EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION) (No.3) ORDER 2006

2006 No. 3338

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

2. Description

2.1 Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 ("the 2003 Act") provides for a scheme for the recovery of charges in cases where a person who suffers a personal injury receives National Health Service treatment or ambulance services. The charges are specified in certificates issued by the Scottish Ministers, and are payable by persons who are required to pay compensation to the injured person. This Order is required to allow the Compensation Recovery Unit (part of the Department for Work and Pensions) to exercise the functions of Scottish Ministers in recovering these NHS charges.

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

3.1 This Order is made by Her Majesty in Council in exercise of the power conferred by section 93(3) of the Scotland Act 1998 ("the Scotland Act"). By virtue of Schedule 7 to that Act the Order is subject to negative resolution procedure in both Houses of the UK Parliament and in the Scottish Parliament.

4. Legislative Background

4.1 Section 93(1) of the Scotland Act enables a Minister of the Crown to make arrangements for any of his specified functions to be exercised on his behalf by the Scottish Ministers; and the Scottish Ministers may make arrangements for any of their specified functions to be exercised on their behalf by a Minister of the Crown. Under section 93(3) functions to be subject to such arrangements must be specified in an Order in Council.

4.2 The 2003 Act provides for two separate but parallel Schemes – one for Scotland for which the Scottish Ministers will be responsible and one for England and Wales for which the Secretary of State for Health will be responsible. The Act confers powers on Scottish Ministers to make regulations in a like manner to the Road Traffic (NHS Charges) Act 1999.

4.3 The Scheme is regulated by three sets of regulations, namely**,**

- The Personal Injuries (NHS Charges) (Amounts) (Scotland) Regulations 2006;
- The Personal Injuries (NHS Charges) (General) (Scotland) Regulations 2006;
- The Personal Injuries (NHS Charges) (Reviews and Appeals) (Scotland) Regulations 2006.

4.4 The purpose of the regulations is;

- **Amounts** - to make provisions concerning the amounts to be recovered from compensators through the Injury Costs Recovery Scheme. As well as setting the tariff for outpatient and inpatient treatment, the provision of NHS ambulance services and the maximum amount to be recovered in relation to any one injury, these Regulations also set out how the Scheme is to deal with a range of circumstances in which the amounts to be recovered may need to be adjusted;

- **General** - to make provisions concerning the operational procedures and requirements that will govern how NHS charges will be recovered from compensators through the Injury Costs Recovery Scheme by setting out how the Scheme is to deal with applications for certificates, reduction of the amount of NHS charges in cases of contributory negligence, information to be provided, payments to hospitals and the Scottish Ambulance Service and the liability of insurers.

- **Reviews and Appeals** - to make provisions for the circumstances in which a certificate of NHS charges issued to compensators through the Injury Costs Recovery Scheme may be reviewed. It also provides the procedural rules and requirements for bringing appeals against such certificates and against decisions not to grant a waiver under s157(4) of the 2003 Act.

5. Extent

This instrument does not extend to Northern Ireland.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 For the last seventy years hospitals have been able to recover some of the cost of treating those injured in road traffic accidents who have made a successful claim for personal injury compensation against the holder of third party compulsory motor insurance. The system of recovery was revised and improved in April 1999 under the provisions contained in the Road Traffic (NHS Charges) Act 1999. The recovery is now undertaken centrally for the Department of Health (for England and Wales) and Scottish Ministers (for NHS Scotland) by the Compensation Recovery Unit (CRU) which is part of the Department for Work and Pensions.

7.2 The CRU was actually set up to administer a Scheme for recovery of certain state benefits in cases where benefit and personal injury compensation have been paid in respect of the same accident or injury. It has built up extensive links with insurers and has established recovery mechanisms in place. It therefore made sense for CRU to take on recovery of NHS costs as well when the new arrangements came into force in 1999, rather than establishing a new body that would be carrying out many of the same tasks. Since 1999, the CRU has recovered and paid over £650 million direct to hospitals providing treatment in England and Wales and Scotland. Scotland's share to date has been over £42 million.

7.3 Even before the current road traffic recovery Scheme was in place, the Law Commission for England and Wales had consulted on whether the principle behind the recovery Scheme could or should be extended to all cases where people claim and receive personal injury compensation for accidents that require hospital treatment by the NHS. More than three quarters of the people who responded to this consultation agreed with the Commission's view that it was not logical for NHS costs recovery to apply only to road traffic accidents. The majority view was that the principle of making those causing injury to others pay the full cost of their actions, including any related health care costs, should apply in all cases. The Scottish Executive Health Department and the Department of Health therefore undertook a public consultation during the Autumn of 2002 on how an expanded Scheme might operate and, following that, the plans for the expanded Scheme were introduced to Parliament in March 2003 and are now on the statute book in the 2003 Act. The agreement of the Scottish Parliament to Westminster making provisions for Scotland was given via a Legislative Consent motion (previously known as a Sewel motion) in June 2003.

7.4 A further consultation was undertaken between September and December 2004 which set out in detail the draft Regulations that would govern the operation of the new Scheme. One major concern raised in the consultation concerned the proposals for applying a reduction in Injury Costs Recovery Scheme charges where the payment settling the primary compensation claim had been reduced to take account of contributory negligence. The provisions of the 2003 Act were felt to be too restrictive and likely to provide a perverse incentive to compensators to use courts or mediation services in order to obtain a ruling on contributory negligence that would be acceptable for Injury Cost Recovery Scheme purposes.

7.5 In response to these concerns, the Government agreed to amend the 2003 Act to allow contributory negligence to be taken into account by a wide range of alternative dispute resolution mechanisms. The necessary amendment is within the Health Act 2006 at section 73. Again the agreement of the Scottish Parliament to Westminster legislating on its behalf was given through a Legislative Consent Motion (Sewel) earlier this year

8. Impact

The Scottish Executive has prepared a Regulatory Impact Assessment (RIA) for this instrument as it has an impact on business, charities, or voluntary bodies.

9. Contact

Glenn Preston at the Scotland Office (Glenn.Preston@scotland.gsi.gov.uk) can answer any queries regarding the instrument.

Scotland Office
December 2006

EXECUTIVE NOTE

THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION) (No.3) ORDER 2006 (SI/2006/3338)

1. The above instrument was made by her Majesty The Queen in Council, in exercise of the powers conferred upon Her by sections 93(3) and 113(2), (3) and (4) of the Scotland Act 1998. The instrument is subject to the negative resolution procedure in both the Scottish and UK Parliaments.

Policy Objectives

2. Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 ("the 2003 Act") provides for a scheme for the recovery of charges incurred by the National Health Service in cases where a person who suffers a personal injury receives National Health Service treatment or ambulance services. The charges are specified in certificates issued by the Scottish Ministers, and are payable by persons who are required to pay compensation to the injured person. This Order is required to allow the Compensation Recovery Unit (part of the Department for Work and Pensions) to exercise the functions of Scottish Ministers in issuing the certificates, and recovering these NHS charges and dealing with reviews and appeals.

3. Section 93(1) of the Scotland Act enables a Minister of the Crown to make arrangements for any of his specified functions to be exercised on his behalf by the Scottish Ministers; and the Scottish Ministers may make arrangements for any of their specified functions to be exercised on their behalf by a Minister of the Crown. Under section 93(3) functions to be subject to such arrangements must be specified in an Order in Council.

4. The 2003 Act provides for two separate but parallel Schemes – one for Scotland for which the Scottish Ministers will be responsible and one for England and Wales for which the Secretary of State for Health will be responsible. The Act confers powers on Scottish Ministers to make regulations in a like manner to The Road Traffic (NHS Charges) Act 1999.

5. The Scheme is regulated by three sets of regulations, namely**,**

- The Personal Injuries (NHS Charges) (Amounts) (Scotland) Regulations 2006;
- The Personal Injuries (NHS Charges) (General) (Scotland) Regulations 2006;
- The Personal Injuries (NHS Charges) (Reviews and Appeals) (Scotland) Regulations 2006

Consultation

6. For more than 70 years, hospitals have been able to recover the costs of treating the victims of road traffic accidents where the injured person has made a successful claim for personal injury compensation. The arrangements for this were

streamlined and modernised through the provisions of the Road Traffic (NHS Charges) Act 1999 (the 1999 Act).

7. The Law Commission for England and Wales consulted in 1996 on whether the recovery of NHS costs should take place not just following road traffic accidents but in all cases where people claim and receive personal injury compensation. More than three quarters of the people who responded to the consultation agreed with the Commission's view that the NHS should be able to recover its costs from the liable party and that the NHS, and therefore the taxpayer, should not have to pay for the treatment of such patients. Rather, those causing injury to others should pay the full cost of their actions, including the costs of NHS treatment.

8. The Scottish Executive Health Department and the Department of Health undertook parallel consultation exercises on how such an expanded Scheme might operate in the Autumn of 2002. The responses in the main supported the Scheme and proposals for its administration. There were some concerns, however, about whether the Employers' Liability Compulsory Insurance (ELCI) market was sufficiently robust to cope with the expansion.

9. Following on from that consultation the necessary legislative framework was put in place as Part 3 of the Health and Social Care (Community Health and Standards) Act 2003. However, in response to the concerns expressed, the Scottish Executive and the Westminster Government committed to not implementing the expanded Scheme until a study of the ELCI market, carried out by the Department for Work and Pensions during 2003, was published. The study's final report, issued in December 2003, recommended that implementation of the Injury Costs Recovery Scheme should be postponed for a year, and this recommendation was accepted.

10. A further consultation was undertaken at the end of 2004 covering in detail the draft Regulations that would govern the Scheme.

11. The consultation raised further concerns about the planned timing for introducing the Scheme, as the ELCI market was still considered fragile. After further discussions with the Department for Work and Pensions, which was developing a programme of work to implement the recommendations of its earlier study, Ministers .in both the Executive and Westminster agreed to one further postponement of implementation of the Scheme from April 2005 to January 2007.

12. The following bodies were included in both the 2002 and 2004 consultations:

NHS Boards (and NHS Trusts)

Scottish NHS Confederation

The Law Society of Scotland

The Scottish Law Agents Society

The Faculty of Actuaries

Motor Insurers Bureau

Scotland Patients Association

Scottish Association of Health Councils

The Faculty of Advocates

The Scottish Consumer Council

Association of British Insurers

Various Insurance Bodies

13. Commencement of the legislation in the 2003 Act will repeal the 1999 Act but contain transitional provisions in relation to the 1999 Act which will continue to apply in respect of injuries which occur before 29th January 2007, the date on which the new expanded Scheme commences.

Financial effects

14. The instrument has no financial effects on the Scottish Executive or local government. Furthermore, it should be noted that the liability for charges rests with the compensator, and not with the person who has been compensated. A Regulatory Impact Assessment has been completed and this is attached.

Scottish Executive Health Department
December 2006