EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE SCOTTISH MINISTERS ETC.) ORDER 2007

2007 No.

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before the UK Parliament by Command of Her Majesty. This Memorandum contains information for the Joint Committee on Statutory Instruments in respect of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2007.

2. Description

2.1 This Order allows for the transfer of certain functions of UK Ministers to the Scottish Ministers. It does so by using the powers available at section 63 of the Scotland Act 1998 (the "1998 Act"). The powers transferred in this Order relate to the interception of communications and the disclosure of intercepted material under section 5(1)(b) and (d) of the Regulation of Investigatory Powers Act 2000 ("the 2000 Act") for the purpose of giving effect to the provisions of any international mutual assistance agreement. This Order is consistent with two previous Orders made in 2000 and 2003 on this matter.

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

3.1 This Order is made in exercise of the powers conferred by sections 30(3) and (4), 63(1)(a), 113 (2), (3), and (4) and 124(2) of the 1998 Act. The Instrument is, by virtue of Schedule 7 to the Scotland Act, subject to type A procedure and is subject to affirmative resolution procedure in both Houses of the UK Parliament and in the Scottish Parliament.

3.2 Section 30(3) of the 1998 Act provides that Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of that Act, as being exercisable in or as regards Scotland. This is known as a "paving provision". In this instance, the provisions made under section 30(3) will mean that the issuing of warrants in Scotland under section 5(1)(b) of the 2000 Act to the Serious Organised Crime Agency (SOCA) and the Scottish Crime and Drugs Enforcement Agency (SCDEA) will be treated, for the purposes of section 63 of the 1998 Act, as being functions exercisable in or as regards Scotland. Where requests are made by those persons for warrants under section 5(1)(b) together with a request for authorisation to disclose any material intercepted under the warrant under section 5(1)(d), the function of issuing such warrants will also be regarded as being exercisable in or as regards Scotland for the purpose of section 63 of the 1998 Act.

3.3 Section 63(1)(a) of the 1998 Act confers a power on Her Majesty to provide by Order in Council for any functions of a UK Minister of the Crown, so far as they are exercised in or as regards Scotland, to be exercisable by the Scottish Ministers instead of by the UK Ministers of the Crown. This is commonly known as "executive devolution".

3.4 Article 3 of the Order provides that the functions conferred on a Minister of the Crown by the provisions of the 2000 Act specified in Schedule 2 shall, so far as they are exercisable in or as regards Scotland, be exercisable by the Scottish Ministers *instead of* by a Minister of the Crown. In relation to the 2000 Act, the functions are transferred only 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.

4. Legislative Background

4.1 Whilst the interception of communications remains reserved, the functions of issuing certain warrants for the interception of communications in Scotland have been executively devolved to the Scottish Ministers. The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No.2) Order 2000 ("the 2000 Order") specified relevant functions as being exercisable in or as regards Scotland and transferred these to the Scottish Ministers. These functions related to the issuing of warrants authorising the interception of communications and the disclosure of material intercepted under sections 5(1)(a) and (d) of the 2000 Act. These provisions relate to the interception of communications by means of a postal service or telecommunications system for serious crime purposes where the person or premises in question are located in Scotland, and for disclosure of any material intercepted under the warrant.

4.2 Further functions were transferred to the Scottish Ministers in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2003 ("the 2003 Order"). That Order transferred functions which were exercisable in or as regards Scotland under section 5(1)(b), (c) and (d) of the 2000 Act. Section 5(1)(c) relates to the issuing of warrants to authorise the provision of assistance in response to a request for assistance under a mutual assistance agreement. Section 5(1)(b) relates to the issuing of warrants to secure the making, in accordance with a mutual assistance agreement, of a request for assistance relating to an interception of communications. A request for assistance with the interception of communications abroad under section 5(1)(b) can only be made if the authorising authority is satisfied that such an operation would meet the criteria for communications to be intercepted in the United Kingdom under the 2000 Act. The 2003 Order transferred the functions of the Secretary of State in issuing warrants under section 5(1)(b) and (d) to chief constables of Scottish police forces and HM Revenue and Customs to the Scottish Ministers. At the time of the 2003 Order, neither SOCA nor the SCDEA were operational, and as such were not specified in that Order.

4.3 Article 2 of, and Schedule 1 to, this Order now provide that further functions in relation to the issue of warrants to the SCDEA and SOCA under section 5(1)(b) and (d) of the 2000 Act are to be treated, to the extent specified in that Schedule, as exercisable in or as regards Scotland for the purpose of section 63 of the 1998 Act. Having provided that these functions are exercisable in or as regards Scotland, Article 3 of, and Schedule 2 to, this Order transfer the exercise of functions under section 5(1)(b) and (d) of the 2000 Act to Scottish Ministers insofar as they are exercisable in or as regards Scotland. These provisions are consistent with the transfer of functions in the 2003 Order which transferred the same functions in relation to Scottish Police forces and HMRC. This Order will allow the Director Generals of the SCDEA and SOCA to apply directly to Scottish Ministers for interception warrants under section 5(1)(b) of the 2000 Act for the purposes of the prevention or detection of serious crime in Scotland and for disclosure, under section 5(1)(d), of any intercepted material obtained under a warrant issued under section 5(1)(b).

5. Extent

5.1 This instrument has UK wide extent (which mirrors the extent provisions in the 2000 Act).

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

"In my view the provisions of the draft Scotland Act (Transfer of Functions to the Scottish Ministers etc.) Order 2007 are compatible with the Convention rights".

7. Policy background

7.1 The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ("the Convention") was signed by EU Ministers on 29 May 2000. The primary aim of the Convention is to improve judicial co-operation by developing the existing provisions governing mutual assistance. The Convention extends the range of circumstances in which mutual assistance may be requested and by facilitating assistance so that it is quicker and more effective.

7.2 The Convention covers a variety of matters upon which assistance may be requested, one of these is the interception of telecommunications. The statutory basis in the UK for this part of the Convention is contained in Part I Chapter I of the 2000 Act . The Act allows for the designation of international assistance agreements that relate to the provision of mutual assistance in interception matters. Under the 2000 Act, warrants may be issued to enable law enforcement agencies to seek assistance from other agencies in Europe with the interception of telecommunications outside the United Kingdom.

7.3 Since the transfer of functions Order in 2003, the Scottish Ministers have exercised the power to issue warrants to authorise requests for assistance with the interception of communications by law enforcement agencies in Europe, as set out in section 5(1)(b) and (c) of the 2000 Act. Paragraph 1 of Schedule 1 to the 2003 order specified that one of the conditions which must be met before a function can be treated as being exercisable by Scottish Ministers is that the warrant is issued on an application made by the chief constable of any police force maintained under or by virtue of section 1 of the Police (Scotland) Act 1967 or by the Commissioners of Customs and Excise (now HM Revenue and Customs) for the purposes of preventing or detecting crime in Scotland. Since then, part 1 of the Serious Organised Crime and Police Act 2005 and the Police, Public Order and Criminal Justice (Scotland) Act 2006, established respectively the Serious Organised Crime Agency (SOCA) and the Scottish Crime and Drug Enforcement Agency (SCDEA) respectively.

7.2 In order to allow the Scottish Ministers to now issue warrants authorising matters as set out in section 5(1)(b) and (d) of the 2000 Act on an application made by or on behalf of the Director General of SOCA or the SCDEA, it is necessary to transfer further functions in relation to SOCA and the SCDEA. This Order makes provision to ensure that the SCDEA and SOCA are also able to apply directly to the Scottish Ministers for warrants under section 5(1)(b) and (d) of the 2000 Act, as the Scottish Police forces and HMRC are currently able to do.

8. Impact

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

9. Contact

Adam Pile at the Scotland Office (email; adam.pile@scotland.gsi.gov.uk) can answer any queries regarding the instrument.

Scotland Office
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