

**EXPLANATORY MEMORANDUM TO THE
MANAGEMENT OF OFFENDERS ETC. (SCOTLAND) ACT 2005
(CONSEQUENTIAL MODIFICATIONS) ORDER 2006**

SI 2006/ 1055 (S.11)

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Management of Offenders etc. (Scotland) Act 2005 (“the 2005 Act”) establishes new community justice authorities (“CJA”) in Scotland. This Order disqualifies the chief officer of a CJA from membership of the UK Parliament. The 2005 Act also establishes a Home Detention Curfew (“HDC”) system in Scotland, broadly similar to that operating in England and Wales, and new release on licence provisions for certain sexual offenders. This Order provides that the Scottish HDC system and release of certain sexual offenders provisions may continue to apply to prisoners transferred on a restricted basis from Scotland to England and Wales or Northern Ireland as a matter of the law of those parts of the UK. This Order also provides that the HDC system in England and Wales may continue to apply to prisoners transferred from England and Wales to Scotland on a restricted basis as a matter of the law of Scotland and England and Wales.

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

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998 (“the 1998 Act”). The Order is, by virtue of Schedule 7 to that Act, subject to affirmative resolution procedure in both Houses of the UK Parliament. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament, in this case the 2005 Act.

3.2 A section 104 Order under the 1998 Act is necessary in consequence of the 2005 Act as the Scottish Parliament does not have legislative competence under the 1998 Act to legislate in respect of the following matters:

- disqualifying chief officers of CJAs from membership of the UK Parliament.
- applying the HDC system in England and Wales to prisoners transferred from England and Wales to Scotland.
- extending to the law of England and Wales or Northern Ireland amendments already made for Scotland in the 2005 Act in relation to the application of the Scottish HDC system and provisions relating to the release of certain sexual offenders to prisoners transferred from Scotland to England and Wales and Northern Ireland.

4. Legislative Background

4.1 The 2005 Act was passed by the Scottish Parliament on 3 November 2005 and received Royal Assent on 8 December 2005. The purposes of the Act include making provision for the establishment of CJAs; to make further provision for the supervision and care of prisoners put on probation or released from prison and to amend Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 to make new provisions for the release of prisoners on licence.

4.2 In particular section 15 of the 2005 Act introduces a new system for the release of most short-term prisoners in Scotland who are subject to the notification requirements of the Sexual Offences Act 2003. Section 15 of the 2005 Act also establishes an HDC system in Scotland allowing prisoners to be released early on licence.

4.3 Paragraph 8 of Schedule 1 to the Crime (Sentences) Act 1997 ("1997 Act") deals with the transfer of prisoners from England and Wales to Scotland. Currently there is no provision for the HDC system in England and Wales (found in sections 246 and 253 of the Criminal Justice Act 2003) to continue to apply to prisoners transferred from England and Wales to Scotland on a restricted basis. This Order, at article 2, amends paragraph 8 of Schedule 1 to the 1997 Act to insert reference to sections 246 and 253 of the Criminal Justice Act 2003 so that the HDC system in England and Wales may continue to apply to prisoners transferred from England and Wales to Scotland, following upon the establishment of an equivalent HDC system in Scotland in the 2005 Act.

4.4 Section 21(8) of the 2005 Act amends paragraphs 10 and 11 of Schedule 1 to the 1997 Act which deal with the transfer of prisoners from Scotland to England and Wales and Northern Ireland respectively. The effect of section 21(8) of the 2005 Act is that the new Scottish HDC system and sex offender provisions may continue to apply to prisoners transferred on a restricted basis from Scotland to England and Wales or Northern Ireland, as a matter of Scots law. This Order, at article 3, provides that the amendment made by section 21(8) of the 2005 Act to the 1997 Act extends to England and Wales and Northern Ireland.

4.5 This order deals with transfers conducted on a "restricted" basis only. A restricted transfer is defined by paragraph 6(1)(a) of Schedule 1 to the Crime (Sentences) Act 1997 which has United Kingdom extent. Such a transfer takes place where it is made subject to a condition that for certain purposes (including release on licence) the law of the country from which the person is transferred is to continue to apply. An "unrestricted" transfer (which this Order is not concerned with) is a transfer that is not subject to such a condition.

4.6 Section 3 of the 2005 Act gives Scottish Ministers the power to create, by Order, a body corporate to be known as a community justice authority for a specified area in Scotland. Each of these bodies has responsibility to prepare and submit a plan for the management of relevant offenders, having consulted with Scottish Ministers, local authorities and other groups with an interest. Each CJA shall have a chief officer to have day to day responsibility for the work of the authority. The chief officer will be in a position of control in terms of the CJAs being in receipt of Government grants and funds. This Order, at article 4, disqualifies chief officers of CJAs from membership of the UK Parliament in order to maintain the political impartiality of the post.

5. Extent

5.1 This Order extends to the UK, except for article 3 which extends to England and Wales and Northern Ireland only.

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 Management of Offenders etc. (Scotland) Act 2005 (Consequential Modifications) Order 2006 are compatible with the Convention rights.

7. Policy Background

7.1 In December 2004 the Scottish Executive published its Criminal Justice Plan *Supporting Safer, Stronger, Communities*¹ setting out its proposals for addressing weaknesses identified in the management of offenders in Scotland, in response to its consultation on re-offending: *Reduce, Rehabilitate, Reform*². The 2005 Act is part of the result of this process, which identified the need for legislative changes. Section 15 in particular introduces two changes in respect of the release and supervision of prisoners.

7.2 The first of these changes is to introduce a system of home detention curfew in Scotland. This will allow selected low-risk prisoners to be released from custody earlier than would otherwise be permitted. Such prisoners will be on licence, and will be required to comply with conditions including a curfew condition monitored electronically. Decisions on release and on the conditions of release have to be taken having regard to considerations of public safety, reducing re-offending and reintegration of the offender into the community. Those who fail to comply with the curfew or other conditions can be recalled to custody. A similar system has been operating in England and Wales since 1999, and is now regulated by the Criminal Justice Act 2003.

7.3 The second change relates to prisoners serving sentences of under 4 years in respect of sexual offences. At present such prisoners, like other short term prisoners, are released after they have served one half of their sentence. Unless the court has imposed an extended sentence, the release is unconditional and the offender is not subject to supervision. The 2005 Act changes this arrangement by providing that the release of such prisoners will be on licence rather than unconditional.

7.4 CJAs will provide a strategic level for planning, managing performance and reporting on performance by local authorities or groups of local authorities in relation to the management of offenders in Scotland. As the new CJAs will be in receipt of Government funding, and the chief officers of each CJA will be responsible for this funding, it is in line with current policy to disqualify these individuals from being MPs (or members of other legislative bodies within the UK) and therefore responsible for voting these sums of money. Whilst members of the CJAs are to be members of local authorities, there is no conflict at this level because local authorities will not be providing the money for the CJAs.

7.5 This Order therefore allows the cross-border transfer to and from Scotland of prisoners subject to the HDC system and from Scotland for certain sexual offenders subject to the new release on licence provisions; and disqualifies chief officers of CJAs from membership of the House of Commons.

8. Impact

¹ ISBN 0-7559-4309-0 <http://www.scotland.gov.uk/consultations/justice/rrrc-00.asp>

² ISBN 0-7559-4511-5 <http://www.scotland.gov.uk/Publications/2005/03/31155757/57583>

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The provisions on cross-border transfer of prisoners will have a minor effect on the Prison Service, Scottish Prison Service, Probation Service and Scottish local authority criminal justice social work services. The supervision and tagging costs will be met by the receiving jurisdictions. Inbound and outbound transfers from each jurisdiction are likely to be at similar levels, so the net effect is expected to be zero.

9. Contact

Alasdair Smith at the Scotland Office, telephone 0207 270 6756 or e-mail: alasdair.smith@scotland.gsi.gov.uk, can answer any queries regarding the instrument.