EXPLANATORY MEMORANDUM TO

THE CRIMINAL JURISDICTION (APPLICATION TO OFFSHORE RENEWABLE ENERGY INSTALLATIONS ETC) ORDER 2009

2009 No. 1739

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

2. Purpose of the instrument

2.1 This Order applies the criminal law in force in England and Wales, on the one hand, and in Scotland on the other, to activities on, under or above a renewable energy installation[1] ("REI") in tidal waters and parts of the sea in or adjacent to Great Britain up to the seaward limits of the territorial sea and waters in the Renewable Energy Zone ("REZ") and to such offshore waters that are within a safety zone[2]. For this purpose it divides these waters into English and Scottish areas (article 2) The Order also extends the jurisdiction of the police to these activities (article 4).

2.2 The Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 has been made in parallel. This applies civil law to activities on, under or above an REI in the same offshore waters as the Criminal Order (and in relation to certain electric lines).

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

3.1 None.

4. Legislative context

4.1 Under Chapter 2 of Part 2 of the Energy Act 2004 ("the Act") provision is made for the exploitation of areas outside the territorial sea of the UK for energy production.

4.2 Section 84(4) of the Act provides a power to designate an area as a Renewable Energy Zone. This was exercised by the Renewable Energy Zone (Designation of Area) Order 2004 (SI 2004/2668). The REZ extends around Great Britain up to 200 nautical miles from the baseline against which the limit of the territorial sea is measured.

4.3 By virtue of the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153)[3] part of the REZ has been

---

[1] A renewable energy installation is defined in section 104(3) to (5) of the Energy Act 2004.
[2] A safety zone is defined in section 104(1) of the Energy Act 2004.
[3] Made under section 84(5) of the Act.

designated as an area in relation to which the Scottish Ministers have functions (mainly in relation to the granting of development consent for offshore generating stations, specifically REIs including offshore wind farms).

4.4 An essential part of the legal framework for a REZ is the need for such development to be secure in legal terms, that is for criminal and civil jurisdiction to be established in the vicinity of those REIs so that persons undertaking criminal activity in relation to those REIs can be prosecuted and that, primarily, developers can rely on civil law to take legal proceedings to protect their assets. Sections 85 and 87 of the Act enables UK criminal and civil law respectively to be extended, by Order in Council, to offshore REIs in inland waters, the territorial sea adjacent to Great Britain and the REZ[4] . As described in paragraph 2.1 above, this Order applies criminal law in force in England and Wales on the one hand and in Scotland on the other, and for this purpose divides the offshore area into English and Scottish parts.

4.5 This Order applies, amongst other things, to Scottish tidal and territorial waters and in doing so it contains provision that would be within the legislative competence of the Scottish Parliament if it were included in an Act of that Parliament. For this reason, and in accordance with section 88 of the Act, this Order has also been laid in the Scottish Parliament.

5. Territorial extent and application

5.1 This Order applies to Great Britain.

6. European convention on human rights

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

7. Policy background

What is being done and why

7.1 The Government has introduced targets for the proportion of electricity generated by renewable energy. It is anticipated that a significant contribution will come from offshore wind farms situated either within territorial waters or in the REZ. In order to facilitate this expansion, The Crown Estate, as owner of most the seabed out to the territorial limit and licensee of wind farm developments in the REZ, has awarded leases and licences over a number of sites to companies on which wind farm development can take place.

7.2 To date, offshore wind farms have been located in tidal or territorial waters only. However, construction commenced in June 2009 on the first wind farm that will be partially situated in the REZ (off the Suffolk coast).

[4] A similar approach was adopted in relation to offshore oilrigs pursuant to sections 10 and 11 of the Petroleum Act 1998. See the Civil Jurisdiction (Offshore Activities) Order 1987 (SI 1987/2197) and the Criminal Jurisdiction (Offshore Activities) Order 1987 (SI 1987/2198).

For the reasons given in paragraph 4.4 above it is important, therefore, that offshore REIs are brought within jurisdiction for the purpose of criminal law in force in England and Wales (and Scotland).

7.3 As explained above, the Order makes provision for English and Scottish areas, delineated by reference to a Scottish border off the east and west coasts of Scotland. The policy intention is for the Scottish border to be consistent with the one used for the purpose of designating the area of the REZ in which Scottish Ministers have functions (see paragraph 4.3). The Scottish border is therefore based on the boundaries contained in the Scottish Adjacent Waters Boundaries Order 1999 (1999/1126).

7.4 In making separate provision for English and Scottish areas this Order departs from the approach taken in the Criminal Jurisdiction (Offshore Activities) Order 1987 (see footnote 4 above). That Order applies UK criminal law to the whole of the REZ, without specifying a division of responsibility. Under that regime it is left to prosecutorial discretion to ensure that offences connected to Scotland are dealt with by Scottish courts etc. In the case of this Order we did not consider this to be an appropriate approach for two reasons. First, it would necessitate accompanying guidance to clarify how prosecutorial discretion is to be exercised. Second, for the reasons set out in paragraph 7.3 above, the Scottish border in this Order is based on boundaries in the Scottish Adjacent Waters Boundaries Order 1999. This is a different (and indeed more southerly) border than that provided for in the 1987 Order. We considered that, absent a precise definition of the Scottish border, there was real risk of confusion as to the correct boundary to be applied.

7.5 A similar decision was taken to make separate provision for English and Scottish areas when exercising the power in section 85(3) to apply police powers to activities in offshore waters (relying also in this case, given the nature of section 85(3), on the power in section 192(4)(a) to make different provision for different cases including different provision in respect of different areas).

7.6 Articles 1, 2, 3(1) and 4(1) of this Order (those applying English law) will come into force on 5th August 2009. All other articles (those applying Scottish law) will come into force on 1st November 2009.

7.7 The later coming into force date for the provisions applying Scottish law reflects the fact that procedure in the Scottish Parliament is delayed during recess and does not count towards the 21 day period. It should be noted that, there are currently no REIs in the Scottish REZ and to our knowledge, unlike in the English area, there are no plans to start building such REIs before the date on which the Orders come into force in Scotland.

Consolidation

7.8 Not applicable

8. Consultation outcome

8.1 Since these are paving measures that do not impose additional burdens on business there has been no external consultation. DECC officials have written to counterparts in a number of Government Departments to seek guidance on whether any legislation for which they have responsibility should be excluded from this Order. Scottish Ministers confirmed their approval for the Order to be made.

9. Guidance

9.1 No guidance has been or will be issued.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business but there is no impact and thus no additional measures need to be taken.

12. Monitoring and review

12.1 It is not proposed that this Order is to be formally reviewed, as there is no impact.

13. Contact

Tony Keegan or Keith Welford at the Department of Energy and Climate Change (telephone: 0300 068 5676 or 0300 068 5686 or e-mail: tony.keegan@decc.gsi.gov.uk or keith.welford@decc.gsi.gov.uk) can answer any queries regarding the instrument.