

**EXPLANATORY MEMORANDUM TO**  
**THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION)**  
**ORDER 2018**

**2018 No. 626**

**1. Introduction**

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

**2. Purpose of the instrument**

- 2.1 The purpose of this instrument is to allow the exercise of functions of the Scottish Ministers under section 22 of the Scotland Act 2016 (“the Act”) to be specified so that they can be exercised by arrangement on behalf of the Scottish Ministers by a Minister of the Crown. This is known as an “agency arrangement”. Any such arrangement would require agreement between the UK Government and the Scottish Government; this instrument only allows for such arrangements to be agreed.

**3. Matters of special interest to Parliament**

*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.
- 3.2 This Order specifies functions that will be exercisable by the Scottish Ministers under section 22 of the Act as soon as executive competence transfers from UK Ministers to Scottish Ministers at the end of the period specified in the Scotland Act 2016 (Transitional) Regulations 2017 (“the Regulations”).
- 3.3 This Order comes into force immediately upon the transfer of executive competence for the exercise of these specified functions.
- 3.4 Executive competence will transfer, according to the Regulations, on 1 April 2020 , or if earlier, when a provision contained in an Act of Scottish Parliament, that is within legislative competence by virtue of section 22 of the Act, comes into force .
- 3.5 As a result of this Order’s commencement approach, the UK Government and Scottish Government will be able to rely on this instrument to make arrangements enabling Ministers of the Crown to immediately exercise the functions specified in this instrument from the date that executive competence transfers. This will enable Ministers of the Crown to continue, without interruption, to deliver benefits falling under section 22 of the Act after executive competence devolves.
- 3.6 Further explanation of this modification of executive competence in relation to section 22 of the Act can be found in section 4 below and in the explanatory memorandum for the Regulations at [http://www.legislation.gov.uk/uksi/2017/444/pdfs/uksiem\\_20170444\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/444/pdfs/uksiem_20170444_en.pdf)

### *Other matters of interest to the House of Commons*

- 3.7 As this instrument is subject to negative resolution procedure and has not yet been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### **4. Legislative Context**

- 4.1 Section 93(1) of the Scotland Act 1998 enables the Scottish Ministers to 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 which are to be subject to such arrangements must be specified in an Order in Council.
- 4.2 This Order specifies, for the purposes of section 93(1) of the Scotland Act 1998, the functions that will become exercisable by the Scottish Ministers by virtue of section 22 of the Act. These functions relate to benefits for disability and industrial injury and carer's allowance, and they will be transferred to the Scottish Ministers at the end of the period determined in the Regulations, immediately before this Order comes into force.
- 4.3 Welfare powers covering a number of existing benefits are being devolved to Scottish Parliament and the Scottish Ministers under the Act. The changes introduced by the Act give Scottish Parliament legislative competence over various aspects of social security. The Scottish Government intends to establish a Scottish social security system and agency for delivering devolved benefits to people in Scotland. The Social Security (Scotland) Bill provides for the replacement of certain existing social security benefits with new Scottish benefits and the top up or amendment of other existing benefits insofar as they are paid to individuals in Scotland. . The Bill will also create a legislative framework for the administration of social security in Scotland, making provision for operational functions such as determination of entitlement, re-determinations, appeals, overpayments and fraud.
- 4.4 The UK and Scottish Governments agreed to commence sections of the Act, including section 22, using a split competence approach, with legislative competence passing on 17 May 2017 and executive competence passing by 1 April 2020. The purpose of withholding the transfer of executive competence for the exercise of powers under section 22 of the Act is to allow the Scottish Government to bring forward its Social Security (Scotland) Bill, without having to take immediate responsibility for the existing benefits that are being devolved. The Scotland Act 2016 (Commencement No. 5) Regulations 2017 (SI 2017/455) transfer the legislative powers, which would generally entail an automatic transfer of the associated executive powers to the Scottish Ministers, but the Regulations hold back executive competence for a specified period during which Ministers of the Crown continue to deliver existing benefits to existing claimants. Once the specified period ends, executive competence will transfer, and the Scottish Government will be responsible for the benefits and payments covered by section 22 of the Act. This will trigger the entry into force of this Order, enabling functions specified by this Order to immediately become exercisable by Ministers of the Crown on behalf of the Scottish Government through an agency agreement.
- 4.5 This approach to split competence provides two key assurances:
- It ensures that either UK Ministers or Scottish Ministers have executive competence for each benefit at any one time, but not both; and

- It allows for the transfer of executive competence on any date determined by Scottish Parliament when a relevant Act of Scottish Parliament comes into force, or else at the very latest by 1 April 2020.

## **5. Extent and Territorial Application**

- 5.1 This instrument extends to England, Scotland, Wales and Northern Ireland, except where otherwise specified.
- 5.2 The territorial application of this instrument is England, Scotland, Wales and Northern Ireland.

## **6. European Convention on Human Rights**

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

## **7. Policy background**

### *What is being done and why*

- 7.1 The Act made provision in section 22 to devolve responsibility for certain benefits including Carer's Allowance to the Scottish Government. The Social Security (Scotland) Bill makes provision for these devolved benefits, and also introduces a Carer's Allowance Supplement (CAS). Once the CAS comes into force executive competence for the exercise of section 22 functions relating to Carer's Allowance will transfer to Scottish Government in accordance with the Regulations.
- 7.2 Both the Scottish Government and the UK Government wish to enter into an agency agreement to allow the Department for Work and Pensions ("DWP") to exercise functions relating to Carer's Allowance and other related functions covered by section 22 of the Act on behalf of the Scottish Ministers. This Order specifies the scope of the functions that may be exercised by DWP on behalf of the Scottish Ministers in any agency arrangement. Whether any arrangement is ultimately entered into, and the terms and duration of an arrangement must be agreed between the UK Government and the Scottish Government.
- 7.3 This Order will allow the Scottish Government to make arrangements with the UK Government for Carer's Allowance to be delivered by DWP from the moment executive competence transfers. Both Governments wish to enter into an agency arrangement that would allow DWP to continue to deliver Carer's Allowance to people in Scotland for a transitional period, with flexibility for either Government to determine when it considers it appropriate for that period to end. The agency agreement will set out the terms and conditions on termination. This will ensure there is no break in service.
- 7.4 In addition to Carer's Allowance, this Order will allow the Scottish Government to agree an agency arrangement with DWP to deliver on the Scottish Ministers' behalf, any of the DWP-delivered benefits that fall within section 22 of the Act.

## **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. The content of this Order has been approved by DWP, Scotland Office and Scottish Government.

## **9. Guidance**

- 9.1 No formal guidance will be available on the use of these powers as the Order makes provision for Ministers of the Crown to enter into agency arrangements with the Scottish Government and has no wider impact.

## **10. Impact**

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 This Order has no direct impact on the public sector, it simply allows for future arrangements to be entered into. While these future arrangements may have an impact on the public sector, that would be for assessment and consideration with each individual arrangement. This Order creates no additional public sector costs.
- 10.3 As such, an Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

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

## **12. Monitoring & review**

- 12.1 There is no need for review or monitoring as any arrangement made as a consequence of the Order will be subject to individual agreement.

## **13. Contact**

- 13.1 Rebecca Cowper and Ben Wilkins at the Scotland Office (telephone: 0207 270 6760, 0207 270 6807) or email: [rebecca.cowper@scotlandoffice.gsi.gov.uk](mailto:rebecca.cowper@scotlandoffice.gsi.gov.uk) [ben.wilkins@scotlandoffice.gsi.gov.uk](mailto:ben.wilkins@scotlandoffice.gsi.gov.uk)) can answer any queries regarding the instrument.