EXPLANATORY MEMORANDUM TO

THE HOUSING (SCOTLAND) ACT 2010 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2012

2012 No. [XXXX]

1. This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order makes provisions that are necessary and expedient in consequence of the Housing (Scotland) Act 2010 (the "2010 Act"), an Act of the Scottish Parliament.

2.2 The 2010 Act makes provisions concerning the regulation of social housing in Scotland, including the establishment of the Scottish Housing Regulator ("SHR").

2.3 The Order is required to facilitate the establishment of the SHR as a non-Ministerial office by making the SHR part of the Scottish Administration. An important effect of that is that staff of the agency (who are civil servants) who presently discharge functions on behalf of Ministers under the Housing (Scotland) Act 2001 ("the 2001 Act") will transfer to the SHR and continue to be civil servants.

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

3.1 The Order is to be made in exercise of the powers conferred by sections 104, 112(1), 113(2) and (5) and 114(1) 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 that are necessary or expedient in consequence of an Act of the Scottish Parliament, in this case the 2010 Act.

3.2 This section 104 Order is expedient in consequence of the 2010 Act as the Scottish Parliament does not have the legislative competence to make provisions concerning the membership of the Scottish Administration.

3.3 Article 2 of the Order makes the body corporate SHR, established by section 1 of the 2010 Act, part of the Scottish Administration. This reflects the policy decision that it is the body corporate (which employs the staff of the SHR) that is to be part of that Administration.

4. Legislative Context

4.1 The 2010 Act received Royal Assent on 9 December 2010. The 2010 Act modernises the framework for regulating social landlords in Scotland and provides for the establishment of the SHR as a body corporate.

4.2 The 2010 Act repeals Ministers' regulation and inspection functions. In their place it establishes the SHR as an independent body with the objective of safeguarding and promoting the interests of persons who are or who may become homeless, tenants of social landlords, or recipients of services provided by social landlords.

4.3 The SHR was vested as a body corporate on 1 April 2011 with limited powers to consult on how it proposed to perform its functions by the Housing (Scotland) Act 2010 (Commencement No. 2, Transitional, Transitory and Saving Provisions) Order 2011. This Order under section 104 of the 1998 Act will come into force on 1st April 2012, which is the same day when the SHR will assume all of its substantive functions. A Scottish Statutory Instrument will commence the relevant provisions in the 2010 Act on that day.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom, except for the specific amendment in paragraph 2 of the Schedule to the Order, the amendment of the meaning of "unregistered" in the Housing Associations Act 1985 which applies only to England and Wales.

6. European Convention on Human Rights

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

In my view the provisions of the Housing (Scotland) Act 2010 (Consequential Provisions and Modifications) Order 2012 are compatible with the Convention rights.

7. Policy Background

What is being done and why

7.1 The overarching aim of the 2010 Act is to achieve the legal and practical independence for the SHR that is central to the modernised regulatory framework by establishing the SHR as a non-Ministerial office of the Scottish Administration. An important effect of that is that civil servants who presently discharge functions on behalf of Ministers under the 2001 Act will transfer to the SHR and continue to be civil servants.

7.2 Currently, the Scottish Ministers are responsible for regulating and inspecting RSLs and local authority housing and homelessness services under Part 3 of the 2001 Act. The Scottish Housing Regulator was set up in April 2008 as an executive agency to operate these functions on behalf of Ministers. The executive agency status was

seen as an interim structure for discharging the regulatory functions until the regulator could be established on a fully independent basis. This followed the decision to abolish the national housing agency, Communities Scotland, which had previously exercised Ministers' Part 3 functions on their behalf.

7.3 The 2010 Act changes the status of the SHR to that of a body corporate which, as a result of this Order, will be part of the Scottish Administration but will not form part of the Scottish Executive. The SHR will no longer come under the direct authority of Scottish Ministers but will operate within a set of priorities agreed with them. It will be accountable to the Scottish Parliament for the efficient use of public resources.

7.4 Article 2 of the Order facilitates the establishment of the SHR as a body corporate by making it part of the Scottish Administration, ensuring that its staff remain as civil servants.

7.5 Article 3 of the Order ensures that the Crown Suits (Scotland) Act 1857 does not apply to the Scottish Housing Regulator with the effect that the Lord Advocate cannot be sued in the place of the SHR.

7.6 The Order will in addition make consequential amendments to existing primary and secondary legislation, where required as a consequence of provisions in the 2010 Act by virtue of the creation of the SHR as a body corporate and the replacement of the regulatory framework under the 2001 Act (repealing provisions in Part 3 and schedules 7 and 8 of the 2001 Act) with the new regulatory framework.

Consolidation

7.7 This Order stands alone.

8. Consultation Outcome

8.1 Provisions to reform regulation are based on proposals that the Scottish Government included in Firm Foundations, the discussion document on the future of housing that was published in October 2007. These proposals attracted broad stakeholder support.

8.2 In light of that, the Scottish Government prepared and consulted on a draft Housing (Scotland) Bill. The consultation ran from 27 April to 14 August 2009. It attracted a total of 319 responses. Stakeholders expressed a high degree of support for the principle of independent regulation.

9. Guidance

9.1 This Order stands alone, guidance is not considered necessary.

10. Impact

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

10.2 There will be no impact on the public sector. An executive agency of the Scottish Government discharges on Ministers' behalf regulatory functions in respect of social landlords under provisions in the 2001 Act. These provisions will be repealed when the provisions of the 2010 Act in respect of the SHR are commenced and the staff of the agency are transferred to the new non-ministerial office in the Scottish Administration.

11. Regulating Small Business

11.1 The legislation does not apply to small business.

12. Monitoring and Review

12.1 This Order will have immediate effect in that the current staff of the SHR who transfer to the new statutory SHR will remain civil servants. Monitoring and review is not considered necessary.

13. Contact

Emma Lopinska at the Scotland Office Tel: 0131 244 9026 or email: emma.lopinska@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.