedings in the sheriff court against the Crown but which are not against the Scottish Administration, such a certificate would be produced by the Advocate General for Scotland.

Paragraph 7(5) amends section 50 (application to Scotland of section 35). Section 35 provides that a power to make rules of court includes power to make rules for the purpose of giving effect to the provisions of the Crown Proceedings Act 1947 and that such rules may contain provisions to have effect in relation to any proceedings by or against the Crown. A different subsection (2) of section 35 is substituted for Scotland

by section 50. It provides that certain provisions shall apply as regards proceedings involving the Crown in the Court of Session or the sheriff court.

Paragraph 7(5) amends section 35(2)(d) as substituted for Scotland and inserts a new subsection (e). The references to the Crown in the Scottish version of section 35(2)(a), (b) and (c) without express mention will apply to the Scottish Administration but the Scottish version of section 35(2)(d) is to be amended so that the reference to the Crown in that subsection means only the Crown in right of the UK Government. Subsection (2)(d) is concerned with the matter of set-off or counterclaim in proceedings against a Government Department. The amendment provides that:

- (a) after “Crown” there is inserted “in right of her Majesty’s Government in the United Kingdom”,
- (b) for “Lord Advocate” there is substituted “Advocate General for Scotland”; and
- (c) after “department”, in the second place where it appears, there is inserted:
 - “(i) shall not be entitled to avail itself of any set-off or counterclaim if the subject matter thereof relates to the Scottish Administration, and
 - (ii)”,and.”

The new subsection (2)(e) is as follows:

- “(e) a part of the Scottish Administration, in any proceedings against that part or against the Lord Advocate on its behalf, shall not be entitled to avail itself of any set-off or counterclaim if the subject matter thereof relates to another part of the Scottish Administration or to the Crown in right of Her Majesty’s Government in the United Kingdom.”

These amendments to section 35(2) as it applies to Scotland provide that the Crown in any proceedings against a UK Government Department cannot avail itself of any set off or counterclaim if the subject matter relates to the Scottish Administration and vice versa. No permission from the Court will be available. The amendment also provides that the Scottish Administration is not able to avail itself of any set-off or counterclaim in respect of money owed to other parts of the Scottish Administration, such as the Registrar General or the Keeper of the Registers of Scotland without the leave of the Court.

Paragraph 7(8) amends section 51(2) of the 1947 Act. Section 51(2) makes provision for the application of section 38(4) of the Act to Scotland. Section 38 is the interpretation provision. Section 38(4) as it applies to Scotland provides that references in Parts III (judgements and executions) and IV (miscellaneous and supplemental) of the 1947 Act to civil proceedings by or against the Crown or to civil proceedings to which the Crown is a party shall be construed as including a reference to civil proceedings which the Lord Advocate, or any Government department, or any officer of the Crown as such is the party. The amendment inserts “or the Advocate General for Scotland” after “Lord Advocate”.

This amendment is one of a number, in this and in the Crown Suits (Scotland) Act 1857, which reflect the fact that the Lord Advocate will act for the Crown where the court proceedings are on behalf of or against part of the Scottish Administration and that the Advocate General will act for the Crown in other Scottish cases.

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.

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

SCHEDULE 8, Paragraph 8: Public Registers and Records (Scotland) Act 1948

Purpose and Effect

Paragraph 8 amends the Public Registers and Records (Scotland) Act 1948 so that the Secretary of State's statutory power to appoint a Keeper of the Registers of Scotland and a Keeper of the Records of Scotland will transfer to Scottish Ministers.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Section 1(1) of the Public Registers and Records (Scotland) Act 1948 provides the Secretary of State with the power to appoint the Keeper of the Registers and the Keeper of the Records. Paragraph 8 substitutes "Scottish Ministers" for "Secretary of State" in section 1(1) of the Public Registers and Records (Scotland) Act 1948.

SCHEDULE 8, Paragraph 9: Lands Tribunal Act 1949

Purpose and Effect

This paragraph amends the Lands Tribunal Act 1949 so that the remuneration of members of the Lands Tribunal for Scotland is a charge on the Scottish Consolidated Fund.

General

This amendment is related to several provisions concerning the remuneration of the senior judiciary. Under Schedule 5 (Part II, Section L1) the determination of the remuneration of judges of the Court of Session, sheriffs and certain other senior judicial postholders including members of the Lands Tribunal for Scotland are a reserved matter. Payment of the remuneration will, of course, be funded from the assigned budget of the Scottish Parliament. Before devolution, most of these judicial salaries are a direct charge on the Consolidated Fund. Under section 119 they became a direct charge on the Scottish Consolidated Fund. The present amendment removes the anomaly that the remuneration of members of the Lands Tribunal is not a direct charge on the Consolidated Fund.

The determination of judicial pensions is also reserved (Part II, Section F3), which allows Scottish judges to continue to receive pensions under the UK pension schemes.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	253

Details of Provisions

The paragraph amends section 2 of the Lands Tribunal Act 1949 by:

- (a) providing in subsection (9) that subsection (8) does not apply in relation to the Lands Tribunal for Scotland. Subsection (8) provides for remuneration and certain expenses to be defrayed out of moneys provided by Parliament. A consequential amendment to subsection (9)(a) is also made;

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

- (b) inserting a new subsection (10) which provides that that remuneration of members of the Lands Tribunal for Scotland is a charge on the Scottish Consolidated Fund.

SCHEDULE 8, Paragraph 10: Defamation Act 1952

Purpose and Effect

This paragraph amends section 10 of the Defamation Act 1952 for the purpose of extending its provisions on the limitation on privilege at elections to cover elections to the Scottish Parliament.

General

Section 10 of the Defamation Act 1952 provides that a defamatory statement published by a candidate at a local government or Parliamentary election is not entitled to privilege for the purposes of the law of defamation on the grounds that it is material to an election issue. This amendment applies the same provision to elections to the Scottish Parliament and complements section 41 (Defamatory statements) and the amendments to the Defamation Act 1996 at paragraph 22 of this Schedule. Paragraph 11 makes the same modification for the purposes of the law of defamation in Northern Ireland.

Details of Provisions

Paragraph 10 amends section 10 of the Defamation Act 1952 so that its provisions, as described above, apply also in relation to elections to the Scottish Parliament.

SCHEDULE 8, Paragraph 11: Defamation Act (Northern Ireland) 1955

Purpose and Effect

This paragraph amends section 10(2) of the Defamation Act (Northern Ireland) 1955 for the same purposes as the amendment made by paragraph 10 to section 10 of the Defamation Act 1952.

General

Section 10(2) of the Defamation Act (Northern Ireland) 1955 makes the same provision in the law of Northern Ireland as section 10 of the Defamation Act 1952, relating to the limitation on privilege at elections. As with the amendment to section 10 of the 1952 Act in paragraph 10 of this Schedule, this provision ensures that the same limitation on privilege applies to elections to the Scottish Parliament.

Details of Provisions

This makes amendment to the Defamation Act (Northern Ireland) 1955 identical in effect to those made by paragraph 10 to the Defamation Act 1952.

SCHEDULE 8, Paragraph 12: Registration of Births, Deaths and Marriages (Scotland) Act 1965

Purpose and Effect

Paragraph 12 amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 so that the Secretary of State's statutory power to appoint the Registrar General for Births, Deaths and Marriages for Scotland will transfer to Scottish Ministers.

General

Section 1(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides the Secretary of State with the power to appoint the Registrar General for Births, Deaths and Marriages for Scotland.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 12 substitutes “Scottish Ministers” for Secretary of State in section 1(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

SCHEDULE 8, Paragraph 13: Pensions (Increase) Act 1971

Purpose and Effect

Paragraph 13 amends the Pensions (Increase) Act 1971 so as to ensure that any pensions payable to or in respect of Members of the Scottish Parliament (MSPs), Members of the Scottish Executive and the staff of the Scottish Parliamentary Corporate Body (SPCB) under pensions schemes established in accordance with section 81(4)(b) and paragraph 3(4)(b) of Schedule 2 of the Act will be increased in accordance with the provisions made in the 1971 Act. The effect of this is that the levels of pensions payable under such schemes would, like other official pensions, have to be increased annually in line with the Retail Price Index figure set out in an order by the Treasury.

General

Any pension schemes established by the Parliament or the Scottish Parliamentary Corporate Body (SPCB) providing pensions in respect of MSPs or Members of the Scottish Executive and the staff of the SPCB are in effect public service pensions and therefore ought to be increased in line with the provision made in relation to official pensions by the 1971 Act. This will provide for inflation-proofing of pensions and will help to ensure that whatever pension scheme the Parliament adopts should meet with the Inland Revenue’s tax approval rules. This does not, however, apply the 1971 Act to pensions payable under private arrangements. This will bring the pension provisions for MSPs, members of the Scottish Executive and the staff of the SPCB in line with what exists for Members of the Westminster Parliament, Members of the European Parliament and which is also proposed for Members of the Welsh Assembly.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

SCHEDULE 8, Paragraph 14: Superannuation Act 1972

Purpose and Effect

This paragraph amends section 1(6) of the Superannuation Act 1972. The 1972 Act makes provision for the Principal Civil Service Pension Scheme (PCSPS) and those bodies entitled to be admitted to the Scheme are listed in Schedule 1 of the 1972 Act. However, section 1(6) of the 1972 Act currently provides that no employment or office can be added to the schedule unless the persons employed are remunerated from

the Consolidated Fund. This amendment adds the Scottish Consolidated Fund to the criteria.

General

Paragraph 3(3) of Schedule 2 to the Act makes provision for the SPCB to determine the terms and conditions of staff of the Parliament including the arrangements for the payment of pensions. The SPCB can establish and administer one or more pension schemes.

One option open to the SPCB might be to arrange admittance for the staff of the Parliament to the Principal Civil Service Pension Scheme (PCSPS) under the 1972 Act. It is a matter for the Minister of the Civil Service to decide whether or not any employment or office should be admitted. Those eligible are listed in Schedule 1 of the Superannuation Act 1972 and the Minister of the Civil Service can under section 1(6) of the 1972 Act add or remove employment to this list. However, no employment should be added unless the remuneration of persons in that employment is paid for out of funds provided by Parliament or the Consolidated Fund.

The amendment to section 1(6) to enable the Minister to add to Schedule 1 persons remunerated out of the Scottish Consolidated Fund facilitates the admittance of the staff of the Parliament and any other employees who may be remunerated out of the SCF.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	253

SCHEDULE 8, Paragraph 15: European Communities Act 1972

Purpose and Effect

This paragraph makes various modifications to the European Communities Act 1972.

General

This provision is one of a number dealing with the relations between the Scottish Parliament and Executive and the European Union. Schedule 5 provides that international relations including those with the European Communities (and their institutions) are to be reserved to the UK Parliament and Government. But the Scottish Parliament and Executive are responsible for observing and implementing obligations under Community law in relation to devolved matters.

Section 29 provides that it is *ultra vires* for the Scottish Parliament to legislate in a way that is incompatible with Community law. Section 53 transfers to the Scottish Ministers any functions of Ministers of the Crown of observing and implementing Community Law in relation to devolved matters in or as regards Scotland. Section 57(1) provides that, notwithstanding that 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. Section 57(2) provides that it is *ultra vires* for the Scottish Executive to make subordinate legislation or otherwise to act in any way which is incompatible with Community law.

Details of Provisions

The European Communities Act 1972 is not reserved but certain sections of the Act are entrenched by paragraph 2 of Schedule 4.

The effect of section 53 is that Scottish Ministers are able to exercise the powers under section 2(2) of the 1972 Act to make regulations for the purpose of implementing any Community obligation in relation to devolved matters and as regards Scotland.

Paragraph 15 of Schedule 8 makes certain necessary amendments to the 1972 Act.

Paragraph 15(1) states that the European Communities Act shall be amended.

Paragraph 15(2) provides that in section 2 of the 1972 Act (general implementation of Treaties), references to a statutory power or duty include a power or duty conferred by an Act of the Scottish Parliament (or an instrument made under such an Act); and references to an enactment include an enactment within the meaning of the Scotland Act.

Paragraph 15(3) makes provisions about regulations made by the Scottish Ministers, or an Order in Council made on the recommendation of the First Minister, under section 2 of the 1972 Act.

Paragraph 15(3)(a) provides that the Scottish Ministers do not require to be “designated” in order to make regulations under section 2(2) of the 1972 Act. Section 2(2) of the 1972 Act provides that a “designated” Minister may make regulations for the purpose of implementing any Community obligation, or enabling any such obligation to be implemented. Section 2(2) further provides that any “designated Minister” means such Minister of the Crown as may from time to time be designated by Order in Council. The amendment removes the need for Scottish Ministers to be designated by Order in Council before they can exercise the powers under section 2(2) to make regulations to give effect to Community obligations for Scotland.

Paragraphs 15(3)(b) and (c) make further minor amendments in relation to such regulations or Orders in Council made under section 2. Paragraph 15(3)(b) provides that references to an Act of Parliament shall be read as referring to an Act of the Scottish Parliament. Paragraph 15(3)(c) provides that paragraph 2(2) of Schedule 2 (which makes provision about the parliamentary procedure for statutory instruments made under section 2(2)) shall have effect as if the references to each, or either, House of Parliament were to the Scottish Parliament.

Paragraph 15(4) provides that in section 3(4), which relates to evidence, references to a government department include any part of the Scottish Administration.

SCHEDULE 8, Paragraph 16: Interpretation Act 1978

Purpose and Effect

The Interpretation Act 1978 is concerned with the construction and operation of Acts of Parliament and subordinate legislation. This provision amends the Interpretation Act 1978 to regulate the relationship between an Act of the Scottish Parliament and an Act of the UK Parliament where either one operates on the other.

General

This amendment provides a new section 23A for the Interpretation Act 1978 which will provide for the interpretation of Westminster legislation in connection with Acts of the Scottish Parliament. It deals with those sections of the 1978 Act which contemplate one Act operating on another Act. They make provision about references to Acts of the Scottish Parliament in Acts of the UK Parliament and UK statutory instruments and about regulating certain effects of an Act of the Scottish Parliament which repeals or consolidates an Act of the UK Parliament, and vice versa.

In addition, the amendment inserts new definitions in Schedule 1 to the Act to provide that the terms “Act” and “Enactment” will not include Acts of the Scottish Parliament or instruments made under an ASP. This has the effect of providing a general rule, as a

starting point, that in future Westminster legislation, references to Acts and enactments will not include ASPs and instruments under ASPs.

The Scottish Parliament is able to make its own legislative provision about the construction and operation of Acts of the Scottish Parliament and statutory instruments made under such Acts. Provision is made for these matters 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) until the Scottish Parliament does so.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	253

Details of Provisions

Paragraph 16(1) states that the Interpretation Act 1978 shall be amended.

Paragraph 16(2) inserts new sections after section 23 of the Interpretation Act.

New section 23A(2) and (3) provide that, in certain sections of the Interpretation Act 1978, “Act” includes an Act of the Scottish Parliament. These are sections 15 to 17 (repealing enactments) and section 18 (duplicated offences). The amendment will mean that the provisions in sections 15 (repeal of repeals), 16 (general savings) and 17 (repeal and re-enactment) apply both where a UK Act repeals a previous enactment and where an Act of the Scottish Parliament repeals a previous UK enactment. The subsections also provide that “Act” in section 18 (duplicated offences) includes an Act of the Scottish Parliament. This is to prevent an offender being liable to be punished under both an Act of the UK Parliament and an Act of the Scottish Parliament.

New section 23A(4) provides for the application of section 20, which makes provision about how an Act of the UK Parliament or a UK statutory instrument may describe or refer to another enactment. The amendment will provide that in section 20 a reference to an “enactment” includes an enactment comprised in an Act of the Scottish Parliament.

Paragraph 16(3) amends Schedule 1 of the 1978 Act to provide definitions of “Act” and “enactment” which will apply to future Acts of Parliament. These definitions exclude Acts of the Scottish Parliament and instruments made under them. This will ensure that future references in Westminster legislation to “Act” or “enactment” do not inadvertently include Scottish legislation.

SCHEDULE 8, Paragraph 17: Education (Scotland) Act 1980

Purpose and Effect

Paragraph 17 amends the Education (Scotland) Act 1980 by removing the Secretary of State’s function to make recommendations to Her Majesty with regard to the appointment of Her Majesty’s Inspectors of Schools.

General

Section 135(1) of the Education (Scotland) Act 1980 defines “Her Majesty’s inspectors” as the inspectors of schools appointed by Her Majesty on the recommendation of the Secretary of State. Paragraph 17 removes the reference to the recommendation to the Secretary of State. These recommendations are to be made by the First Minister.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 17 amends section 135(1) of the Education (Scotland) Act 1980 by removing the words which provide for the Secretary of State to make recommendation to Her Majesty in relation to the appointment of Schools Inspectors.

SCHEDULE 8, Paragraph 17: Civil Jurisdiction and Judgments Act 1982

Purpose and Effect

This paragraph amends section 46 of the Civil Jurisdiction and Judgements Act 1982, which makes provision about the domicile and seat of the Crown for the purposes of the 1982 Act. The amendment to subsection (3) provides that the Crown in right of the Scottish Administration has its seat in, and in every place in, Scotland. (See note on paragraph 7 of Schedule 8 for discussion of the Crown in right of the Scottish Administration).

Subsection (7) provides that nothing in section 46 applies to the Crown otherwise than in right of Her Majesty's Government in the United Kingdom or Her Majesty's Government in Northern Ireland. This is amended to insert a reference to the Scottish Administration.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	649

SCHEDULE 8, Paragraph 19: Mental Health Act 1983

Purpose and Effect

This paragraph amends section 141 of the Mental Health Act 1983 for the purposes of ensuring that the Presiding Officer is informed when a member of the Parliament is detained on grounds of mental illness in the same way that the Speaker of the House of Commons is notified when a Member of Parliament is detained. It also enables the Presiding Officer to have the member examined independently by medical practitioners in the same way that the Speaker can provide for such examination of an MP. It also provides that the member's seat is vacated if he is still detained after 6 months.

General

Section 141 of the Mental Health Act makes provision for the Speaker of the UK Parliament to be informed if a member of the House of Commons is authorised to be detained on grounds of mental illness. Where the Speaker receives such a notification, or is notified by two MPs that they are credibly informed that such an authorisation has been made, the Speaker can have the member examined by 2 registered medical practitioners appointed by the Royal College of Psychiatrists. If they report that he is suffering from mental illness and is authorised to be detained, the Speaker is to have him examined again after six months. If after the second examination the position has not changed, the Speaker must lay both medical reports before the House of Commons and the member's seat then becomes vacant. This amendment provides for the same

procedures to apply to members of the Scottish Parliament detained on grounds of mental illness for the purposes of determining when their seat should become vacant.

Section 17(4) makes further provision in relation to an MSP to whom section 141 as amended applies. In particular it provides that he may not take part in the proceedings of the Parliament while he is disqualified, even though his seat is not yet vacated.

Details of Provisions

Paragraph 19 adds a new subsection (8) to section 141 of the Mental Health Act 1983 so as to apply its provisions (as described above) with appropriate modifications to Members of the Scottish Parliament in the same way that it applies to Westminster MPs. The section will then provide for the Presiding Officer of the Scottish Parliament to be informed when any Member of the Scottish Parliament is authorised to be detained on grounds of mental illness, and for the member's seat to be vacated in accordance with section 141.

The Presiding Officer may be informed of a member's detention by the court, authority or person on whose order or application the detention was authorised, or by any registered medical practitioners who recommended detention, or by the person in charge of the establishment where the MSP is authorised to be detained. Two members of the Scottish Parliament may also notify the Presiding Officer that they are credibly informed that such an authorisation has been given notification of a detention the Presiding Officer must have the member examined by two registered medical practitioners appointed by the President of the Royal College of Psychiatrists. A report is then made to the Presiding Officer. A second such report is made after a period of six months from the first report (if the Parliament is sitting: if not as soon as possible thereafter).

If the second report confirms that the member is suffering from mental illness and is still detained the Presiding Officer will lay both reports before the Parliament and the seat of the MSP shall become vacant.

The fees and expenses incurred by medical practitioners in examining the member on behalf of the Scottish Parliament should be paid out of the Scottish Consolidated Fund.

SCHEDULE 8, Paragraph 20: National Audit Act 1983

Purpose and Effect

Paragraph 20 amends the National Audit Act 1983 so as to ensure that the powers of the UK Comptroller and Auditor General under sections 6 and 7 do not apply in relation to the Scottish Administration or any Scottish public authority with mixed functions or no reserved functions.

General

At present the Comptroller and Auditor General has powers under sections 6 and 7 of the National Audit Act 1983 to carry out examinations into the economy, efficiency and effectiveness with which certain public authorities and bodies have used their resources in discharging their functions. These are commonly known as value for money studies. These apply in relation to government departments and other authorities and bodies including any authority or body, whose members are appointed by or on behalf of the Crown, and which has received more than half its income from public funds. It could therefore apply to the Scottish Administration and a wide range of bodies with functions in relation to devolved matters. However it is intended that they should instead be subject to such provision as to value for money studies as the Scottish Parliament makes under section 70(1)(c) and (2)(c) and (d). Those require the Parliament to make provision for independent persons to carry out value for money studies in relation to the Scottish Ministers, the Lord Advocate and other persons who receive funds from the Scottish Consolidated Fund or from the Scottish Ministers. Therefore this section

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

ensures that they are not also subject to the UK Comptroller and Auditor General's examinations under sections 6 and 7 of the 1983 Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	258

Details of Provisions

Paragraph 20 disapplies the provisions of sections 6 and 7 of the National Audit Act 1983 as described above in relation to:

the Scottish Administration; and

any Scottish public authority with mixed functions or no reserved functions.

Persons with functions relating solely to reserved matters will still be subject to sections 6 and 7.

SCHEDULE 8, Paragraph 21: Tourism (Overseas Promotion) (Scotland) Act 1984

Purpose and Effect

This paragraph deletes the requirement in section 1(2) of the Tourism (Overseas Promotion) (Scotland) Act 1984 for the Scottish Tourist Board to obtain the consent of the Secretary of State before carrying out overseas marketing activities and for the Secretary of State to consult the British Tourist Authority before giving or withholding such consent.

General

The Scottish Tourist Board (STB) has responsibility for developing tourism in Scotland. Section 1(1) of the 1984 Act provides the power for STB to market Scotland overseas. However, the British Tourist Authority (BTA) also has responsibility, under the Development of Tourism Act 1969, for marketing Scotland overseas. The STB powers are used to supplement BTA activity. Because of this secondary nature of STB's overseas marketing, section 1(2) of the 1984 Act requires the Secretary of State's consent to STB's marketing proposals, following consultation with the BTA.

Following devolution, legislative and executive powers for tourism rests with the Scottish Parliament and Executive. Overseas marketing is simply one of a number of STB activities for which the Board will be accountable to the Scottish Ministers and through them to the Scottish Parliament. The requirement for consultation with the BTA is incompatible with this position. The requirement to obtain the consent of the Secretary of State, which would also have passed to Scottish Ministers, is unnecessary. Such consent is not required for any other STB activity and is removed.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	651

SCHEDULE 8, Paragraph 22: Bankruptcy (Scotland) Act 1985

Purpose and Effect

This paragraph provides that the Accountant in Bankruptcy is to be appointed by the Scottish Ministers. It further provides that the Scottish Ministers may appoint a member of staff to be his Depute and to exercise all his statutory functions when he is unable to do so. It replaces existing provision for the Secretary of State to appoint the Accountant in Bankruptcy and his staff on such terms and conditions, and to pay such remuneration and allowances as he determines, with the approval of the Treasury. This existing provision also provides for the Secretary of State to appoint a member of staff to be Depute Accountant in Bankruptcy. Powers to appoint staff are effectively replaced by section 51.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 22 replaces section 1 of the Bankruptcy (Scotland) Act 1985 (as amended by the Bankruptcy (Scotland) Act 1993) with:

- “1(1) The Accountant in Bankruptcy shall be appointed by the Scottish Ministers
- (2) The Scottish Ministers may appoint a member of the staff of the Accountant in Bankruptcy to be Depute Accountant in Bankruptcy to exercise all of the functions of the Accountant in Bankruptcy at any time when the Accountant in Bankruptcy is unable to do so”.

SCHEDULE 8, Paragraph 23: Insolvency Act 1986

Purpose and Effect

This paragraph amends the Insolvency Act 1986 so that certain functions of and in relation to the Registrar of Companies in Scotland and the Assistant Registrar of Friendly Societies for Scotland are transferred to the Accountant in Bankruptcy, or are to be performed also by him.

This paragraph also amends the 1986 Act to apply the requirements of section 427(4) to (6) (which require a court to notify a bankruptcy adjudication or award of sequestration of a member of Parliament to the Speaker) to members of the Scottish Parliament.

General

The Registrar of Companies in Scotland is appointed by the Secretary of State for Trade and Industry. The Assistant Registrar of Friendly Societies for Scotland is appointed by the Treasury. The bulk of the functions of these two office-holders relate to the reserved matters of business associations and financial services, but some are concerned with the registration of documents which relate to the process of the winding-up of business associations or the receivership of such associations - matters which are excepted from the reservation.

To create a divide between the reserved and devolved aspects of insolvency, the devolved functions of the Registrar and the Assistant Registrar were therefore to be transferred to an office-holder within the Scottish Administration, the Accountant in Bankruptcy, who following devolution is to be appointed and funded by the Scottish Ministers. This is achieved by the present amendments, and by consequential

amendments made by the Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 (S.I. 1999/1820).

The Accountant is already responsible for maintaining a register of the insolvency of individuals, partnerships, unincorporated bodies and certain bodies corporate, but not companies and other business associations.

Although the provisions require insolvency practitioners to submit forms to 2 officials in certain circumstances, any additional bureaucratic burden can be lessened by making the relevant forms identical, through administrative arrangements.

Section 427(1) of the 1986 Act provides that where a bankruptcy adjudication or award of sequestration is made against any person, he is disqualified from sitting and voting in the House of Commons. Section 427(4) provides that where a member of the House of Commons continues to be disqualified until the end of the 6 month period beginning with the day of adjudication or award, then his seat shall be vacated at the end of that period. By virtue of section 15(1)(b) of this Act, he would also thereby become disqualified for membership of the Scottish Parliament. It is therefore considered appropriate that notification should also be given to the Presiding Officer of the Scottish Parliament in respect of the bankruptcy or sequestration of any MSP. Section 427(5) of the Insolvency Act 1986 provides that a court must notify the Speaker of the House of Commons if a member is adjudged bankrupt or if an award of sequestration is made in respect of such a member.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	258

Details of Provisions

Paragraph 23(6) inserts a new section 427(6A), the effect of which is to apply section 427(4) to (6) in relation to a member of the Scottish Parliament so as to ensure that if a court adjudges that an MSP is bankrupt or awards sequestration of an MSP's estate the Presiding Officer must be notified and his seat will be vacated in accordance with section 427(4).

In the period before his seat is vacated, section 17(4) provides that the MSP may not take part in the proceedings of the Parliament and gives the Parliament the power to withdraw his rights and privileges.

SCHEDULE 8, Paragraph 24: Public Order Act 1986

Purpose and Effect

Part III of the Public Order Act 1986 creates certain offences in relation to the stirring up of racial hatred. Section 26(1) of the Act provides that nothing in Part III applies to a fair and accurate report of proceedings in Parliament. Paragraph 20 of the Act amends section 26(1) so that Part III does not apply to such a report of proceedings in the Scottish Parliament.

General

This amendment relates to reports of the proceedings of the Parliament. Section 21(1) provides that the proceedings shall be regulated by standing orders. Schedule 3, paragraph 1(1) provides that the standing orders shall include provision for preserving order in the proceedings of the Parliament, including provision for preventing conduct which would constitute a criminal offence.

Details of Provisions

This provision inserts in section 26(1) of the Public Order Act 1986 after the reference to proceedings in Parliament a reference to proceedings in the Scottish Parliament.

SCHEDULE 8, Paragraph 25: Copyright, Designs and Patents Act 1988

Purpose and Effect

Part I of the Copyright, Designs and Patents Act 1988 sets out the law relating to copyright. Amendments to the 1988 Act are required to make provision about copyright in Bills and Acts of the Scottish Parliament and about copying for the purposes of proceedings of the Parliament.

General

Her Majesty is entitled to copyright in every Act of the Scottish Parliament and copyright in every Bill introduced into the Scottish Parliament belongs to the Scottish Parliamentary Corporate Body.

The provisions of section 45 of the 1988 Act which provides that copyright is not infringed by anything done for the purposes of parliamentary proceedings apply to the Scottish Parliament.

In regard to Scottish parliamentary copyright, which for Westminster is dealt with in section 165 of the 1988 Act which applies to work made by or under the direction or control of the House of Commons or the House of Lords, provision was made under section 165(7) of the 1988 Act which permits an Order in Council to apply that section, with exceptions or modifications, to works of any other legislative body of a country to which the Act extends. This was done in making the Parliamentary Copyright (Scottish Parliament) Order 1999 ([S.I. 1999/676](#)).

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	3-Nov-98	260

Details of Provisions

Paragraph 25(1) states that the Copyright, Designs and Patents Act 1988 shall be amended.

Paragraph 25(2) provides for a reference to ‘section 166A’ in place of a reference to section 166 in section 12(9) of the Act. Section 12 of the 1988 Act deals with the duration of copyright. A new section 12 was inserted by the Duration of Copyright and Rights in Performances Regulations 1995 ([S.I. 1995/3297](#)) which came into force on 1 January 1996. Subsection (9) of section 12 provides that the section does not apply to Crown copyright or Parliamentary copyright and refers to sections 163 to 166. By virtue of this amendment, the reference will instead be to sections 163 to 166A.

Paragraph 25(3) provides for a reference to “section 166A” in place of a reference to section 166 in section 153(2) of the Act. Section 153 of the 1988 Act deals with qualification for copyright protection but subsection (2) provides that subsection (1) does not apply in relation to Crown copyright or Parliamentary copyright. Again there is a reference to sections 163 to 166 which by virtue of this amendment will instead be to sections 163 to 166A.

Paragraph 25(4) provides for a reference to “to 166A” in place of a reference to “and 166” in section 163(6) of the Act. Section 163 of the 1988 Act deals with Crown copyright and subsection (6) provides that the section does not apply to a work if, or to

the extent that, Parliamentary copyright subsists in the work. Again there is a reference to sections 165 and 166 which by virtue of this amendment will instead be to sections 165 to 166A.

Paragraph 25(5) provides for the insertion of a reference to Acts of the Scottish Parliament in relation to Crown copyright in section 164(1) of the Act. This means that Her Majesty is entitled to copyright in every Act of the Scottish Parliament as well as every Act of Parliament.

Paragraph 25(6) provides for the insertion after section 166 of a new section 166A which makes provision about copyright in Bills of the Scottish Parliament. Subsections (1) and (2) of subsection 166A provide that copyright in every Bill introduced to the Scottish Parliament belongs to the Scottish Parliamentary Corporate Body. That copyright subsists from the time when the text of the Bill is handed into the Parliament for introduction until the Bill receives Royal Assent or, if the Bill does not receive Royal Assent, until it is withdrawn or rejected or no further Parliamentary proceedings may be taken in respect of it. Subsection (3) of section 166A provides that references in Part I (copyright) of the 1988 Act to Parliamentary copyright include copyright under section 166A (except in section 165 which makes provision about work made by or under the direction or control of the House of Commons or the House of Lords). Subsection (4) of section 166A provides that no other copyright or right in the nature of copyright subsists in a Bill after copyright has subsisted under section 166A but without prejudice to the subsequent operation of that section in relation to a Bill which, not having received Royal Assent, is later re-introduced into the Parliament.

Paragraph 25(7) provides for the insertion of a reference to “the Scottish Parliament” in the definition of “Parliamentary proceedings” in section 178. This will mean that “parliamentary proceedings” in the 1988 Act includes proceedings of the Scottish Parliament. So for example the provisions of section 45 of the 1988 Act (parliamentary and judicial proceedings) apply to proceedings of the Scottish Parliament. That section provides that copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings nor by anything done for the purposes of reporting such proceedings. The paragraph also amends the definition of “the Crown” in section 178 so that it includes the Crown in right of the Scottish Administration.

Paragraph 21(8) provides for the insertion of a reference to “section 166(6) and 166A(3)” in place of the reference to “section 166(6)” in section 179 of the Act (Index of defined expressions). This is to indicate that the meaning of “Parliamentary copyright” is to be found in 166A(3) as well as in the other sections of the Act already mentioned in that entry.

SCHEDULE 8, Paragraph 26: Official Secrets Act 1989

Purpose and Effect

This amendment provides that members of the Scottish Executive and junior Scottish Ministers are to be Crown servants for the purposes of the Official Secrets Act 1989. It also provides that people providing goods or services for the purpose of office holders of the Scottish Administration are government contractors for the purposes of the 1989 Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	652

Details of Provisions

The Official Secrets Act 1989 makes it an offence in certain circumstances, for a person who is or has been a Crown servant or a government contractor within the meaning of that Act, to disclose without lawful authority information which relates to: security and intelligence, defence; international relations; or crime and special investigation. A disclosure by a Crown servant is made with lawful authority if it is made in accordance with his official duty. A disclosure by a government contractor is made with lawful authority if it is made in accordance with an official authorisation or without contravening an official restriction. Again “official authorisation” and “official restriction” are defined in the Act.

Section 12(1) of the Official Secrets Act 1989 defines what is meant by Crown Servant for the purposes of the 1989 Act. The definition covers Ministers of the Crown and anyone employed in the civil service of the Crown, as well as members of the military forces, the police or holders of prescribed offices and members and employees of prescribed bodies. The amendment will extend the definition to cover members of the Scottish Executive and junior Scottish Ministers. This amendment is required because otherwise offences created by the 1989 Act would not catch members of the Scottish Executive but it would catch their staff by virtue of section 12(1)(c). It will ensure that the Scottish Ministers are able to receive and if necessary authorise disclosure of information covered by the 1989 Act and puts them in the same position as Ministers in the UK government.

Section 12(2) defines what is meant by a government contractor. The definition includes any person who is not a Crown servant but who provides goods or services for the purposes of any Minister or of the civil service, armed forces etc. The amendment makes clear that the definition of Government contractor includes anyone who provides goods and services for the purposes of any office-holder in the Scottish Administration.

The order-making power in section 12 has also been executively devolved to the Scottish Ministers by [S.I. 1999/1750](#).

SCHEDULE 8, Paragraph 27: Prisons (Scotland) Act 1989

Purpose and Effect

Paragraph 27 amends the Prisons (Scotland) Act 1989 to remove or amend specific provisions for appointment of staff in relation to prisons. These powers of appointment are no longer required as a consequence of the provision in section 51 for the Scottish Ministers to appoint persons to be members of the staff of the Scottish Administration.

Details of Provisions

Paragraph 27(1) provides that the Prisons (Scotland) Act 1989 is to be amended.

Paragraph 27(2) repeals section 2 of the 1989 Act, which provides for the employment and payment of such inspectors and other officers and servants as the Secretary of State with the sanction of the Treasury as to number, may appoint.

Paragraph 27(3) removes provision in section 3(1) of the 1989 Act for the Secretary of State to appoint the governors and other officers of prisons. This is replaced by a requirement for every prison to have a governor and such other officers as may be necessary.

Section 3A of the 1989 Act requires the Secretary of State to secure the provision of appropriate medical services within prisons, and provides that he may perform this duty by appointing for a prison one or more medical officers. Paragraph 27(4) replaces the power in section 3A(2) for the Secretary of State to appoint medical officers with a power to provide medical officers. A consequential amendment is also made to section 3A(4).

SCHEDULE 8, Paragraph 28: European Communities (Amendment) Act 1993

Purpose and Effect

This paragraph amends section 6 of the European Communities (Amendment) Act 1993 to provide that a person may be proposed as a member for the UK of the Committee of the Regions if he or she is a member of the Scottish Parliament.

General

This section forms part of the set of sections and Schedules dealing with the relations between the Scottish Parliament and Executive and the European Union. Schedule 5 provides that relations with the European Communities (and their institutions) are to be reserved to the UK Parliament and Government. But the Scottish Parliament and Executive are responsible for observing and implementing obligations under Community law in relation to devolved matters.

Details of Provisions

Section 6 of the European Communities (Amendment) Act 1993 provides that a person may be proposed as a member or alternate member for the UK of the Committee of the Regions constituted under Article 198a of the Treaty establishing the European Community only if, at the time of the proposal, he is an elected member of a local authority.

This paragraph provides that in section 6 a reference to a member of the Scottish Parliament is inserted before the reference to an elected member of a local authority. The purpose of the amendment is to provide that a person may also be proposed as a member or alternate member of the Committee of the Regions if he or she is a member of the Scottish Parliament.

SCHEDULE 8, Paragraph 29: Scottish Land Court Act 1993

Purpose and Effect

This paragraph amends the Scottish Land Court Act 1993 to provide that it is for the First Minister to make recommendations to The Queen on the appointment of members of the Scottish Land Court and adds a new subsection requiring the First Minister to consult the Lord President of the Court of Session before recommending a person as Chairman of the Scottish Land Court.

General

The Scottish Land Court Act 1993 consolidates certain enactments relating to the constitution and proceedings of the Scottish Land Court. Section 1(2) of the 1993 Act provides for the appointment and number of members of the Court and for the appointment of the Chairman.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	757

Details of Provisions

Paragraph 29 provides that in section 1 of the Scottish Land Court Act 1993 (the Scottish Land Court):

- (a) in subsection (2), for Secretary of State there is substituted “First Minister”, and

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

(b) after subsection (2) there is inserted:

“(2A) Before recommending the appointment of a person as Chairman, the First Minister shall consult the Lord President of the Court of Session.”

Paragraph 29(a) provides that the First Minister will take over from the Secretary of State the function of recommending to Her Majesty persons for the appointment as members of the Scottish Land Court and paragraph 29(b) requires him to consult the Lord President before recommending a person for appointment as Chairman of the Scottish Land Court.

SCHEDULE 8, Paragraph 30: Value Added Tax Act 1994

Purpose and Effect

To secure that the Scottish Administration is treated in the same way as a government department for VAT purposes.

General

Special rules under section 41 of the Value Added Tax Act 1994 apply to the treatment of supplies of goods and services by and to government departments for VAT purposes. In particular the section allows the Treasury to direct that VAT should be charged on any goods or services provided by a government department even though the supply of those goods or services does not amount to the carrying on of a business. It also enables refunds of VAT to be made, subject to Treasury directions, to government departments in respect of goods or services supplied to it for non-business purposes. The most significant of these is the ability of departments to reclaim VAT they pay on contracted-out services. The section will apply these rules to the Scottish Administration, in the same way that they apply to government departments and will ensure continuation of the same treatment for VAT purposes in relation to functions that are transferred to the Scottish Administration.

Details of Provisions

The definition of “government department” in section 41(6) of the Value Added Tax Act 1994 is extended to include the Scottish Administration. The Scottish Administration is defined in section 126.

SCHEDULE 8, Paragraph 31: Requirements of Writing (Scotland) Act 1995

Purpose and Effect

This paragraph makes amendments to the Requirements of Writing (Scotland) Act 1995 so as to apply the provisions of that Act to the execution of documents for the purposes of Scots law by a member of the Scottish Executive in the same way as they apply to the execution of documents by Ministers of the Crown.

General

The Requirements of Writing (Scotland) Act 1995 makes provision with regard to the execution of documents and their formal validity for the purposes of Scots law.

Paragraph 31 amends section 12(1) of the 1995 Act (interpretation) to extend the definition of “Minister” to include a member of the Scottish Executive and the definition of “officer” to include a member of staff of the Scottish Ministers or the Lord Advocate. Section 55(4) provides that a document is validly executed by the Scottish Ministers if it is executed by any member of the Scottish Executive.

Details of Provisions

Paragraph 31 provides that in section 12(1) of the Requirements of Writing (Scotland) Act 1995 (interpretation):

- (a) in the definition of “Minister” after “1975” there is inserted “and also includes a member of the Scottish Executive”, and
- (b) in paragraph (a) of the definition of “officer”, after “Department” there is inserted “or, as the case may be, as a member of staff of the Scottish Ministers or Lord Advocate.”

Schedule 2 of the 1995 Act contains special rules relating to the execution of documents by Ministers, amongst others. Paragraph 6 of that Schedule provides that, except where an enactment expressly provides otherwise, where a grantor of a document is a Minister the document is signed by the Minister if it is signed by him personally, or, in a case where by virtue of any enactment or rule of law a document by a Minister may be signed by an officer of his or by any other Minister, it is signed by that officer or by that other Minister as the case may be. It also provides that, for the purposes of signing a document under that paragraph, a person of the signing of a document under that paragraph, a person purporting to sign as an officer of a Minister or as another Minister shall be presumed to be the officer or other Minister as the case may be. It is expected that the *Carltona* doctrine will apply in relation to the members of the Scottish Executive as it applies to Ministers of the Crown so that any member of staff appointed by the Scottish Minister can, amongst other things, execute documents which the Scottish Minister could execute. This amendment ensures that the provisions of the 1995 Act apply to the execution of documents by a member of the Scottish Executive in the same way as they apply to the execution of documents by a Minister.

SCHEDULE 8, Paragraph 32: Criminal Procedure (Scotland) Act 1995

Purpose and Effect

This paragraph inserts a new section 288A into the Criminal Procedure (Scotland) Act 1995 to enable the Advocate General for Scotland to refer a devolution issue which may arise in criminal proceedings to the High Court of Justiciary for their opinion.

The paragraph also inserts a new section 288B into the 1995 Act. The new section makes provision for the implementation by the High Court of Justiciary of any determination by the Judicial Committee of the Privy Council following an appeal on a devolution issue from the High Court.

General

The procedures for dealing with devolution issues in Schedule 6 have implications for civil and criminal proceedings in Scotland. Where a devolution issue arises in the course of proceedings, under the provisions of paragraphs 5 and 6 of Part I of Schedule 6 to the Act the Advocate General is required to be given an opportunity of taking part in the proceedings but only so far as they relate to the devolution issue.

The Advocate General has no existing rights of appeal. In the context of criminal proceedings, the provision made by this amendment is necessary to give the Advocate General for Scotland the right to appeal against the determination of a trial judge upon a devolution issue. So far as the accused is concerned, where he is convicted, he can simply appeal against conviction or sentence in terms of sections 106 or 175 of the Criminal Procedure (Scotland) Act 1995. So far as the Lord Advocate is concerned, if the devolution issue has arisen in solemn proceedings, as the devolution issue will be a point of law, the Lord Advocate will be able to refer the issue to the High Court for their opinion under section 123 of the 1995 Act whether the accused has been acquitted or convicted. If the devolution issue has arisen in summary proceedings, under section 175(3) of the 1995 Act the Lord Advocate will be able to appeal to

the High Court on a point of law against an acquittal or against a sentence passed on conviction. In addition, he will be able to appeal by way of suspension under section 191 of the 1995 Act.

The provision made by new section 288A ensures that where the Advocate General wishes to appeal against the decision of the trial court on a devolution issue then, whether the accused is tried on indictment or summarily and whether he is acquitted or convicted, the Advocate General may make a reference to the High Court for their opinion on the devolution issue in a similar way to that in which the Lord Advocate can make a reference under section 123 of the 1995 Act. The new section is in similar terms to section 123 of the 1995 Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	653

Details of Provisions

Paragraph 27 inserts new sections 288A and 288B into the 1995 Act. Subsection 288A(1) and 288A(2) provide that where the Advocate General has been a party to criminal proceedings in Scotland during which a devolution issue has been raised, she may refer that issue to the High Court after the criminal proceedings have concluded. Subsection 288A(2) also provides that notice of the appeal and the date of the hearing must be notified to the person acquitted or convicted in the case and his solicitor.

Subsection 288A (3) provides that the individual can elect to appear personally at the hearing or be represented by counsel.

Subsection 288A (4) provides that where the individual does not indicate that he will be represented then the court may appoint an *amicus curiae* (counsel to assist the court). This will help ensure that the relevant legal arguments are led before the court.

Subsection 288A(5) provides that counsel's costs will be paid by the Advocate General out of money provided by Parliament.

Subsection 288A(6) provides that the opinion of the court on the devolution issue shall not affect the acquittal or conviction.

Subsection 288A(7) makes it clear that "devolution issue" has the same meaning as in Schedule 6 to the Act. The meaning of "devolution issue" is set out in paragraphs 1 and 2 of Schedule 6.

Section 288B makes provision for the implementation by the High Court of Justiciary of any determination by the Judicial Committee of the Privy Council following an appeal on a devolution issue from the High Court. Under Schedule 6, paragraph 13 of the Bill, provision is made for an appeal against the determination of a devolution issue by the High Court of Justiciary to the Judicial Committee of the Privy Council. This deals with devolution issues raised in criminal proceedings.

The matter will be remitted to the High Court which is empowered to deal with the case as it would as if it were determining it as a fresh appeal. This would enable the High Court to decide in the light of the Judicial Committee's decision whether a conviction should be upheld or quashed and, if appropriate, a retrial ordered, and so on. The new section also makes it clear that the Judicial Committee's determination does not affect any earlier acquittal in the proceedings.

In the case of the criminal law the role of the Judicial Committee will be limited to determining devolution issues as a matter of law but it will be for the High Court to give

effect to the determination in a particular case. In order to do this it needs all the powers it would have when sitting as an appeal court and this is what the amendment provides.

In addition it ensures that where there has previously been an acquittal or a quashing of a conviction, these would not be affected by a Judicial Committee determination.

SCHEDULE 8, Paragraph 33: Defamation Act 1996

Purpose and Effect

This paragraph makes amendments to the Defamation Act 1996 which are consequential upon the establishment of the Scottish Parliament and the Scottish Executive to ensure that relevant provisions made by or under Acts of the Scottish Parliament and appointments made by members of the Scottish Executive are covered by the 1996 Act in the same way that equivalent provisions made by or under UK Acts or appointments by UK Ministers are covered.

General

The Defamation Act 1996 makes provision amending the law of defamation in each part of the United Kingdom. In particular sections 14 and 15 make provision as to the circumstances in which certain reports will enjoy absolute privilege and qualified privilege. These amendments ensure that the Act will apply taking account of provisions that may be made by or under Acts of the Scottish Parliament and appointments made by the Scottish Executive. It complements section 41 (Defamatory statements), paragraph 10 of Schedule 8 (Defamation Act 1952) and paragraph 11 of Schedule 8 (Defamation Act (Northern Ireland) 1955).

Details of Provisions

Paragraph 33(2) amends the definition in the 1996 Act of “statutory provision” for the purposes of the Act so that it includes provisions contained in an Act of the Scottish Parliament or in a Statutory Instrument made under any such Act. There are references in the 1996 Act to “statutory provision” in section 14(2) of the Act (reports of court proceedings absolutely privileged) and in paragraphs 11(c) to (e) and 13(2)(c) and (4)(b) of Schedule 1 which deal with statements which have qualified privileged under the Act subject to explanation or contradiction.

Paragraph 33(3) amends paragraph 11(1)(c) of Schedule 1 to the 1996 Act, which provides qualified privilege for certain reports of proceedings of a commission, tribunal, committee or person appointed for the purpose of any inquiry by Her Majesty or by a Minister of the Crown or a Northern Ireland Department, so that it also applies in relation to any such commission etc. appointed by a member of the Scottish Executive.

SCHEDULE 8, Paragraph 34: Damages Act 1996

Purpose and Effect

The Damages Act 1996 makes provision in relation to damages for personal injury, including provision for structured settlements. It also provides for Ministers of the Crown to guarantee payments for public sector settlements to be made by bodies which are designated in relation to their department by guidelines agreed between that department and the Treasury.

The amendment would enable the Scottish Ministers to designate bodies in relation to the Scottish Administration, without a requirement to follow guidelines agreed with the Treasury. Any liabilities arising from guarantees provided by the Scottish Ministers should fall on the Scottish Consolidated Fund.

General

The Damages Act 1996 makes provision in relation to damages for personal injury. This includes provision for structured settlements. A structured settlement is an agreement settling a claim or action for damages for personal injury on terms whereby:

- (a) the damages are to consist wholly or partly of periodical payments; and
- (b) (in effect) the person against whom a claim is made has purchased an annuity (or annuities) which would enable all or part of the sum to be paid in periodical payments by him (or his insurer).

The claimant (as the annuitant) would receive periodical payments for life, for a specified period or for a specified number of payments. A court may make an order awarding damages for personal injury which incorporates such terms.

Section 6 of the 1996 Act provides for guarantees for public sector settlements.

Where payments are to be made by a body in relation to which a Minister of the Crown has power to do so, under the provisions of section 6(2) the Minister of the Crown may guarantee the payments to be made under the agreement or court order.

Section 6(3) of the 1996 Act provides that bodies in relation to which a Minister may give such a guarantee are such bodies as are designated in relation to the relevant government department by guidelines agreed between that department and the Treasury.

The function of guaranteeing public sector settlements under section 6(2) of the 1996 Act will transfer to the Scottish Ministers under section 53 insofar as these guarantees concern designated Scottish public authorities with mixed functions or no reserved functions.

It is intended that the Scottish Ministers will designate the bodies and, since any liabilities arising from guarantees provided by the Scottish Ministers should fall on the Scottish Consolidated Fund, the requirement to agree guidelines for the designations with the Treasury is not considered necessary.

The amendment therefore makes it clear that it is for the Scottish Ministers to designate bodies without the requirement for Treasury consent.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	655

SCHEDULE 9: Repeals

Purpose and Effect

This Schedule lists the legislation which is repealed to the extent set out in the third column.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	754
LC	8-Oct-98	655
L3	9-Nov-98	612

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

Details of Provisions

Sheriff Courts and Legal Officers (Scotland) Act 1927. This repeal is related to paragraph 3 of Schedule 8;

Administration of Justice (Scotland) Act 1933. This repeal is related to paragraph 4 of Schedule 8;

House of Commons Disqualification Act 1975. This repeal is related to section 48(6);

Ministerial and other Salaries Act 1975. This repeal is related to section 48(6);

Education (Scotland) Act 1980. This repeal is related to paragraph 17 of Schedule 8;

Tourism (Overseas Promotion) (Scotland) Act 1984. This repeal is related to paragraph 21 of Schedule 8;

Parliamentary Constituencies Act 1986. This repeal is related to section 86(2); and

Prisons (Scotland) Act 1989. This repeal is related to paragraph 27 of Schedule 8.