EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS) (SCOTLAND) ACT 2010 (CONSEQUENTIAL PROVISIONS) ORDER 2011

2011 No. [XXXX]

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before the UK 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 provision consequential on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 ("the 2010 Act"). The 2010 Act reformed Scots law in respect of persons being questioned by police constables on suspicion of having committed an offence. In particular, the 2010 Act enshrined a right to legal advice for suspects prior to and during questioning by a constable; it made provision in respect of legal aid for suspects wishing to exercise this right and it extended the period for which persons could be detained by a police constable. The 2010 Act was enacted by the Scottish Parliament in response to the ruling of the Supreme Court in the case of *Cadder v Her Majesty's Advocate*, with a view to ensuring that the law of Scotland is compatible with the European Convention on Human Rights.

2.2 This Order brings Scots law in respect of persons being questioned by HM Revenue & Customs ("HMRC") and the UK Border Agency ("UKBA") on suspicion of having committed a revenue and customs offence in Scotland into line with the law which applies to criminal investigations carried out by police constables in Scotland, following enactment of the 2010 Act.

2.3 This Order also amends the law on cross-border arrest and detention to bring parity between the powers of police constables, HMRC and UKBA acting within Scotland and the powers of Scottish police constables, HMRC and UKBA exercising cross-border powers of arrest and detention elsewhere in the UK.

3. Matters of Special Interest to the Joint Committee of Statutory Instruments

3.1 This Order is to be made in exercise of the powers conferred by section 104 of the Scotland Act 1998 ("the 1998 Act"). The Order is subject to affirmative resolution procedure in the UK Parliament. Section 104 of the 1998 Act provides that subordinate legislation may make such provision as the person making it considers to be necessary or expedient in consequence of any Act of the Scottish Parliament. This Order is necessary or expedient in consequence of the 2010 Act.

3.2 Following the enactment of the 2010 Act, the position of police suspects and HMRC and UKBA suspects in Scotland is not aligned. This Order will put HMRC and UKBA suspects in the same position as police suspects in Scotland by enshrining in statute their right of access to a solicitor prior to and during questioning; by extending the right to access advice and assistance, without means testing, to HMRC and UKBA suspects; and by including HMRC and UKBA suspects in the duty which has been placed upon the Scottish Legal Aid Board by the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 ("the Duty Solicitors Regulations 2011") to ensure the availability of advice. The Order will ensure that HMRC and UKBA can continue to effectively carry out their duties in Scotland in order to tackle serious crime by extending the period for which they may detain suspects from 6 to 12 hours, with a possible further extension up to a maximum of 24 hours. This places HMRC and UKBA in the same position as police constables in Scotland.

3.3 The 2010 Act only amended the powers of Scottish police constables when detaining or arresting suspects in Scotland. The period for which Scottish police constables can detain suspects in cross-border cases is now markedly out of step with the detention period permitted in Scotland following the coming into force of the 2010 Act. Cross-border detention provisions in the Criminal Justice and Public Order Act 1994 ("the 1994 Act") allow for the detention of suspects for only 4 hours where a suspect's detention commences in England or Wales; and 6 hours where detention commences in Northern Ireland. This applies regardless of whether the suspect is taken for interview to a police station in England, Wales or Northern Ireland, or taken back to a police station in Scotland. Cross-border detentions usually arise in relation to the most serious types of cases and the current detention period raises significant challenges due to the need to allow solicitor access before questioning which has a negative impact on the time available to conduct effective investigations. This Order brings the cross-border detention provisions for Scottish police constables, HMRC and UKBA into line with the provisions in the 2010 Act to ensure consistency of approach for the detention and arrest of suspects throughout the United Kingdom in investigations carried out by Scottish police forces, HMRC and UKBA.

3.4 The 2010 Act ensured that suspects were able to obtain legal advice before and during questioning by the police. This Order ensures that the right to legal advice is available to suspects who are being questioned by Scottish Constables, HMRC Officers conducting revenue and customs investigations and UKBA Officers conducting customs related criminal investigations, in a cross border scenario.

3.5 The Order also ensures that when a suspect is to be transported to Scotland for questioning their right to have another person informed of their arrest or detention arises at the point of arrest or detention. This differs from the position where a suspect is detained in Scotland or questioned in England, Wales or Northern Ireland where the right of intimation to another person arises upon arrival at a police station. It is considered more appropriate and proportionate to grant this right at the point of arrest or detention where a suspect is to be transported to Scotland, particularly where such transportation may take a number of hours. This amendment is both necessary and expedient as a direct consequence of the amendments by the 2010 Act. It ensures that a suspect is detained in a manner which is compliant with their rights under the European Convention of Human Rights.

4. Legislative Context

4.1 The 2010 Act was enacted by the Scottish Parliament in response to the Supreme Court's judgment in *Cadder v Her Majesty's Advocate* [2010] UKSC 43:

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf).

4.2 The 2010 Act makes provision for persons being questioned by Scottish police constables on suspicion of having committed an offence to have a right of access to legal assistance before and during questioning; gives Scottish Ministers an order making power to make criminal advice and assistance under the Legal Aid (Scotland) Act 1986 ("the 1986 Act") available for such persons in certain circumstances as may be prescribed without reference to financial limits; extends the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995 ("CP(S)A 1995") from 6 to 12 hours, and enables that period to be further extended in certain circumstances up to a maximum of 24 hours. In addition, the 2010 Act provides for a right to make representations in relation to applications for extension of time limits for bringing appeals; provides a time limit for lodging Bills of Suspension or Advocation; makes provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission; and confers power on the High Court to reject such references in certain circumstances.

4.3 A copy of the 2010 Act is available here:

http://www.legislation.gov.uk/asp/2010/15/contents.

4.4 The criminal investigation powers of HMRC and UKBA (for customs related matters) in Scotland arise from the Criminal Law (Consolidation) (Scotland) Act 1995 ("CL(C)(S)A 1995"). These powers largely mirror those available to Scottish police constables under the CP(S)A 1995.

4.5 The 1986 Act makes provision in connection with the availability of criminal advice and assistance. Amongst other things, the Advice and Assistance Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 ("the A&A Regulations 2011") disapply the financial limits on the availability of criminal advice and assistance for police suspects who have a right of access to a solicitor under the CP(S)A 1995, as amended by the 2010 Act. The Duty Solicitors Regulations 2011 place an obligation on the Scottish Legal Aid Board to make arrangements for a solicitor to be available to provide advice and assistance to suspects who have a right of access to a solicitor under the CP(S)A 1995, as amended by the 2010 Act.

4.6 Part 10 of the 1994 Act confers on police constables cross-border powers of arrest and detention throughout the UK.

4.7 Section 87 of the Finance Act 2007 ("the 2007 Act") applies the cross-border enforcement provisions in Part 10 of the 1994 Act to HMRC and UKBA.

5. Territorial Extent and Application

5.1 Articles 2 to 5, and Schedule 1, which amend the CL(C)(S)A 1995, the 1986 Act, the A&A Regulations 2011 and the Duty Solicitors Regulations 2011 extend to Scotland only.

5.2 Article 1 and articles 6, 7 and Schedule 2, which amend the 1994 Act and the 2007 Act, extend to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Scotland has made the following statement regarding Human Rights:

'*In my view the provisions of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (Consequential Provisions) Order 2011 are compatible with the Convention rights*'.

7. Policy Background

7.1 HMRC and UKBA - in relation to non-fiscal customs matters at the border - are responsible for carrying out criminal investigations into fraud and smuggling offences, throughout the United Kingdom. The types of offences investigated include fiscal fraud (e.g. VAT fraud, excise smuggling and income tax fraud) and drugs and weapon smuggling.

7.2 In Scotland, these investigations are conducted under CL(C)(S)A 1995, which replicates the powers and procedures used by police constables in Scotland under CP(S)A 1995, with cases being prosecuted by the Crown Office and Procurator Fiscal Service.

7.3 The 2010 Act amended the CP(S)A 1995, to update police powers and procedure in Scotland, with a view to ensuring that Scottish law and practice accords with the standards of the European Convention on Human Rights and to ensure the effective functioning of the criminal justice system following the judgment in the case of *Cadder v Her Majesty's Advocate*. The 2010 Act did not deal with the cross-border enforcement powers of Scottish police constables (the Scottish Parliament only has power to legislate "in or as regards Scotland") or with the powers of HMRC and UKBA, whose functions are reserved under the Scotland Act 1998.

7.4 The policy objective of this Order are two fold. The first is to ensure that in Scotland HMRC and UKBA suspects are subject to the same rights and procedures as police suspects. The Order will:

- Enshrine in CL(C)(S)A 1995 the right to legal advice for persons being questioned by HMRC and UKBA on suspicion of having committed a revenue and customs offence;

- Extend the period of time for which a person can be detained by HMRC and UKBA Officers under CL(C)(S)A 1995 from 6 hours to a 12 hour period of detention, with the potential to extend to 24 hours in certain circumstances with the appropriate authority;

- Expand Scottish Ministers' power under the 1986 Act to make regulations disapplying the financial eligibility criteria for advice and assistance to HMRC and UKBA suspects This provision will be underpinned by a Ministerial agreement and administrative arrangement that the provision of legal aid for HMRC and UKBA suspects will be on equivalent terms to the provisions made for legal aid in relation to persons detained by police constables in Scotland;

- Extend the right to access advice and assistance, without means testing, to HMRC and UKBA suspects by amending the A&A Regulations 2011; and

- Include HMRC and UKBA suspects in the duty which has been placed upon the Scottish Legal Aid Board by the Duty Solicitors Regulations 2011 to ensure the availability of advice

7.5 The second is to update the law in cross-border cases to mirror the position in the 2010 Act by amending the cross-border enforcement provisions in the 1994 Act and the 2007 Act, which applies with modifications the cross-border provisions in the 1994 Act to HMRC and UKBA cross-border cases. This Order will amend the law on cross-border enforcement in the following ways – it will:

- Enshrine in statute the right to legal advice for persons being questioned under cross-border enforcement powers by Scottish police constables or by HMRC and UKBA;

- Extend the period of time by which a person can be detained under cross-border enforcement powers to 12 hours, with the potential to extend to 24 hours in certain circumstances with the appropriate authority. As at present, detention will begin on arrival at a police station (either in Scotland or in another part of the UK) and the suspect must be transported to the police station "as soon as is reasonably practicable"; and

- Specify that the entitlement to have intimation sent to a solicitor and a reasonably named person arises at the point of arrest or detention. This amendment avoids the provision of these entitlements being delayed until arrival at a police station, as is the current position.

Consolidation

7.6 This Order does not amend or consolidate any previous Instruments.

8. Consultation Outcome

8.1 No consultation has taken place as this Order aims to align the powers of UKBA and HMRC in carrying out their reserved functions in Scotland for the purposes of customs and revenue criminal investigations, with any amendments made to CP(S)A in respect of criminal investigations carried out by police constables in Scotland.

8.2 No consultation undertaken in respect of cross-border powers as the Order is being made in consequence of changes made by the 2010 Act. Engagement with Scottish stakeholders has taken place within the Cadder Senior Working Group. The Cadder Senior Working Group was established in summer 2010. The group brought together representatives of the Scottish Government, Crown Office and Procurator Fiscal Service, Scottish Court Service, Scottish Legal Aid Board, the Association of Chief Police Officers in Scotland and the Law Society of Scotland to discuss and work together on issues arising from the case of *Cadder v Her Majesty's Advocate* and to contribute to advice to Scottish Ministers. The original 2010 Act was scrutinised in the Scottish Parliament during its passage and through post-legislative scrutiny by the Justice Committee of that Parliament in March 2011.

9. Guidance

9.1 Home Office and HMRC departmental guidance will be updated to reflect the amendments.

9.2 The Manual of Guidance on Solicitor Access produced by the Association of Chief Police Officers in Scotland is to be updated to reflect amendments to cross-border powers contained in the Order.

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 does not apply to small business.

12. Monitoring and Review

12.1 The powers and procedures provided by this Order will be monitored by both HMRC and UKBA to ensure they remain aligned to wider criminal justice procedure in Scotland.

12.2 While the 2010 Act ensured that the system of arrest and detention in Scotland was compatible with Article 6, as expressed by the Supreme Court judgment in *Cadder v Her Majesty's Advocate*, the Scottish Cabinet Secretary for Justice also announced a review of Scottish criminal law and practice to be led by Lord Carloway, a senior High Court Judge. He is expected to report later in 2011. In the context of Lord Carloway's review into this matter, the UK Government considers that it is sensible to do all that it can until Lord Carloway reports and his findings can be acted upon, to ensure that reserved bodies carrying out reserved functions in Scotland, can continue to do so effectively and in compliance with the Supreme Court judgment in *Cadder v Her Majesty's Advocate*.

12.3 Once the Carloway Review Reference Group reports its findings, it is likely that the provisions of both the 2010 Act and this Order will require to be reviewed. In the interim period, this Order will amend powers of detention to ensure that HMRC and the Scottish police can continue to effectively carry out their functions to investigate serious crime, both in Scotland and in cross-border cases in compliance with the Supreme Court's judgment in *Cadder v Her Majesty's Advocate*.

13. Contact

13.1 Jennifer Manton at the Scotland Office, Email: jennifer.manton@scotlandoffice.gsi.gov.uk can answer any queries regarding the Instrument.