

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

# SCOTLAND ACT 1998

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## EXPLANATORY NOTES

### COMMENTARY

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

#### 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.

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

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

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

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

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

### **Parliamentary Consideration**

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

### **Details of Provisions**

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

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

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

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

Subsection (2) provides that the Lord Advocate and the Solicitor General may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

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

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

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

Subsection (5) protects the independence of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland by providing that any decision made by him in that capacity is to continue to be taken by him independently of any other person. This is intended to ensure that the traditional independence of the Lord Advocate in taking those decisions when he was a member of the UK Government continues now that he is a member of the Scottish Executive.

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