EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2014

2014 No. 1559

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 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 5 to the Scotland Act 1998 ("the 1998 Act") to bring the Scottish Parliament's legislative competence better into line with the executive competence of the Scottish Ministers both by updating the definition of 'food' in the 1998 Act, thus bringing it in to line with EU legislation, and by amending section J4 of Schedule 5, with respect to animal feeding stuffs.

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

3.1 None.

4. Legislative Context

4.1 At devolution the regulation of food safety and standards was devolved under the 1998 Act. Under Section C7 (consumer protection) in Schedule 5 there is an exception for the "subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)". This reference picked up – and continues to pick up by virtue of paragraph 5 (interpretation) of Part 3 of Schedule 5 - the definition of "food" under the Food Safety Act 1990 as it stood at devolution on 1 July 1999. Post-devolution that definition was changed on a GB-wide basis by the Food Safety Act 1990 (Amendment) Regulations 2004 (S.I. 2004/2990) to align it with the new, and slightly different, EU definition of "food" (contained in Article 2 of Regulation (EC) No. 178/2002). The definition at devolution and the definition post-devolution are largely similar, but they are not identical. In addition, Section C7 and Sections C5 (import and export control) and C8 (product standards, safety and liability) also contain exceptions for matters which include "food". The term is undefined in that context and it is possible that without express definition could be taken to have the now out of date meaning referred to above. This resulted in a mismatch between what constituted "food" in the 1998 Act and "food" as it was (and is) understood in EU law. The legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers was therefore limited by an out of date definition of "food".

4.2 To ensure that the Scottish Ministers could continue to regulate food safety and standards by giving full effect to EU law in this otherwise devolved area, an Order made under section 63 of the 1998 Act (SI 2005/849) transferred necessary functions in food law to the Scottish Ministers. Those were functions (in so far as not already devolved) under the Food and Environment Protection Act 1985 ("the 1985 Act"), the Food Safety Act 1990 ("the 1990 Act") and the Food Standards Act 1999 ("the 1999 Act"). Both the 1985 Act and the 1999 Act define food as having the same meaning it does under the 1990 Act and the transferred functions were limited by the newer definition of food rather than the older one.

4.3 The effect of this is, essentially, that any differences between the definition of food at devolution and the definition of food under EU law post-devolution have been removed in respect of the Scottish Ministers' functions. This enables the Scottish Ministers to regulate substances as food to the full extent of the EU definition of food. However, this does not affect the legislative competence of the Scottish Parliament as it remains in the position that it was in at devolution in 1999. Therefore, this Order is required to amend the definition of "food" to make a minor amendment to the legislative competence of the Scottish Parliament.

4.4 In relation to non-medicinal animal feed and additives, the regulation of animal feed safety and standards was also devolved under the 1998 Act, except for the regulation of veterinary medicines which was reserved. Section J4 reserves the subject-matter of the Medicines Act 1968 ("the 1968 Act"). Section 130(1) of the 1968 Act (as it stood as at 1 July 1999) defined "medicinal product" as including substances fed to animals and, therefore, veterinary medicinal products.

4.5 Prior to 2005 legislation regulating veterinary medicinal products was made under the 1968 Act or under that Act together with section 2(2) of the European Communities Act 1972. It was subsequently agreed between the Veterinary Medicines Directorate (an executive agency of the Department for Environment, Food and Rural Affairs) and the Food Standards Agency that certain zootechnical additives which do not have a medicinal effect on the animals that consume them should be regulated within the framework of animal feed law rather than veterinary medicines legislation. This led to the Veterinary Medicines Regulations 2005 (SI 2005/2745) which gave effect to this agreement. It was agreed that the Veterinary Medicines Directorate would regulate for the UK all matters falling within the scope of those Regulations. The 2005 Regulations have since been revoked – being replaced or amended by new veterinary medicines regulations almost every year; however, the definitions of "veterinary medicinal product" and "specified feed additives" have been unchanged since 2005. The latest regulations are the Veterinary Medicines Regulations 2013 (SI 2013/2033) which came into force on 1 October 2013.

4.6 In effect, certain animal feedstuffs and additives ceased to be veterinary medicinal products (due to the narrower scope of the 2005 Regulations compared to the 1968 Act) yet continued to fall within the scope of the 1968 Act (the subject-matter of which is reserved by J4). An Order made under section 63 of the 1998 Act (SI 2006/304) transferred functions in respect any feeding stuff used for oral feeding or feed additive

which is not regulated under the 2005 Regulations to the Scottish Ministers. This ensures that the Scottish Ministers can legislate for and control all non-medicinal animal feed in Scotland. However, this does not affect the legislative competence of the Scottish Parliament, which remains as it stood at devolution in 1999. Therefore, this Order amends reservation J4 of the 1998 Act to amend the legislative competence of the Scottish Parliament.

5. Territorial Extent and Application

5.1 This instrument extends throughout the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

> *"In my view the provisions of the Scotland Act 1998 (Modification of Schedule 5) Order 2014 are compatible with the Convention rights."*

7. Policy background

7.1 The Food Standards Agency (FSA) is a non-ministerial government department of the Government of the United Kingdom. It is responsible for protecting public health in relation to food throughout the United Kingdom and is led by a board appointed to act in the public interest. Its headquarters are in London with national offices in Scotland, Wales and Northern Ireland.

7.2 In 2010, certain aspects of food labelling policy in England were transferred from the FSA to the UK Government's Department for Environment, Food and Rural Affairs (Defra). However, the devolved FSA offices in Scotland, Wales and Northern Ireland continued to be responsible for all labelling and standards policy.

7.3 Similarly in 2010, nutrition policy, including nutrition labelling, in England and Wales was transferred from the FSA to Defra and to the Assembly Government in Wales. The FSA offices in Scotland and Northern Ireland have retained their responsibilities for nutrition policy.

7.4 Following these changes, an independent expert group was convened by Scottish Ministers to consider the need to make further changes to food safety and standards in Scotland. Based on recommendations made by this group, Scottish Ministers took the decision in 2012 to establish a new food safety body for Scotland which will take on the roles and responsibilities of the UK-wide FSA as exercised in Scotland. This will require primary legislation in the Scottish Parliament.

7.5 Updating Schedule 5 to reflect changes in the definition of "food" and the agreement reached regarding regulation of animal feeding stuffs will allow the introduction of primary legislation in the Scottish Parliament to constitute a new food body with functions which align fully with the scope of EU legislation on food safety and standards and animal feeding stuffs.

8. Consultation outcome

8.1 Although there has been no general consultation specific to this Order, the UK Government departments with responsibility for the legislation which this Order affects have been consulted during the drafting of this Order. All amendments contained in this Order have the approval of the relevant departments.

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 As the purpose of this Order is to amend the legislative competence of the Scottish Parliament to allow it to legislate to establish a new food safety body for Scotland, no monitoring or review of the effects of this Order are required by the UK Government. Any primary legislation introduced in the Scottish Parliament will be scrutinised in the normal way.

13. Contact

13.1 Emma Lopinska at the Scotland Office Tel: 0131 244 9016 or email: emma.lopinska@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.