Draft Order in Council laid before Parliament and the Scottish Parliament under section 115(1) of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998 for approval by resolution of each House of Parliament and of the Scottish Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2007 No.

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

INVESTIGATORY POWERS

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2007

Made - - - - *2007*

Coming into force in accordance with article 1

At the Court at , the day of 2007

Present,

The Queen's Most Excellent Majesty in Council

This Order is made by Her Majesty in Council in exercise of the powers conferred upon Her by section 30(3) and (4), 63(1)(a), 113(2), (3) and (4) and 124(2) of the Scotland Act 1998(**a**).

In accordance with section 115 of, and paragraphs 1 and 2 of Schedule 7 to, that Act a draft of this Order was–

(a) laid before and approved by a resolution of each House of Parliament; and

(b) laid before and approved by a resolution of the Scottish Parliament;

Accordingly, Her Majesty, by and with the advice of Her Privy Council, makes the following Order:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2007 and, except as provided in paragraph (2) below, shall come into force on the second day after the day on which it is made.

(**a**) 1998 c.46.

(2) This article and articles 2 and 4 of, and Schedule 1 to, this Order shall come into force on the day after the day on which it is made.

(3) In this Order–

"the 1998 Act" means the Scotland Act 1998;

"the 2000 Act" means the Regulation of Investigatory Powers Act 2000(**a**);

"the 2000 Order" means the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000(**b**); and

"the 2003 Order" means the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2003(**c**).

(4) Any word or expression used in this Order in referring to the 2000 Act and which is also used in the 2000 Act has the same meaning as it has in the 2000 Act.

Functions to be treated as being, or not being, exercisable in or as regards Scotland

2.—(1) Schedule 1 to this Order (which makes provision for certain functions to be treated for the purposes of section 63 of the 1998 Act as being functions which are exercisable in or as regards Scotland) shall have effect.

(2) Except as provided in–

(a) article 2 of, and Schedule 1 to, the 2000 Order;

(b) article 2(1) of, and Schedule 1 to, the 2003 Order; and

(c) paragraph (1) above and Schedule 1 to this Order,

the functions of the Secretary of State under sections 5, 9(1)(b) and (3), 10(1)(a) and (2) and 15(1) of the 2000 Act (interception with a warrant, duration, cancellation, modification and renewal of warrants etc. and general safeguards) are, for the purposes of section 63 of the 1998 Act, to be treated as otherwise not being exercisable in or as regards Scotland(**d**).

Transfer of functions to the Scottish Ministers

3.—(1) The functions which are conferred on a Minister of the Crown by the enactments specified in column 1 of Schedule 2 to this Order shall–

(a) so far as they are exercisable by that Minister in or as regards Scotland; and

(b) subject to any restriction in the corresponding entry in column 2 of that Schedule,

be exercisable by the Scottish Ministers instead of by the Minister of the Crown.

(2) Paragraph (1) above, and Schedule 2 to this Order, are without prejudice to–

(a) article 3 of, and Schedule 2 to, the 2000 Order; and

(b) article 3 of, and Schedule 2 to, the 2003 Order.

Modification of the 2003 Order

4. Article 2(2) of the 2003 Order is repealed.

(**a**) 2000 c.23.

(**b**) S.I. 2000/3253. The 2000 Order was amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2003 (S.I. 2003/2617). There are other amendments to the 2000 Order which are not relevant to this Order.

(**c**) S.I. 2003/2617.

(**d**) Certain functions of the Secretary of State under sections 5, 9, 10 and 15 of the Regulations of Investigatory Powers Act 2000 have already been transferred to the Scottish Ministers by S.I. 2000/3253 and 2003/2617.

General modifications of enactments

5.—(1) Section 117 of the 1998 Act shall apply in relation to the exercise of functions by the Scottish Ministers by virtue of article 3 of this Order as it applies in relation to the exercise of functions by the Scottish Ministers within devolved competence.

(2) Section 119 of the 1998 Act shall apply in relation to functions exercisable by the Scottish Ministers by virtue of that article as it applies in relation to functions of the Scottish Ministers exercisable within devolved competence.

(3) In the application of those sections by virtue of this article, any reference in them to a pre-commencement enactment is to be read as if it were a reference to any enactment.

Transitional and saving provision

6.—(1) The transfer, by virtue of this Order, of any function exercisable by a Minister of the Crown to the Scottish Ministers shall not affect the validity of anything done (or having effect as if done) by or in relation to a Minister of the Crown, for the purposes of or in connection with any such provision, before the date on which the transfer takes effect.

(2) Anything (including legal proceedings) which, at the time when that transfer takes effect, is in the process of being done by or in relation to a Minister of the Crown may, so far as it relates to any function transferred, be continued by or in relation to the Scottish Ministers.

(3) Anything done (or having effect as if done) by or in relation to a Minister of the Crown for the purposes of or in connection with any function transferred to the Scottish Ministers by virtue of this Order shall, if in force at the time when that transfer takes effect, have effect as if done by or in relation to the Scottish Ministers in so far as that is required for continuing its effect after that time.

Clerk of the Privy Council

2007

SCHEDULE 1

Article 2

FUNCTIONS TO BE TREATED AS BEING EXERCISABLE IN OR AS REGARDS SCOTLAND

Functions under the 2000 Act

1.—(1) Without prejudice to paragraph 2 of Schedule 1 to the 2000 Order or paragraph 1 of Schedule 1 to the 2003 Order, the functions of the Secretary of State under section 5 of the 2000 Act (interception with a warrant) are, for the purposes of section 63 of the 1998 Act, to be treated as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below.

(2) The class of case referred to in sub-paragraph (1) constitutes any case where the warrant under section 5 of the 2000 Act–

(a) authorises or requires the person to whom it is addressed to secure the making of a request in accordance with paragraph (b) of section 5(1), or a request in accordance with that paragraph and disclosure in accordance with section 5(1)(d); and

(b) the warrant is issued on an application made by or on behalf of–

(i) the Director General of the Scottish Crime and Drug Enforcement Agency; or

(ii) the Director General of the Serious Organised Crime Agency for the purpose of preventing or detecting serious crime in Scotland.

2.—(1) Without prejudice to paragraph 3 of Schedule 1 to the 2000 Order or paragraph 2 of Schedule 1 to the 2003 Order, the functions of the Secretary of State under sections 9(1)(b) and (3), 10(1)(a) and (2) and 15(1) of the 2000 Act (duration, cancellation, modification and renewal of warrants etc. and general safeguards) are, for the purposes of section 63 of the 1998 Act, to be treated as being exercisable in or as regards Scotland if they are exercisable in the class of case mentioned in sub-paragraph (2) below.

(2) The class of case referred to in sub-paragraph (1) constitutes any case where–

(a) the function is exercisable in relation to a warrant issued under section 5 of the 2000 Act; and

(b) the function of issuing such a warrant is, under paragraph 1 above, to be treated for the purposes of section 63 of the 1998 Act as a case where the function is, for those purposes, treated as being exercisable in or as regards Scotland.

SCHEDULE 2

Article 3

ENACTMENT CONFERRING FUNCTIONS TRANSFERRED TO SCOTTISH MINISTERS

Column 1 *Enactment*	*Column 2* *Restrictions*
The 2000 Act–	
(a) section 5	Only so far as the functions are exercisable for the purpose–
	(a) of preventing or detecting serious crime; or
	(b) in circumstances appearing to the Scottish Ministers to be equivalent to those in which they would issue a warrant by virtue of section 5(3)(b) of the 2000 Act, of giving effect to the provisions of any international mutual assistance agreement.
(b) sections 9(1)(b) and (3), 10(1)(a) and (2) and 15(1)	Only so far as the functions are exercisable in relation to a warrant issued under section 5 by the Scottish Ministers by virtue of this Order.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order, made under the Scotland Act 1998, provides for certain specified functions of a Minister of the Crown under the Regulation of Investigatory Powers Act 2000 ("the 2000 Act") so far as they are exercisable by him in or as regards Scotland, to be exercisable by the Scottish Ministers instead of by the Minister of the Crown.

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2003 ("the 2003 Order") specified relevant functions under section 5(1) of the 2000 Act as being, or not being, exercisable in or as regards Scotland for the purposes of section 63 of the Scotland Act 1998 and transferred those functions to the Scottish Ministers in so far as they were exercisable by the Secretary of State in or as regards Scotland.

Article 2 of, and Schedule 1 to, this Order now provide that further functions in relation to the issue of warrants under section 5(1)(b) and (d) of the 2000 Act are to be treated, to the extent specified in Schedule 1, as being exercisable in or as regards Scotland for the purposes of section 63 of the Scotland Act. This is to facilitate the transfer of further functions under the 2000 Act by this Order. Article 3 of, and Schedule 2 to, this Order transfer to the Scottish Ministers the specified functions under the 2000 Act, so far as they are exercisable by the Secretary of State in or as regards Scotland, subject to the restrictions set out in column 2 of that Schedule. This Order will enable the Scottish Ministers to issue certain warrants in response to requests under section 5(1)(b) of the 2000 Act and requests for warrants under that paragraph and for disclosure of the intercepted material in accordance with section 5(1)(d) of the 2000 Act. Section 5(1)(b) is concerned with the making, in accordance with an international mutual assistance agreement, of a request for the provision of assistance with the interception of communications outside the United Kingdom and section 5(1)(d) authorises disclosure of intercepted material obtained by any interception authorised or required by the warrant. The Scottish Ministers will only be able to exercise the functions so far as they are exercisable in or as regards Scotland. The 2003 Order provided for functions to be treated as exercisable in or as regards Scotland when requests for warrants were made under those paragraphs by chief constables of police forces in Scotland or by Commissioners of Customs and Excise for the purpose of preventing or detecting serious crime in Scotland. This Order adds to that by providing that functions under section 5(1)(b) and (d) are to be treated as exercisable in or as regards Scotland when requests are made under section 5(1)(b), or under section 5(1)(b) and (d), by the Director General of the Scottish Crime and Drugs Enforcement Agency or by the Director General of the Serious Organised Crime Agency for the purpose of the prevention or detection of serious crime in Scotland. Those functions are only transferred to Scottish Ministers for the purpose of preventing or detecting serious crime or, in circumstances equivalent to that, for the purpose of giving effect to the provisions of any international mutual assistance agreement.

Article 4 repeals part of the 2003 Order in consequence of this Order. Article 5 provides for certain general modifications of enactments in connection with provision made by the Order. Article 6 makes transitional and saving provision.

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DRAFT STATUTORY INSTRUMENTS

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