EXPLANATORY MEMORANDUM TO

THE ADOPTION AND CHILDREN (SCOTLAND) ACT 2007 (CONSEQUENTIAL PROVISIONS) (AMENDMENT) ORDER 2011

2011 No. 1345

1. This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Adoption and Children (Scotland) Act 2007 (Consequential Provisions) Order 2010 ("the 2010 Order") which was made under section 104 of the Scotland Act 1998 ("the 1998 Act") and made provisions which were necessary and expedient in consequence of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). The 2010 Order made modifications to certain provisions of the Adoption and Children Act 2002 ("the 2002 Act") and the Adoption (Northern Ireland) Order 1987 ("the 1987 Order").

2.2 The 2010 Order had effect only for a period of 8 months as it was intended (subject to Parliamentary approval) that before the end of that period a further, substantive, Order would be made under section 104 of the 1998 Act amending the 2002 Act and the 1987 Order, and a number of other enactments.

2.3 The substantive Order has not yet been made. As a result, it is necessary and expedient to make this Order, which provides for the 2010 Order to continue to have effect. The 2010 Order will be revoked and replaced by the substantive Order.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order is made in exercise of the powers conferred by sections 104, 112(1) and 113(4) and (5) of the 1998 Act. Section 104 of the 1998 Act provides for subordinate legislation to be made which is necessary or expedient in consequence of any Act of the Scottish Parliament, in this case the 2007 Act.

3.2 The 2010 Order was necessary and expedient in consequence of the 2007 Act. The Order made modifications to the 2002 Act and the 1987 Order to ensure the courts in England and Wales and Northern Ireland, may recognise, and make adoption orders in respect of children who are subject to, permanence orders that include provision granting authority to adopt made under the 2007 Act (or are deemed to be so by virtue of transitional provisions referred to in detail below). Without the 2010 Order, the 2002 Act and the 1987 Order would only recognise freeing orders made under the Adoption (Scotland) Act 1978 ("the 1978 Act").

3.3 It is necessary and expedient to make this Order, to extend the life of the 2010 Order to ensure that those modifications to the 2002 Act and the 1987 Order continue to have effect prior to the substantive Order under section 104 being made.

4. Legislative Context

4.1 The 2007 Act repeals and replaces the 1978 Act, with the exception of Part 4 of the 1978 Act which concerns the status of adopted children.

4.2 The 2007 Act introduced a new order, the permanence order, made under section 80, which replaces freeing orders made under section 18 of the 1978 Act and parental responsibilities orders made under section 86 of the Children (Scotland) Act 1995 ("the 1995 Act").

4.3 Chapter 4, Part 3, of the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009 (SSI 2009/267) ("the 2009 Order") makes transitional and savings provisions in relation to freeing orders, or applications for freeing orders, made before the coming into force of the 2007 Act. In particular, article 17(1) of the 2009 Order provides that where a child is subject to a freeing order immediately before 28 September 2010, that child will be treated as though they were subject to a permanence order. Under article 17(2) and (3), that permanence order is deemed to consist of the mandatory provision specified in section 81(1) of the 2007 Act, (provisions vesting parental responsibilities and parental rights in the local authority), and provision granting authority for the child to be adopted. Article 19(2) of the 2009 Order provides that where an application to revoke a freeing order has been made, but not yet determined, immediately before 28 September 2010 and the court subsequently decides not to revoke the freeing order, the child will be treated as though they are subject to a permanence order which will be deemed to consist of those provisions set out in articles 17(2) and (3).

4.4 Section 47 of the 2002 Act provides that an adoption order may not be made under that Act unless one of the three conditions set out in that section is met. Under section 47(6), the third condition includes that that the child must be free for adoption by virtue of an order made in Scotland under section 18 of the 1978 Act. Section 105 of the 2002 Act makes provision for the effect of certain Scottish orders and provisions. In particular, subsection (2) provides that freeing orders made under the 1978 Act (and the revocation or variation of such an order) have effect in England and Wales as they have effect in Scotland, but as if references to parental responsibilities and parental rights were to parental responsibility.

4.5 The Adoption (Northern Ireland) Order 1987 makes similar provision in relation to Northern Ireland with respect to the making of adoption orders. Article 16(1)(a) of the 1987 Order includes provision that the court may make an adoption order in respect of a child where that child is subject to a freeing order made under the 1978 Act.

4.6 By virtue of section 115 of, and Schedule 7 to, the 1998 Act this Order is subject to the negative resolution procedure.

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1. The 2007 Act came into force on 28 September 2009 and replaced the 1978 Act, restating and updating existing provisions as well as creating new provisions in relation to adoption in Scotland. The 2007 Act introduced a new court order, the permanence order, which replaces freeing orders made under the 1978 Act and parental responsibilities orders under the 1995 Act. Permanence orders are not an exact replacement for freeing orders; there are important differences between the two.

7.2. Freeing orders under the 1978 Act were made by the court in cases where there was likely to be a disputed adoption. The order effectively "freed" the child for adoption removing all parental rights and parental responsibilities from the child's parents and on that basis parental consent to the making of a subsequent adoption order was not required.

7.3. Under the 2009 Order, any freeing orders existing at 28 September 2010 are deemed to be permanence orders granting authority for the child to be adopted.

7.4. Permanence orders are granted by the sheriff on the application of the local authority. As a minimum requirement they must vest in the local authority the right to determine where the child shall reside (as well as the guidance duty (under section 1(1)(b)(ii) of the 1995 Act)). The permanence order must be kept under review by the local authority and an application may be made for variation or revocation of such an order.

7.5. Permanence orders may also include provision granting authority for the child to be adopted if certain criteria are met. A permanence order which does not contain this provision may be amended to include authority for the child to be adopted on the application of the local authority.

7.6. The policy intention is that the substantive Order under section 104 will amend the 2002 Act and the 1987 Order to replace references to freeing orders under the 1978 Act with references to permanence orders under the 2007 Act in addition to making necessary

amendments to a number of other enactments. Such an order has been prepared by the Scotland Office and is currently awaiting scrutiny by the JCSI. It is subject to the affirmative procedure and it is unlikely that it will now come into force before 1st July 2011. If the 2010 Order were to cease to have effect before the substantive section 104 Order were made, the courts in England and Wales and Northern Ireland would be unable to make an adoption order with respect to a child subject to a permanence order which grants authority to adopt without the consent of the birth parents or the court being satisfied that they should dispense with such consent. If the court is unable to make an adoption order on the basis of the Scottish courts having made a permanence order, this will mean reopening the issue of parental consent which will already have been dealt with by the Scottish courts in the making of the permanence order. This will prolong the hearing of the application and therefore cause delay which will not be in the best interests of the child.

7.7. Therefore, this Order is being made as a temporary measure to amend the 2010 Order to ensure that the modifications made by it continue to have effect in the interim to enable the courts to recognise permanence orders which grant authority to adopt. The 2010 Order will continue in force until it is revoked and replaced by the substantive section 104 Order.

8. Consultation Outcome

8.1 No formal consultation was undertaken on the provisions of the 2010 Order as it was made for the purpose of enabling the courts in England and Wales and Northern Ireland, to make adoption orders in relation to children who are subject to permanence orders granting authority to adopt. No consultation has been undertaken in relation to the making of this Order.

9. Guidance

9.1 No guidance is necessary**.** The Ministry of Justice ensured that the English and Welsh Courts were aware of the provisions made by the 2010 Order, and their practical implications. The Department for Justice for Northern Ireland made similar provision in relation to the courts in Northern Ireland. The Department of Education has notified the Ministry of Justice, Northern Ireland Office and Welsh Ministers that this Order is being made.

10. Impact

10.1 There is no impact on the public sector and therefore an impact assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The Order does not impose an additional burden on small business.

12. Monitoring and Review

12.1 This Order will cease to have effect once the substantive section 104 Order comes into force. In light of this, no monitoring or review of the provisions of the Order is necessary.

13. Contact

13.1 Ruth Wilson at the Department for Education, Tel: 020 7783 8071 or email: ruth.wilson@education.gsi.gov.uk can answer any queries regarding the instrument.