

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

SCHEDULES

Schedule 5

Part I: General Reservations

Paragraphs 1 to 5: The Constitution

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)¹ 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:

- (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

¹ This paragraph was inserted by article 3 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

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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

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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 Prerogative² including the use of Royal Names³ and Royal Patronage⁴;

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;

² In respect of the use of the Royal Prerogative, where the advice concerns a devolved matter the First Minister will advise Her Majesty.

³ 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.

⁴ 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.

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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.