EXPLANATORY MEMORANDUM TO THE

SCOTLAND ACT 1998 (MODIFICATIONS OF SCHEDULE 5) (NO.2) ORDER 2005

2005 No. 866 (S. 4)

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 and House of Lords Merits of Statutory Instruments Committee in respect of the draft Scotland Act 1998 (Modifications of Schedule 5) (No.2) Order 2005.

2. Description

2.1 The order is being made under the power provided by Section 30(2) of the Scotland Act 1998. Section 30(2) orders provide a mechanism whereby Schedule 4 or 5 to the Act can be modified by an Order in Council, subject to the agreement of both the UK and Scottish Parliaments. It allows the Scottish Parliament's legislative competence to be altered by removing existing reservations in whole or in part, adding new ones or updating existing ones. This order modifies Schedule 5.

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

3.1 None.

4. Legislative Background

4.1 Article 2 amends the reservation at Section B8 (National security, interception of communications, official secrets and terrorism) in Part 2 of Schedule 5 to the Scotland Act 1998. The amendment is needed in respect of the definitions of 'person detained', 'Place of detention' and 'Private telecommunication system' to reflect the repeal of and changes to other legislation (see para 7.2) which those definitions currently refer to. It is needed also to clarify the scope of the exception to the reservation (see para 7.3).

5. Extent

5.1 This order applies to the United Kingdom.

6. European Convention on Human Rights

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

In my view the provisions of the Scotland Act 1998 (Modifications of Schedule 5) (No.2) Order 2005 are compatible with the Convention rights.

7. Policy background

7.1 Schedule 5 to the Scotland Act 1998 lists those matters reserved to the UK Parliament and any exceptions to the reservations. The interception of communications is reserved, except for the interception of any communications made to or by a person detained in a place of detention if the communication is a written communication and is intercepted there; or if it is intercepted in the course of its transmission by means of private telecommunication system running there. Places of detention may be prisons or similar facilities where a person may be detained as a result of criminal legislation or hospitals where a person may be detained as a result of criminal or mental health legislation. The terms "Place of detention", "person detained" and "Private telecommunication system" are defined in the reservation. The exception to the reservation was inserted into Section B8 by the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (SI 1999/1749).

7.2 As currently drafted the definitions in the reservation refer to two Acts (the Telecommunications Act 1984 and the Sex Offenders Act 1997), which have since been repealed and to another Act, the Mental Health (Scotland) Act 1984 (the '1984 Act'), which will be repealed by the introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the '2003 Act'). The 2003 Act is not yet in force. The Scottish Executive have confirmed that the modification to Section B8 by this Order will not cause difficulties for the Scottish Ministers in relation to the interception of communications in Scotland between the date this Order comes into force and the coming into force of the 2003 Act.

7.3 The reference to the 1984 Act in the definition of 'Place of detention' is being replaced with reference to the 2003 Act. The definition of 'Private telecommunication system' is being updated by a definition drawn from the more recent Regulation of Investigatory Powers Act 2000, which takes account of technological developments. The definition of 'person detained' is being replaced by references to the appropriate detaining legislation, which are certain provisions of the 1984 Act and the Criminal Procedure (Scotland) Act 1995, the 2003 Act, and regulations made under provisions of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. The opportunity is being taken to extend the definition of 'person detained' to include all those detained in hospital by mental health legislation in addition to those detained via the criminal justice system. This will reflect the existing powers under the 1984 Act.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this order, as it has no impact on business, charities, or voluntary bodies. This is a constitutional measure that concerns the modification of a reservation in Schedule 5 to the Scotland Act 1998.

8.2 There is no impact on the public sector or public spending.

9. Contact

Glenn Preston at the Scotland Office, Department for Constitutional Affairs (Glenn.Preston@scotland.gsi.gov.uk) can answer any queries regarding the order.

Scotland Office, Department for Constitutional Affairs
January 2005