EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION) (OVERSEAS PRODUCTION ORDERS) ORDER 2021

2021 No. 144

1. Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to ensure that overseas production orders ("OPOs") made in Scotland by reference to the Agreement between the Government of the United Kingdom and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime ("the Agreement")[1] can be served by the Secretary of State for the Home Department. This is currently prohibited by Section 9(3) of the Crime (Overseas Production Orders) Act 2019 ("COPO Act"). The instrument does this by allowing the Lord Advocate and Secretary of State for the Home Department to enter into agency arrangements so that the Lord Advocate's function of serving OPOs, as set out in Section 14 of the COPO Act, can be carried out by the Secretary of State for the Home Department on the Lord Advocate's behalf.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As this instrument is subject to negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

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

[1] The Agreement is available online at: https://www.gov.uk/government/publications/ukusa-agreement-on-access-to-electronic-data-for-the-purpose-of-countering-serious-crime-cs-usa-no62019. A hard copy of this agreement can be obtained on request by writing to the Office for Security and Counter-Terrorism, Home Office, Peel Building, 2 Marsham Street, London, SW1P 4DF.

6. Legislative Context

6.1 Section 93(1) of the Scotland Act 1998 enables a Minister of the Crown to make arrangements for any of that Minister's specified functions to be exercised on that Minister's behalf by the Scottish Ministers and enables the Scottish Ministers to make arrangements for any of their specific functions to be exercised on their behalf by a Minister of the Crown. Section 93(1) applies to the Lord Advocate as it does to the Scottish Ministers. Under section 93(3) of the Scotland Act 1998, functions which are to be subject to such arrangements, known as agency arrangements, must be specified in an Order in Council.

6.2 The Agreement was designated in the Overseas Production Orders and Requests for Interception (Designation of Agreement) Regulations 2020 as a relevant international agreement for the purposes of the COPO Act.

6.3 This instrument is made to allow the Secretary of State for the Home Department and the Lord Advocate to enter into agency arrangements under Section 93(1) of the Scotland Act 1998 to allow the Secretary of State for the Home Department to carry out the Lord Advocate's function of serving OPOs made in Scotland on the Lord Advocate's behalf for the purposes of the Agreement.

7. Policy background

What is being done and why?

7.1 The policy intention of this instrument is to ensure that OPOs made in Scotland by reference to the Agreement can be served on US-based communications services providers ("CSPs") by the Secretary of State for the Home Department. This can only be achieved through a legislative mechanism such as an Order enabling agency arrangements to be made between the Lord Advocate and the Secretary of State for the Home Department.

7.2 The COPO Act grants law enforcement and prosecuting authorities the power to apply for and obtain electronic data directly from service providers (those who create, process, communicate, or store electronic data) using an OPO for the purposes of criminal investigations and prosecutions. OPOs may only be used when permitted under an international co-operation arrangement between the UK and the country where the subject of the Order is located.

7.3 The Agreement is the first international co-operation arrangement to be designated as a relevant international agreement for the purposes of the COPO Act. It will allow UK public authorities to obtain data directly from US-based CSPs for the purpose of preventing, detecting, investigating, and prosecuting serious crime and can be used in conjunction with OPOs.

7.4 The Agreement and the COPO Act both set out requirements for the service of Orders. Article 5(5) of the Agreement states that "Orders shall be transmitted by the Issuing Party's Designated Authority", and Article 1(8) of the Agreement indicates that there will be one UK Designated Authority, which must be designated by the Secretary of State for the Home Department. The Investigatory Powers Unit within the Home Office has since been designated by the Secretary of State for the Home Department as the UK Designated Authority. Section 14 of the COPO Act sets out the means by which OPOs may be served. In this context, "served" means served on an overseas

person, such as a US-based CSP, and is equivalent to the term "transmitted" used in the Agreement.

7.5 However, Section 9(3) of the COPO Act states that "An overseas production order made in Scotland may be served only by the Lord Advocate". Consequently, the UK Designated Authority is currently prohibited from serving OPOs made in Scotland.

7.6 This Order therefore provides the necessary legal power for the Lord Advocate and the Secretary of State for the Home Department to enter into agency arrangements. Once agreed, any arrangement will allow for the Lord Advocate's function of serving OPOs, as set out in Section 14 of the COPO Act, to be carried out by the Secretary of State for the Home Department on the Lord Advocate's behalf, with the Lord Advocate retaining the overall responsibility for the powers. This will ensure that OPOs made in Scotland can be served by the UK Designated Authority for the purposes of the Agreement.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 No general consultation specific to this Order is required.

11. Guidance

11.1 No formal guidance will be made available on the use of these powers as the Order makes provision for Ministers of the Crown to enter into agency arrangements with the Lord Advocate and has no wider impact.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the changes introduced by this Order will have no impact on business, or the private or voluntary sectors. This Order simply allows for future arrangements to be entered into.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This Order does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Secretary of State for Scotland has made the following statement: "There is no need for review or monitoring as the Order does not regulate businesses".

14.2 There is no need for review or monitoring, as any arrangement made as a consequence of this Order will be subject to individual agreement.

15. Contact

15.1 Arthur Halfhide at the Office of the Secretary of State for Scotland (Telephone: 07557896644 or email: arthur.halfhide@scotlandoffice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine or Alison Evans (job share), Deputy Directors for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.