EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 4) ORDER 2009

2009 No. [ ]

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 The purpose of this Order is to amend Schedule 4 to the Scotland Act 1998 to enable the Scottish Parliament to create a similar time limit for certain proceedings brought under the Scotland Act alleging that the Scottish Ministers or a member of the Scottish Executive have or has acted in breach of Convention rights as exists in relation to such claims brought under the Human Rights Act 1998[1].

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

3.1 This Order is being made under section 30(2) of the Scotland Act 1998. Section 30(2) Orders provide a mechanism whereby Schedule 4 or Schedule 5 to that Act can be modified by an Order in Council, subject to the agreement of both the UK and Scottish Parliaments. This Order modifies Schedule 4.

3.2 This Order is by virtue of section 115 (1) and paragraphs 1 and 2 to Schedule 7 to the Scotland Act, subject to affirmative resolution procedure in both Houses of the UK Parliament and the Scottish Parliament.

4. Legislative Context

4.1 Under section 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention Right. The Convention rights are those rights and freedoms drawn from the European Convention on Human Rights set out in Schedule 1 to the Act. If a person claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1), they may bring proceedings against the public authority under the Human Rights Act in the appropriate court or tribunal (section 7(1)(a)). They are only permitted to do so if they are, or would be, a victim of the unlawful act. A "public authority" includes the members of the Scottish Executive.

4.2 Additionally, Section 57(2) of the Scotland Act provides that members of the Scottish Executive do not have the power to act in a manner that is incompatible with Convention rights. This means that where it is alleged that members of the Scottish Executive have acted incompatibly with Convention rights, a claim can be brought against them under the Human Rights Act or under the Scotland Act, on the latter basis that in so doing they have acted outwith their powers under the devolution settlement.

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[1] Although the members of the Scottish Executive are referred to collectively as the Scottish Ministers (section 44(2) of the Scotland Act) and any act or omission of any member of the Scottish Executive is treated as an act or omission of each of them (section 52(4)), that does not apply in respect of functions conferred solely on the First Minister or on the Lord Advocate (section 52(5)).

4.3 Section 100 of the Scotland Act however provides that proceedings of this sort under the Scotland Act cannot be brought by a person unless they would fall within the class entitled to bring proceedings under the Human Rights Act. It also limits any damages by reference to the Human Rights Act.

4.4 Under section 7(5) of the Human Rights Act, proceedings brought under section 7(1)(a) must generally be brought within one year from the date of the alleged breach, unless a stricter time limit applies to the proceedings in question. A court or tribunal may permit proceedings beyond this time limit if it considers it equitable having regard to all the circumstances. The Scotland Act, however, makes no such provision[2], therefore those bringing their claim under the Scotland Act will, notwithstanding the claim is identical in all other respects, have longer in which to do so, and only be subject to general limitation principles as a matter of Scots law.

4.5 This Order provides the Scottish Parliament with the power to pass legislation to ensure that a similar time-limit is included within the Scotland Act to ensure consistency with the Human Rights Act, so that certain Convention-based claims brought against the Scottish Ministers, or a member of the Scottish Executive, which may be based on the same facts and unlawful act, are subject to the same time limit whether pursued under either Act.

4.6 Time limitations in relation to claims brought in civil courts in Scotland are a devolved area of law. However, paragraph 4(1) of Schedule 4 to the Scotland Act provides that an Act of the Scottish Parliament may not modify, or confer power by subordinate legislation to modify, the Scotland Act itself. There are certain exceptions to this rule, and paragraph 4(2) of Schedule 4 lists sections of the Scotland Act which may be modified by the Scottish Parliament.

4.7 This Order inserts a new paragraph 4A into Schedule 4 to enable the Scottish Parliament to legislate in relation to time limits for claims brought under the Scotland Act alleging breach of Convention rights by the Scottish Ministers or members of the Scottish Executive. It provides that any legislation enacted by the Scottish Parliament must provide for a period for proceedings to be brought within one year beginning with the date on which the act complained of took place or such longer period as a court may consider equitable. This is similar in effect to section 7(1)(a) and (5) of the Human Rights Act 1998. That limitation period may be without prejudice to any shorter period applicable to the relevant procedure and will not apply to claims about the making of legislation.

5. Territorial Extent and Application

5.1 This instrument extends and applies to Scotland only.

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 Scotland Act 1998 (Modification of Schedule 4) Order 2009 are compatible with the Convention rights

[2] This is the effect of the decision of the House of Lords in the case of *Somerville v Scottish Ministers [2007] UKHL 44.*

7. Policy background

7.1 This Order provides the Scottish Parliament with the ability to put in place an equivalent time limit for certain cases taken under the Scotland Act to the time limit that exists under the Human Rights Act 1998. This will ensure that the same time limits apply to certain cases whichever statutory route they follow.

7.2 Litigants can choose to bring a claim for breach of their Convention rights by Scottish Ministers under the Scotland Act or the Human Rights Act. This is because the Scotland Act – as with the Devolution Acts for Wales and Northern Ireland – provides that the Convention Rights set out in the Human Rights Act 1998 are a limitation on the powers of the devolved institutions. This means the Scottish Parliament has no power to legislate, and Scottish Ministers have no powers to act (or fail to act) in ways that are incompatible with the Convention Rights. This is an important part of all three devolution settlements and will not be altered by this Order. The Government is committed to retaining the link between the competence of Scottish Ministers and the Scottish Parliament under the devolution settlement with compliance with the Convention Rights.

7.3 But, as noted above, the current procedures for legal challenge under the Human Rights Act, and those for challenging the actions of Scottish Ministers under the Scotland Act are subject to different time limits. A claim for breach of human rights brought under the Human Rights Act must generally be brought within one year from the action that caused the breach (or longer if the court so decides); but a challenge to the powers of the Scottish Ministers under the Scotland Act, which might arise from the same breach of rights, is subject to no such statutory time limit. This Order will provide the Scottish Parliament with the competence to end this inconsistency in certain cases by an Act of the Scottish Parliament. This will ensure the time limit for raising proceedings on human rights grounds that the UK Parliament put in place within the Human Rights Act will be applied to certain claims raised for alleged breaches by the Scottish Ministers under the Scotland Act.

8. Consultation outcome

8.1 This Order does not itself create a time limit for proceedings under the Scotland Act in relation to human rights matters. This Order modifies the prohibition in Schedule 4 of the Scotland Act to enable the Scottish Parliament to pass legislation which could create a time limit. It would be for the Scottish Parliament consider the appropriateness of any legislation that is taken forward within its legislative competence.

9. Guidance

9.1 No additional guidance is required for this 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 & review

12.1 This Order provides the Scottish Parliament with the competence to pass legislation which could create a time-bar in relation to certain matters. It is for the Scottish Parliament to consider how best to monitor and review legislation within its legislative competence.

13. Contact

13.1 Laura Thomas at the Scotland Office Tel: 020 7270 6802 or email: laura.thomas@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.