

Devolution Guidance Note 14

Orders made under Section 30(2) of the Scotland Act (Alterations to Legislative Competence)

SUMMARY

- **Section 30(2) Orders can change the list of subject matters reserved to the UK Parliament listed in the Scotland Act 1998 – either increasing or reducing the scope of reserved matters – but the use of this Order making power is not the only, and sometimes not the best, way of achieving the policy aim.**

- **This guidance note covers:**
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Introduction

1. The Scotland Act 1998 (“the 1998 Act”) defines the legislative competence of the Scottish Parliament. It does so largely by listing a range of subjects where legislative competence is reserved to the UK Parliament. Matters not reserved by the 1998 Act are generally devolved.¹
2. Schedule 4 of the 1998 Act sets out enactments which cannot be modified by the Scottish Parliament. Schedule 5 sets out the reserved matters. These Schedules can be modified by Order in Council, made under Section 30(2) of the 1998 Act. In practice modifications to Schedule 4 are likely to be infrequent, so this note focuses on proposed modifications to Schedule 5. The guidance has been agreed with the Scottish Government, so you should expect colleagues there to follow a similar process of analysis, even if on occasion their conclusions may be different.

Schedule 5 of the 1998 Act

3. Schedule 5 of the 1998 Act does not list devolved matters. Nor does it list specific functions which are reserved. Instead it sets out *subjects* where legislative competence has been reserved to the UK Parliament. The approach varies, but in general the reservations have been expressed in broad terms – typically by general descriptions of the subject or by reference to the subject matter of a particular Act. Where exceptions are made to these reservations, these are also typically expressed in fairly general terms (though it stands to reason that greater detail is used than in the reservations themselves).
4. This approach was adopted deliberately when drafting the 1998 Act, to allow the courts to take a broad approach to the interpretation of Schedule 5 and, in particular, to consider the intended coverage of reservations instead of relying on an unduly literal approach. It is important that this should not be undermined by a series of unduly detailed section 30(2) Orders, not least because this could cast doubt on the interpretation of existing more general reservations.

Alternatives to Section 30(2) Orders

5. Modification of Schedule 5 may be the most obvious route to achieve your policy aim, but it may not be the only option and alternatives could prove preferable. You should speak to colleagues in the Scottish Government and in your Department’s central devolution liaison point (if you have one) at the earliest possible stage to establish whether they take the same view on the options available and which is preferable. The Scotland Office should also be consulted early on in discussions.
6. In considering alternative approaches to a Section 30(2) Order, remember that:
 - the exercise of functions, and therefore operational authority, can be transferred to the Scottish Government by means of an Executive Devolution

¹ The Scottish Parliament may legislate only as regards Scots law and may not confer functions exercisable other than “in or as regards Scotland”; the Scottish Government has competence only where its actions are “or as regards Scotland” and are within devolved competencies.

Order made under Section 63 of the 1998 Act. That would have the effect of maintaining the relevant reservation (i.e. the legislative framework continues to be set by the UK Parliament), but devolving to the Scottish Government responsibility for implementation and related casework. Similarly an Order made under Section 108 of the 1998 Act provides for specific functions to be undertaken by a Minister of the Crown instead of by the Scottish Government. In neither case is legislative competence affected;

- the fact that there is some element of doubt as to the precise boundaries of a reservation or exception does not necessarily mean that a Section 30(2) Order is required. Section 30(2) Orders should not routinely be used only for the purposes of clarification – that should generally be left to the courts. However, exceptions will inevitably arise from time to time, e.g. it might be appropriate for a reservation or exception to be clarified if:
 - a. the Scottish Government intends inviting the Scottish Parliament to legislate in an area; and
 - b. the Scottish Government and UK Government see the risks and consequences of a successful legal challenge as being significant in the wider context. There may be other cases where new circumstances, for instance the development of new legal concepts or areas of Government activity, make revision of reservations desirable. These cases should be assessed on their merits.

Section 30(2) Orders

7. Notwithstanding the alternatives available, the 1998 Act recognises that changes may, over time, have to be made to the reservations and exceptions set out in Schedule 5. Section 30(2) of the Act therefore allows the Schedule to be modified through an Order in Council. The draft Order must be approved by the Scottish Parliament and both Houses of the UK Parliament before it is made and can come into force. The initiative in proposing a Section 30(2) Order can be taken by either the Scottish Government or the UK Government, but both sides need to agree both the principle and the detail before an Order can be pursued.
8. Where departments believe that a Section 30(2) Order may be required, it is important that the following steps are taken:
 - a. Consider the **political dimension**. A Section 30(2) Order must be approved by both the UK and Scottish Parliaments.
 - b. In view of the requirement for (on occasion complex) inter-governmental negotiation, there is a considerable lead time involved in taking forward an Order under the Scotland Act 1998. This should be factored into the timetables for the delivery of the Order to meet the desired implementation dates. . Proposals for section 30(2) Orders should be entered into **the Scotland Act Order Programme** which is maintained by the Scotland Office. Such action should be taken well ahead of the implementation date and the programme for delivery of an Order should allow a realistic timescale to provide for the Order-making process.

- c. UK Government Departments and the Scottish Government should seek their own legal advice and, following the identification of an Order being required under the 1998 Act, **engage with interested parties at an early stage** (i.e. your Ministers, your department's devolution contact, your own legal advisers, the Scotland Office, the Devolution team in the Cabinet Office, other relevant Whitehall departments (including the Wales Office and Northern Ireland Office) and the Scottish Government). Similarly you must inform and invite comments from them if you receive a request for a Section 30(2) Order from the Scottish Government. You should also encourage your contacts in Scotland to approach the Scottish Government's Constitutional Policy Team.
- d. Bear in mind that **inserting new reservations** may affect the approach the courts take to the interpretation of existing ones (for example if the new amendments are more detailed than the existing entries, particularly those in the same Head). Seeking to achieve greater certainty in one context may have the unintended consequence of introducing uncertainty elsewhere.
- e. **Remember** that Schedule 5 of the 1998 Act does not list devolved matters. Remember also that the Schedule covers subject areas which are reserved (or exceptions to those reservations) rather than detailing specific functions.
- f. **Collective Ministerial agreement** is required for an Order to be taken forward under Section 30(2) of the 1998 Act – usually via the Home Affairs Committee. Once you have firm policy proposals agreed in principle with the Scottish Government and have agreed this with officials in the Scotland Office, your Ministers should write to the Parliamentary Under Secretary of State at the Scotland Office (who has Ministerial responsibility for Orders under the Scotland Act 1998) to seek permission for the Order to be taken forward. This correspondence should be copied to those UK Government departments who have a policy interest in the terms of the Order. ,
- g. If agreement is reached that a Section 30(2) Order should be pursued agreement should be reached on who will be leading on the **instructing and drafting of the Order** (i.e. either the Scottish Government or a UK Government department). Policy instructions should be agreed by both parties. The instructions should set out clearly and unambiguously the agreed policy objectives and how the Order will seek to achieve these objectives. Final Ministerial agreement will need to be obtained once the Order is in final form, the process for that agreement being reached being the same as set out at paragraph h above.
- h. **Seek the advice of the Scotland Office** as to whether any other Section 30(2) Orders are being prepared and if it would be possible to add an entry rather than produce an additional Order. Also, request from the Scotland Office information on the timing of future meetings of the Privy Council so you have a clear timetable for completion of the draft Order.

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