

*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 8, Paragraph 7: Crown Proceedings Act 1947

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

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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.