



# Scotland Act 1998

## 1998 CHAPTER 46

### PART VI

#### SUPPLEMENTARY

##### *Subordinate legislation*

#### **112 Subordinate legislation: general.**

- (1) Any power to make subordinate legislation conferred by this Act shall, if no other provision is made as to the person by whom the power is exercisable, be exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order.
- (2) But the power to make subordinate legislation under section 129(1) providing—
  - (a) for the appropriation of sums forming part of the Scottish Consolidated Fund, or
  - (b) for sums received by any person to be appropriated in aid of sums appropriated as mentioned in paragraph (a),shall be exercisable only by Her Majesty by Order in Council.
- (3) References in this Act to an open power are to a power to which subsection (1) applies (and include a power to make subordinate legislation under section 129(1) whether or not the legislation makes provision as mentioned in subsection (2)).
- (4) An Order in Council under an open power may revoke, amend or re-enact an order, as well as an Order in Council, under the power; and an order under an open power may revoke, amend or re-enact an Order in Council, as well as an order, under the power.
- (5) Any power to make subordinate legislation conferred by this Act shall, in relation to its exercise by a Minister of the Crown or a member of the [<sup>F1</sup>Scottish Government], be exercisable by statutory instrument.

<sup>F2</sup>(6) .....

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*Changes to legislation: There are currently no known outstanding effects for the Scotland Act 1998, Cross Heading: Subordinate legislation. (See end of Document for details)*

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### Textual Amendments

- F1** Words in Act substituted (3.7.2012) by [Scotland Act 2012 \(c. 11\)](#), **ss. 12(2)(a)**, 44(5) (with s. 12(3)); S.I. 2012/1710, art. 2(f)
- F2** [S. 112\(6\)](#) omitted (18.5.2017) by virtue of [Scotland Act 2016 \(c. 11\)](#), **ss. 10(3)**, 72(4)(a); S.I. 2017/608, reg. 2(1)(h)

## 113 Subordinate legislation: scope of powers.

- (1) References in this section to a power are to an open power and to any other power to make subordinate legislation conferred by this Act which is exercisable by Her Majesty in Council or by a Minister of the Crown, and include a power as extended by this section.
- [<sup>F3</sup>(1A) Subsections (2) to (11), except subsection (9), apply also to the power of the Scottish Ministers to make an order under section 12.]
- (2) A power may be exercised so as to make different provision for different purposes.
- (3) A power (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to—
- those cases subject to specified exceptions, or
  - any particular case or class of case.
- (4) A power includes power to make—
- any supplementary, incidental or consequential provision, and
  - any transitory, transitional or saving provision,
- which the person making the legislation considers necessary or expedient.
- (5) A power may be exercised by modifying—
- any enactment or prerogative instrument,
  - any other instrument or document,
- if the subordinate legislation (or a statutory instrument containing it) would be subject to any of the types of procedure referred to in Schedule 7.
- (6) But a power to modify enactments does not (unless otherwise stated) extend to making modifications of this Act or subordinate legislation under it.
- (7) A power may be exercised so as to make provision for the delegation of functions.
- (8) A power includes power to make provision for sums to be payable out of the Scottish Consolidated Fund or charged on the Fund.
- (9) A power includes power to 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.
- [<sup>F4</sup>(9A) A power may not be exercised so as to create any criminal offence punishable with any of the penalties specified for the offence in subsection (9B) or (10).
- (9B) In relation to Scotland, the specified penalties are—
- where the offence is triable on summary complaint only, imprisonment for a period exceeding 12 months and a fine exceeding level 5 on the standard scale,

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- (b) where an offence triable either on indictment or on summary complaint is tried on summary complaint, imprisonment for a period exceeding 12 months and a fine exceeding the statutory maximum,
- (c) where the offence is tried on indictment, imprisonment for a period exceeding two years.

(10) In relation to England and Wales and Northern Ireland, the specified penalties are—

- (a) where the offence is tried summarily, imprisonment for a period exceeding [<sup>F5</sup>the prescribed term] and a fine exceeding—
  - (i) in the case of a summary offence, level 5 on the standard scale,
  - (ii) in the case of an offence triable either way, the statutory maximum,
- (b) where the offence is tried on indictment, imprisonment for a period exceeding two years.]

[<sup>F6</sup>(10A) In subsection (10)(a), “the prescribed term” means—

- (a) in relation to England and Wales, where the offence is a summary offence, 51 weeks;
- (b) in relation to England and Wales, where the offence is triable either way, [<sup>F7</sup>the general limit in a magistrates’ court];
- (c) in relation to ... Northern Ireland, three months.]

[<sup>F8</sup>(10AA) If a power—

- (a) is exercised so as to make provision for a summary offence under the law of England and Wales to be punishable with imprisonment for more than 6 months (“the relevant provision”) and
- (b) is so exercised—
  - (i) on or after 2 May 2022, but
  - (ii) before the day on which section 281(5) of the Criminal Justice Act 2003 comes into force,

the power must also be exercised so as to provide that, in relation to an offence committed before the day referred to in paragraph (b)(ii), any reference in the relevant provision to a term of imprisonment of more than 6 months is to be read as a reference to a term of imprisonment of 6 months.]

(11) The fact that a power is conferred does not prejudice the extent of any other power.

[<sup>F9</sup>(12) Her Majesty may by Order in Council amend subsection (9B) or (10) so as to change—

- (a) any period of imprisonment specified there, or
- (b) the amount of any fine so specified.]

#### Textual Amendments

- F3** S. 113(1A) inserted (1.7.2015) by [Scotland Act 2012 \(c. 11\)](#), **ss. 3(1)**, 44(5); [S.I. 2015/682](#), art. 2(b) (with saving in [S.I. 2015/683](#), art. 2)
- F4** S. 113(9A)-(10) substituted for s. 113(10) (31.10.2012) by [Scotland Act 2012 \(c. 11\)](#), **ss. 39(2)**, 44(5); [S.I. 2012/2516](#), art. 2(e)
- F5** Words in s. 113(10)(a) substituted (2.5.2022) by [Criminal Justice Act 2003 \(c. 44\)](#), s. 336(3)(4), **Sch. 27 para. 7(2)** (with s. 283(7)); [S.I. 2022/500](#), reg. 3(b)(ii)
- F6** S. 113(10A) inserted (2.5.2022) by [Criminal Justice Act 2003 \(c. 44\)](#), s. 336(3)(4), **Sch. 27 para. 7(3)** (with s. 283(7)) (as amended (31.10.2012) by [2012 c. 11](#), **s. 39(5)**; [S.I. 2012/2516](#), **art. 2(e)**); [S.I. 2022/500](#), **reg. 3(b)(ii)**

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- F7** Words in s. 113(10A)(b) substituted (14.7.2022) by Judicial Review and Courts Act 2022 (c. 35), s. 51(4), **Sch. 2 para. 18**; S.I. 2022/816, regs. 1(2), 3(d)
- F8** S. 113(10AA) inserted (28.4.2022) by The Criminal Justice Act 2003 (Commencement No. 33) and Sentencing Act 2020 (Commencement No. 2) Regulations 2022 (S.I. 2022/500), regs. 1(2), **8(2)**
- F9** S. 113(12) inserted (31.10.2012) by Scotland Act 2012 (c. 11), **ss. 39(3), 44(5)**; S.I. 2012/2516, art. 2(e)

#### **114 Subordinate legislation: particular provisions.**

- (1) A power to make subordinate legislation conferred by any of the following provisions of this Act may be exercised by modifying any enactment comprised in or made under this Act (except Schedules 4 and 5): sections [<sup>F10</sup>66(5),] 89, 104, 107, 108 and 129(1).
- (2) The reference in subsection (1) to a power to make subordinate legislation includes a power as extended by section 113.
- (3) A power to make subordinate legislation conferred by any of the following provisions of this Act may be exercised so as to make provision having retrospective effect: sections 30, 58(4), 104 and 107.

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#### **Textual Amendments**

- F10** Word in s. 114(1) inserted (12.12.2014) by [Scotland Act 2012 \(c. 11\), ss. 32\(11\), 44\(4\)\(b\)](#); S.I. 2014/3250, art. 2

#### **115 Subordinate legislation: procedure.**

- (1) Schedule 7 (which determines the procedure which is to apply to subordinate legislation under this Act in relation to each House of Parliament and the Scottish Parliament) shall have effect.
- (2) In spite of the fact that that Schedule provides for subordinate legislation under a particular provision of this Act (or the statutory instrument containing it) to be subject to any type of procedure in relation to the Parliament, the provision conferring the power to make that legislation may be brought into force at any time after the passing of this Act.
- (3) Accordingly, any subordinate legislation (or the statutory instrument containing it) made in the exercise of the power in the period beginning with that time and ending immediately before the principal appointed day is to be subject to such other type of procedure (if any) as may be specified in subordinate legislation made under section 129(1).

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#### **Subordinate Legislation Made**

- P1** S. 115(2) power wholly exercised (16.12.1998): different dates appointed for specified provisions by [S.I. 1998/3178](#)

## **116 Transfer of property: supplementary.**

- (1) This section applies in relation to subordinate legislation under section 60, 62, 90 or 109 or paragraph 2 of Schedule 2.
- (2) Any such subordinate legislation may, in particular—
  - (a) provide for the creation of rights or interests, or the imposition of liabilities or conditions, in relation to property transferred, or rights or interests acquired, by virtue of such legislation,
  - (b) provide for any property, liabilities or conditions to be determined under such legislation,
  - (c) make provision (other than provision imposing a charge to tax) as to the tax treatment of anything done by virtue of such legislation.
- (3) No order shall be made by a Minister of the Crown by virtue of subsection (2)(c), and no recommendation shall be made to Her Majesty in Council to make an Order in Council by virtue of subsection (2)(c), without the agreement of the Treasury.
- (4) Subordinate legislation to which this section applies shall have effect in relation to any property or liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the transfer of the property or liabilities.
- (5) 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 of property by virtue of any subordinate legislation to which this section applies.
- (6) Any such right shall have effect in the case of any such transfer as if the transferee were the same person in law as the transferor and as if no transfer of the property had taken place.
- (7) Such compensation as is just shall be paid to any person in respect of any such right which would, apart from subsection (5), have operated in favour of, or become exercisable by, that person but which, in consequence of the operation of that subsection, cannot subsequently operate in his favour or (as the case may be) become exercisable by him.
- (8) Any compensation payable by virtue of subsection (7) shall be paid by the transferor or by the transferee or by both.
- (9) Subordinate legislation under this subsection may provide for the determination of any disputes as to whether and, if so, how much, compensation is payable by virtue of subsection (7) and as to the person to whom or by whom it shall be paid.
- (10) Subsections (4) to (9) apply in relation to the creation of rights or interests, or the doing of anything else, in relation to property as they apply in relation to a transfer of property; and references to the transferor and transferee shall be read accordingly.
- (11) 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 section 60 or 62 or paragraph 2 of Schedule 2 shall be conclusive evidence of the transfer or (as the case may be) the fact that there has not been a transfer.
- (12) A certificate issued by the Secretary of State and the Scottish Ministers that any property or liability has, or has not, been transferred by virtue of an Order in Council

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under section 90 or 109 shall be conclusive evidence of the transfer or (as the case may be) the fact that there has not been a transfer.

- (13) In this section “right of return” means any right under a provision for the return or reversion of property in specified circumstances.

**Changes to legislation:**

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