

**EXPLANATORY MEMORANDUM TO THE
SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE SCOTTISH
MINISTERS ETC.) ORDER 2005**

2005 No. 849 (S. 2)

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 (Transfer of Functions to the Scottish Ministers etc.) Order 2005.

2. **Description**

- 2.1 This order allows for the transfer of certain functions to the Scottish Ministers. It does so by using the powers available at section 63 of the Scotland Act 1998. Section 63 provides that by Order in Council, any function of a UK Minister of the Crown, so far as it is exercisable in or as regards Scotland, can be exercisable by the Scottish Ministers instead of, concurrently with, or after agreement with the UK Minister of the Crown. This is commonly known as 'executive devolution'.

- 2.2 Any function, whether statutory or non statutory, of a UK Minister of the Crown, including a power to make subordinate legislation, so far as it is exercisable in or as regards Scotland, can be the subject of an order under section 63. The UK Minister of the Crown will continue to exercise these functions as regards the rest of the UK.

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

- 3.1 Article 2 of the order provides that the functions conferred on a Minister of the Crown by the enactments specified in the Schedule shall, so far as they are exercisable in or as regards Scotland, be exercisable by the Scottish Ministers *instead of* by a Minister of the Crown. The exception to this is the transfer of functions to the Scottish Ministers in respect of the Road Traffic Regulation Act 1984. These functions are to be exercised by the Scottish Ministers with the agreement of the Secretary of State.

- 3.2 Article 3 of the order provides for a concurrent transfer of the section 2(2) powers under the European Communities Act 1972 for the limited purposes of regulating food. European Community legislation on food safety and standards is, from time to time, transposed using these powers (see paragraphs 7.3 – 7.4 for further details).

- 3.3 Article 4 of the order repeals section 22C(7) of the Road Traffic Regulation Act 1984 and section 39BA(1) and (2) of the Roads (Scotland) Act 1984. These provisions will be spent by virtue of the transfer of functions under this order. Article 4 also modifies section 39BA(3) of the Roads (Scotland) Act 1984 as a consequence of the transfer of functions.

4. Legislative Background

4.1 In relation to the Fire and Rescue Services Act 2004, the order transfers to the Scottish Ministers functions in respect of Fire Authority pensions. Specifically, the functions to be transferred are sections 34 (1) to (5) and (8), 35 (1), (4) and (6), 36 (1) to (3) and section 60(2).

4.2 In relation to the Electricity Act 1989, the order transfers to the Scottish Ministers functions specified in section 3A, 32BA and 32(7), which relate to the principal objective and general duties of the Secretary of State in relation to consumers, the use of green certificates issued in Northern Ireland and consultation requirements.

4.3 In respect of the Energy Act 2004, the order transfers to the Scottish Ministers consultation requirements concerning functions exercisable under the Electricity Act 1989. Specifically the functions to be transferred arise under sections 115(6), 116(8), 117(2), 118(2) and 119(7).

4.4 In relation to the Food and Environment Protection Act 1985, the Food Safety Act 1990 and the Food Standards Act 1999, the order transfers to the Scottish Ministers those functions (other than those already devolved to the Scottish Ministers) relating to food safety and standards in respect of all substances considered food under EC Regulation 178/2002. The order also allows for the concurrent transfer of the powers under section 2(2) of the European Communities Act 1972 for the limited purpose of regulating food.

4.5 In relation to the Road Traffic Regulation Act 1984, the order transfers to the Scottish Ministers, subject to the agreement of the Secretary of State, functions exercisable for purposes in connection with traffic regulation orders, temporary prohibitions or restrictions on roads, and bollards and other obstructions which relate to avoiding or reducing the likelihood of danger connected with terrorism. In relation to the Roads (Scotland) Act 1984, the order transfers to the Scottish Ministers functions exercisable for purposes in connection with traffic calming which relate to avoiding or reducing the likelihood of danger connected with terrorism.

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 (Transfer of Functions to the Scottish Ministers etc) Order 2005 are compatible with the Convention rights.

7. Policy background

Fire and Rescue Services Act

7.1 Primary legislation in respect of pensions is a reserved issue. However, powers under the Fire Services Act 1947 to make an order setting out the details of pension arrangements for fire-fighters were executively devolved to Scottish Ministers (SI 1999/1750). These order-making powers have recently been repealed and re-enacted by the UK Parliament in the Fire and Rescue Services Act 2004. This order under the Scotland Act is therefore being brought forward to ensure the Scottish Ministers are able to exercise similar functions under the new regime as they were under the old regime.

Electricity Act 1989 and Energy Act 2004

7.2 The order transfers to the Scottish Ministers functions of the Secretary of State specified in section 3A of the Electricity Act 1989 (“the 1989 Act”). Section 3A specifies the principle objective and general duties of the Secretary of State and the Gas and Electricity Markets Authority (GEMA), in carrying out functions under Part 1 of the 1989 Act. The order also transfers functions specified in sections 115(6), 116(8), 117(2), 118(2), and 119(7) of the Energy Act 2004, and section 32(7) of the 1989 Act. These sections provide for amendments to the requirements for Scottish Ministers to consult, before making an Order in relation to the renewables obligation under sections 32 to 32C of the 1989 Act. The Order also transfers a new function, under section 32BA of the 1989 Act, which allows green certificates issued in respect of electricity generated from eligible renewables sources in Northern Ireland to be produced to GEMA as proof that a supplier has met its renewables obligation.

Food

7.3 Regulation of food safety and standards in Scotland is devolved. A new European framework for the regulation of food safety and standards within the Community will be provided with effect from 1 January 2005 by Regulation 178/2002. This lays down:

- the general principles and requirements of food law;
- procedures in matter of food safety; and
- establishes the European Food Safety Authority.

7.4 As part of the implementation of Regulation 178/2002, the Food Safety Act 1990 (Amendment) Regulations 2004 substituted (with effect from the 7 December) the definition of “food” used in the Regulation for the definition of “food” in the Food Safety Act 1990. There are slight differences between the two definitions. The order therefore transfers to Scottish Ministers functions relating to the regulation of substances falling within the definition of “food” in the Food Safety Act 1990 as amended, which are not already within the devolved competence of Scottish Ministers. This ensures that the Scottish Ministers will continue to be able to regulate food safety and standards for Scotland for all substances considered “food” in Community law. Specifically, the functions being transferred arise under the Food and Environment Protection Act 1985, the Food Safety Act 1990 and the Food Standards Act 1999. These Acts are the core framework for the regulation of food in

Great Britain, including the transposition of Community measures, and all share the definition of food contained in the 1990 Act as amended.

7.5 The order also allows for the concurrent transfer of the powers at section 2(2) of the European Communities Act 1972 for the limited purpose of regulating food in so far as those powers are not already exercisable by the Scottish Ministers for that purpose. European Community legislation on food safety and standards is, from time to time, transposed using these powers.

Road Traffic Regulations

7.6 The Civil Contingencies Act 2004 (“the 2004 Act”) amended the Road Traffic Regulation Act 1984 (“the 1984 Act”) to enable traffic regulation orders to be made to prevent or mitigate the impact of vehicle-borne terrorist attacks, in particular no-warning vehicle suicide bombings. Such anti-terrorist traffic regulation orders (ATTROs) will be made on the recommendation of the chief officer of police for the area in question. These new powers are contained in sections 22C and 22D, inserted into the 1984 Act by Schedule 2 to the Civil Contingencies Act.

7.7 National security, including responding to terrorist threats, is a reserved matter. However, various functions under the 1984 Act, including functions relating to traffic regulation orders, were executively devolved to Scottish Ministers by SI 1999/1750. That order was deliberately disapplied by the 1984 Act (as amended by the 2004 Act) to ensure the new ATTRO functions in respect of the reserved matter of terrorism remain with the Secretary of State.

7.8 After consultation between UK Departments and the Scottish Executive, it has been agreed that the Scottish Ministers are the most appropriate authority to exercise these specific new functions in, or as regards, Scotland. In this instance, the Scottish Ministers will be required to seek the agreement of the Home Secretary before they make an ATTRO in respect of a road for which they are the traffic authority, or before they give a direction to a local traffic authority to make an ATTRO. SI 1999/1750 will continue to be disapplied for the avoidance of any uncertainty about the Scottish Ministers’ competence to make an ATTRO or give a direction. Section 22C(7) will be spent, by virtue of the transfer of functions, and is repealed by article 4 of this order.

7.9 Schedule 2 to the Civil Contingencies Act also amended provisions in the Roads (Scotland) Act 1984 concerning traffic calming for the purpose of avoiding or reducing danger from terrorism. Schedule 2 inserted a new section 39BA which provides that construction of such traffic calming works under section 39A on roads for which Scottish Ministers are the traffic authority shall be exercisable by the Secretary of State. The new section 39BA also provides that the power to make regulations under section 39B of the 1984 Act for the purpose of avoiding or reducing danger from terrorism shall also be exercisable by the Secretary of State. It is the intention to transfer both of these powers to Scottish Ministers, without the requirement to seek the agreement of the Secretary of State, by means of this order. The relevant provisions of section 39BA will be spent, by virtue of the transfer of functions, and are repealed by article 4 of this order.

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 appropriate authority for exercising a function in or as regards Scotland.

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
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