



The Scottish Parliament

The Information Centre

Subject Map

Scottish Parliament Series/1
Updated: 24.01.2001

LEGISLATIVE COMPETENCE OF THE SCOTTISH PARLIAMENT

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This Subject Map provides a brief outline of the legislative competence of the Scottish Parliament. The map is organised into four sections. These are

- Legislative competence generally
- Grounds of legislative competence
- Reserved matters
- Enactments protected from modification by the Scottish Parliament

Legislative competence generally

The Parliament has the power to make primary legislation in all areas of public policy where it has 'legislative competence'. This power reflects the distinctive Scottish legal, administrative and social systems which, prior to devolution, were legislated for by Westminster through legislation applying either solely or partly to Scotland.

Primary legislation of the Scottish Parliament refers to Acts of the Parliament which make valid law within the Parliament's legislative competence as prescribed by the *Scotland Act 1998*. Schedule 5 of the *1998 Act* sets out all the areas which are reserved to the Westminster Parliament. All other areas not listed in Schedule 5 therefore fall into the category of devolved areas.

The *1998 Act* states how the legislative competence of proposed legislation can be

- examined before Bills are introduced into the Parliament (s31), and
- challenged before they receive Royal Assent (ss32-35)¹

The UK Parliament retains ultimate power to legislate for Scotland on all matters, but the UK Government expects a convention to evolve that Westminster would not normally do so without the Scottish Parliament's consent.

Grounds of legislative competence

The legislative competence of the Scottish Parliament is the extent of its power to make valid laws through Acts of the Scottish Parliament. Legislative competence is set out in various provisions of the *Scotland Act 1998*.

A purported Act will not be valid law if any of its provisions is outside the Parliament's legislative competence on any of the following five grounds:

- it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland
- it relates to *reserved matters* set out in *Schedule 5* to the Act
- it is in breach of the restrictions in *Schedule 4* to the Act
- it is incompatible with any of the Convention rights² or with European Community law
- it would remove the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland (s29(2)(a)-(e))

The boundaries of legislative competence as set out in **Schedules 4 and 5** can be varied (in either direction) by an Order in Council, which would have to be approved by resolution in the Parliament and in both Houses of the Westminster Parliament³ (s30), and can have retrospective effect.

Reserved matters

The following is an outline of the list of reserved matters in *Schedule 5*

- **General reservations (Schedule 5, Part 1):**
 - *The Constitution*
 - *Political parties*

¹ See further Subject Map B *Legislative process of the Scottish Parliament*

² That is, rights under the European Convention on Human Rights, as defined in the *Human Rights Act 1998*

³ That is, type A subordinate legislative procedure under *Schedule 7* to the *Scotland Act 1998*.
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- *Foreign affairs etc.*
 - *Public service*
 - *Defence*
 - *Treason*
- **Specific reservations (Schedule 5, Part 2):**

These comprise 11 broad *heads*, cited **A-L**⁴ each having a list of different subheads, called *sections* and cited in the form, eg, C5.

- *Head A - Financial and Economic Matters:*
- *Head B - Home Affairs*
- *Head C - Trade and Industry*
- *Head D - Energy*
- *Head E – Transport*
- *Head F - Social Security*
- *Head G - Regulation of the Professions*
- *Head H – Employment*
- *Head J - Health and Medicines*
- *Head K - Media and Culture*
- *Head L – Miscellaneous*

Enactments etc. protected from modification by the Parliament

The following is an outline of the enactments protected (from modification either directly or by grant of delegated power) under *Schedule 4*:

Schedule 4, Part I

- Scottish Acts cannot modify, or confer delegated power to modify:
 - *Union with Scotland Act 1706/Union with England Act 1707*, articles 4 and 6 (freedom of trade provisions)
 - *Private Legislation Procedure (Scotland) Act 1936* (private Bill procedure)
 - *European Communities Act 1972*, part (key aspects of EC membership)
 - *Local Government Planning and Land Act 1980*, sch 32 (designation of enterprise zones)
 - *Social Security Administration Act 1992*, ss140A-G (rent rebate/rent allowance subsidy and council tax benefit)
 - *Human Rights Act 1998* ('incorporation' of European Convention on Human Rights)
 - the law on reserved matters⁵
 - *Scotland Act 1998* (with 4 sets of exceptions in *para 4(2)-(5)*)
 - effect of s119(3) to transfer cost of judicial salaries from the Consolidated Fund to the Scottish Consolidated Fund

⁴ There is no Head I

⁵ Defined in *para 2(2)* (includes restatements of the law on reserved matters (*para 7(2)*))
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- amendments to *Crown Suits (Scotland) Act 1857*, *Crown Proceedings Act 1947*, and *Criminal Procedure (Scotland) Act 1995* as relate to the Advocate General
- amendments to parts of *Lands Tribunal Act 1949*, and *Scottish Land Court Act 1993*
- enactments relating to s56 shared powers

Schedule 4, Parts 2 and 3:

- **General exceptions to protection against modification**

- restatements of the law (including those with modifications not prevented by Part I), but not the law on reserved matters
- operation of the effect of the *Interpretation Act 1978*
- changes to titles of legal offices: any court or tribunal, (or its judge, chairman or officer); any holder of a non-ministerial office⁶ or member of staff in Scottish Administration and any register
- enactments for s70 purposes (i.e. relating to financial control, accounts and audit) and for s91 purposes (investigation of maladministration)
- variation in subordinate legislation procedures by Scottish Ministers, Scottish public authorities with mixed or no reserved functions, and others (except Ministers of the Crown) within devolved competence
- allowing the exercise of a s53 transferred function by a different person in certain specified circumstances. [sch 4, Parts II & III]

Please contact Fiona Killen (x85374) or Frazer McCallum (x85189) if you have any questions or comments about this subject map.

Subject maps are basic outlines of a topic. They are produced by the Parliament's research service as introductory briefings on subjects, and do not assume detailed prior knowledge of the topic. More detailed briefing material will be produced as appropriate.

⁶ This provision entrenches the title of ministerial offices such as First Minister.