EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2011

2011 No. [XXXX]

1. 1.1 This Explanatory Memorandum has been prepared by Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order makes provisions in consequence of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act").

Community Payback Orders

2.2 Section 14 of the 2010 Act introduced a new community sentence in Scotland known as the Community Payback Order (CPO). The policy intention of this Order in relation to CPOs is to enable the transfer of CPOs imposed by a court in Scotland to England and Wales or Northern Ireland where an offender resides or intends to reside there.

Forensic Data

2.3 The 2010 Act sets out what use can be made of various sources of forensic data about individuals who are arrested or detained under suspicion of having committed an offence. The provisions in Part 1 of the Schedule to the Order allow forensic data, as well as such data taken from terrorist suspects, to be used for the reserved purpose of national security and for the purposes of a terrorist investigation.

Extreme Pornography

2.4 The Order will ensure that a person made subject to the sex offender notification requirements (SONR) by virtue of paragraph 44A of Schedule 3 to the Sexual Offences Act 2003, which applies to persons convicted of the offence of possession of extreme pornography, will be subject to the requirements as a matter of law in England, Wales and Northern Ireland.

Foreign Travel Orders

2.5 The Order extends the Scottish offence of breaching the requirement to surrender passports under a Foreign Travel Order (FTO) to England, Wales, and Northern Ireland. The measure ensures that FTOs are capable of applying throughout the United Kingdom, and that any breach should be prosecutable wherever in the United Kingdom it occurs.

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

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113(2), (4) and (5) of the Scotland Act 1998 ("the 1998 Act"). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions which are necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament; in this case the 2010 Act. This Order is subject to affirmative resolution in the UK Parliament.

3.2 This Order is necessary or expedient in consequence of the 2010 Act. The Order ensures that provisions made in the 2010 Act concerning Community Payback Orders, Extreme Pornography and Foreign Travel Orders are applicable throughout the United Kingdom. It also ensures that forensic data will be able to be used for reserved purposes.

4. Legislative Context

Community Payback Orders

4.1 Section 14 of the Criminal Justice and Licensing (Scotland) Act 2010 inserted new provisions (sections 227A to 227ZN) into the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) which introduced a new community sentence in Scotland known as the CPO. These provisions came into effect on 1 February 2011. This Order inserts a new section 227ZO and Schedule 13 into the 1995 Act to make provision for the transfer of CPOs from Scotland to England and Wales or Northern Ireland. (Reciprocal legislative arrangements already exist for the transfer of community orders from England and Wales and Northern Ireland to Scotland under the Criminal Justice Act 2003 and the Criminal Justice Act 1982.)

Forensic Data

4.2 Section 82 of the 2010 Act introduced new section 19C of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Section 19C sets out what use can be made of various sources of forensic data, including data collected under the 1995 Act from individuals who are arrested or detained under suspicion of having committed an offence. This information will be able to be used for devolved purposes, i.e. for the identification of deceased persons and for the prevention, detection and investigation of crime.

4.3 The provisions in Part 1 of the Schedule to the Order will amend section 19C of the 1995 Act to allow forensic data, as well as such data taken from terrorist suspects, to be used for the reserved purpose of national security and for the purposes of a terrorist investigation. Essentially these reserved matters are relevant only to a small number of bodies such as HM Revenue and Customs and the Serious Organised Crime Agency. The provisions also provide for forensic data taken for reserved purposes to be used for devolved purposes as specified in section 19C(2).

Extreme Pornography

4.4 Section 42 of the 2010 Act inserts section 51A into the Civic Government (Scotland) Act 1982 which creates a new offence of possession of extreme pornographic material. It provides that a person convicted of this offence who is sentenced to more than 12 months of imprisonment, and is 18 years of age or over at

the time of the offence, may be made subject to the sex offender notification requirements if the court determines that it is appropriate to do so.

4.5 The Order will ensure that a person made subject to the sex offender notification requirements (SONR) by virtue of paragraph 44A of Schedule 3 to the Sexual Offences Act 2003, which applies to persons convicted of the offence of possession of extreme pornography, will be subject to the requirements as a matter of law in England, Wales and Northern Ireland.

Foreign Travel Orders

4.6 Paragraph 4 of Part 3 of Schedule 1 to the Order extends the Scottish offence of breaching the requirement to surrender passports under a Foreign Travel Order (FTO), to England, Wales, and Northern Ireland. The measure takes account of changes introduced in the Criminal Justice and Licensing (Scotland) Act 2010, mirror changes already introduced in the rest of the United Kingdom through the Policing and Crime Act 2009, and ensure that FTOs are capable of applying throughout the United Kingdom, and that any breach should be prosecutable wherever in the United Kingdom it occurs.

5. Territorial Extent and Application

5.1 Except as provided below, this instrument applies to all of the United Kingdom.

5.2 The provisions relating to the use of forensic data extend to Scotland only.

5.3 The amendment to the Juries (Northern Ireland) Order 1996 extends to Northern Ireland only.

5.4 The repeal of section 234(4) to (11) of the Criminal Procedure (Scotland) Act 1995 and the amendments to the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 and the National Health Service (Direct Payments) Regulations 2010 extend to England and Wales only.

5.5 The amendments to the Public Passenger Vehicles Act 1981 and the Goods Vehicles (Licensing of Operators) Act 1995 extends to Scotland and to England and Wales only.

5.6 The change to the extent of the Sexual Offences Act 2003, the repeal of section 244 of the Criminal Procedure (Scotland) Act 1995 and the amendment to the Social Security Fraud Act 2001 extend to England and Wales and Northern Ireland only.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Scotland, Rt. Hon. David Mundell MP, has made the following statement regarding Human Rights:

'In my view the provisions of the Criminal Justice And Licensing (Scotland) Act 2010 (Consequential Provisions and Modifications) Order 2011 are compatible with the Convention rights.'

7. Policy background

Community Payback Orders

7.1 The policy intention is to enable the transfer of a Community Payback Order (CPO) imposed by a court in Scotland to England and Wales or Northern Ireland where an offender resides or intends to reside there.

7.2 Allowing offenders to transfer can assist in the aims of effective supervision to protect the public, prevent reoffending and aid the rehabilitation of the offender.

7.3 The CPO enables the court to impose one or more of a range of requirements on an offender. These measures are designed to help offenders address their offending behaviour and provide opportunities to reintegrate themselves into society as law abiding and contributing citizens.

7.4 The requirements are:

- Unpaid work or other activity requirement
- Offender supervision requirement
- Compensation requirement
- Programme requirement
- Mental Health Treatment requirement
- Drug Treatment requirement
- Alcohol Treatment requirement
- Residence requirement
- Conduct requirement; and
- Restricted movement requirement

7.5 Offenders subject to a probation order or community service order in Scotland have been able to transfer to England and Wales and those subject to a community service order have been able to transfer to Northern Ireland. The relevant transfer provisions are saved for the transition period for these orders. This section 104 Order will provide similar provision for the transfer of the CPO. The number of cases transferring from Scotland to other UK jurisdictions has been relatively low. Approximately 200 cases transferred out of Scotland in 2009 and it is not expected that the numbers seeking transfer will increase with the introduction of the CPO.

7.6 The Ministry of Justice has agreed that CPOs can be transferred to England and Wales and treated as a community order under the Criminal Justice Act 2003 http://www.legislation.gov.uk/ukpga/2003/44/section/177. For offenders under 18 years, the Youth Justice Board has agreed that a CPO will be treated as a youth rehabilitation order under the Criminal Justice and Immigration Act 2008. http://www.legislation.gov.uk/ukpga/2008/4/contents

7.7 The Northern Ireland Department of Justice has agreed that a CPO with a standalone unpaid work requirement can be transferred to Northern Ireland and

treated as a community service order under the Criminal Justice Northern Ireland Order 1996. A CPO with other requirements can be transferred and treated as a probation order under the same 1996 Order.
http://www.legislation.gov.uk/nisi/1996/3160/contents.

7.8 A specific exclusion to these transfer arrangements has been agreed in respect of those individuals where the court has imposed a CPO with a level 1 unpaid work requirement for fine default under section 227 M of the 1995 Act. This is because there are no similar arrangements in place in the receiving jurisdictions.

7.9 Additional modifications have also been identified as necessary to enable a transfer of a CPO with a compensation requirement or restricted movement requirement.

7.10 Once the CPO has been transferred to a court in England, Wales or Northern Ireland and takes the form of a corresponding order in that jurisdiction, the order is then proceeded with as if the order originated and was made by the courts in those jurisdictions.

7.11 The court in England and Wales or Northern Ireland will however not have the power to:
(a) discharge or revoke the order (other than where the offender is convicted of a further offence and a custodial sentence imposed);
(b) deal with the offender in respect of the offence for which the CPO was imposed;
(c) increase the number of hours of unpaid work in an unpaid work or other activity requirement beyond that which the court which imposed the order could have specified;
(d) vary a restricted movement requirement to specify a longer period than that which the court which imposed the court could have specified.

These powers can only be exercised by the court that originally imposed or last varied the order in Scotland.

7.12 The intention is that when an accusation of breach of a CPO is made, the court in England and Wales or Northern Ireland will hear the breach proceedings and determine whether the offender has breached any of the requirements of the CPO. If on finding there has been a breach, that court can refer the offender back to the court in Scotland which imposed or last varied the CPO, for the offender to be dealt with in any of the ways referred to above.

7.13 Equally, if either the offender or the person supervising the offender wishes the CPO to be varied or revoked, the court in England and Wales or Northern Ireland can hear the application for variation or revocation under the relevant procedure in that jurisdiction. But if the order is to be dealt with in one of the ways outlined above, the offender must be referred back to the court in Scotland.

Forensic Data

7.14 The purpose of these provisions is to set out in statute the position with regard to the retention and use of forensic data in Scotland for reserved purposes, ensuring continued compliance with Article 8 of the European Convention on Human Rights.

7.15 Section 82 of the 2010 Act introduced new section 19C of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Section 19C sets out what use can be made of various sources of forensic data, including data collected under the 1995 Act from individuals who are arrested or detained under suspicion of having committed an offence. This information will be able to be used for devolved purposes, i.e. for the identification of deceased persons and for the prevention, detection and investigation of crime.

7.16 The provisions in Part 1 of the Schedule to the Order will amend section 19c of the 1995 Act to allow forensic data, including forensic data taken from terrorist suspects, to be used for the reserved purpose of national security and for the purposes of a terrorist investigation Essentially these reserved matters are relevant only to a small number of bodies such as HM Revenue and Customs and the Serious Organised Crime Agency. The provisions also provide for forensic data taken for reserved purposes to be used for devolved purposes as specified in section 19C(2).

7.17 Section 82 of the Criminal Justice and Licensing (Scotland) Act 2010 is due to be commenced on 1 August 2011, i.e. at the same time as the provisions in the Order. The co-ordination of the timing of the commencement of the two pieces of legislation will avoid operational confusion and ensure that there is a clear legal basis for the retention and use of forensic data in Scotland for both reserved and devolved purposes.

Extreme Pornography

7.18 The Order extends the provisions concerning the Sex Offender Notification Requirements (the "Sex Offenders Register") for persons convicted of possession of extreme pornography in Scotland to apply in England, Wales and Northern Ireland.

7.19 This ensures that a person made subject to the Notification Requirements as a result of conviction for possession of extreme pornography in Scotland could not evade the requirement to register by moving elsewhere in the UK.

Foreign Travel Orders

7.20 The Order extends the new Scottish offence of failure to surrender passports to England, Wales, and Northern Ireland. It is a sensible measure given the increased mobility of offenders who try to avoid their obligations by leaving one jurisdiction for another, and a growing international concern about sex tourism.

7.21 It is not within legislative competence for an Act of the Scottish Parliament to create an offence under the law of England, Wales and Northern Ireland. Accordingly, if a sex offender failed to surrender a passport to a police station in Scotland, and they travelled to another part of the UK, they could not be prosecuted in that other part of the UK for this failure. For that reason, it is necessary to plug that gap.

7.22 The changes to the Foreign Travel Order regime in Scotland mirror changes already introduced in the rest of the UK through the Policing and Crime Act 2009.

Consolidation

7.23 This instrument does not amend another instrument, therefore no consolidation is required.

8. Consultation outcome

8.1 Policy interests and legal advisers in Scotland, England and Wales and Northern Ireland have been fully consulted on the cross border transfer arrangements for the CPO. The Scottish Court Service has also provided input as to how the provisions will operate in practice.

8.2 No consultation has taken place in relation to the other aspects of this Order as they make amendments in consequence of the Criminal Justice and Licensing (Scotland) Act 2010. Interested parties were consulted throughout the parliamentary passage of the Act, it was also debated in the Scottish Parliament.

9. Guidance

9.1 Guidance as to how the CPO applies in Scotland is available at http://www.scotland.gov.uk/Topics/Justice/public-safety/offender-management/offender/community/16910/Standards/CPO.

9.2 The subject matters contained within this Order are broadly devolved and so guidance on the working of the 2010 Act and associated legislation is a matter for the Scottish Government. Additionally, UK Government departments with policy responsibility for the legislation being amended in this Order will be able to provide guidance to stakeholders if required.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal. Reciprocal transfer arrangements already exist between the jurisdictions and the CPO is a replacement for existing community disposals rather than an additional disposal.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The National Outcomes and Standards for Criminal Justice Social Work prescribe the roles and responsibilities of case managers in planning, managing, monitoring and reviewing case management plans for individual offenders. The cross border transfer arrangements for individuals subject to a CPO will be part of the management plan. On transfer, the offender will become subject to the national standards for monitoring and review which apply in that jurisdiction.

12.2 The effects of this Order are consequential. It does not create new policy or frameworks and therefore no further monitoring or review of the effects of this Order are required.

13. Contact

13.1 Lizzie Walker at the Scotland Office Tel: 020 7270 6811 or email: lizzie.walker@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.