

EXPLANATORY MEMORANDUM TO
THE SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) ACT 2005 AND THE
PROHIBITION OF SMOKING IN CERTAIN PREMISES (SCOTLAND)
REGULATIONS 2006 (CONSEQUENTIAL PROVISIONS) (SCOTLAND) ORDER

2006 No. 1115

1. This explanatory memorandum has been prepared by the Department for Transport 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 This Order makes provision to apply the ban on smoking on vessels contained in the Smoking, Health and Social Care (Scotland) Act 2005 (“the 2005 Act”) and the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 (“the 2006 Regulations”) to certain ships in Scotland which are regulated under the Merchant Shipping Act 1995 (“the MSA”).

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

3.1 This Order is 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 paragraphs 1 and 2 of Schedule 7 to that Act, subject to the negative resolution procedure.

3.2 Part 1 of the 2005 Act and the 2006 Regulations which are made under that Act ban smoking in wholly enclosed or substantially enclosed public places in Scotland. Part 1 of the 2005 Act contains the power for Scottish Ministers to prescribe the premises, including vessels, where smoking is to be banned. The 2006 Regulations specify that vessels are included within the definition of premises. However, power to regulate health and safety on board vessels used in navigation is contained in the MSA and the subject matter of that Act is reserved under section E3 of Part II of Schedule 5 to the 1998 Act. By virtue of section 101 of the 1998 Act, the 2005 Act and the 2006 Regulations must be interpreted as if they excluded vessels which fall to be regulated under section 85 of the MSA.

3.3 This Order is being made under section 104 of the 1998 Act in consequence of the 2005 Act and the 2006 Regulations so as to apply the ban on smoking in enclosed or substantially enclosed premises to certain ships which are specified in the Order and are regulated under the MSA.

3.4 Section 114(1) of the 1998 Act provides that an order under section 104 may not modify Schedule 5. This Order does not modify Schedule 5, as it does not confer new legislative powers on the Scottish Parliament or Administration. There are powers in the 1998 Act that enable new functions to be conferred on Scottish Ministers by way of an Order in Council made under section 63. That section enables an Order in

Council to provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable by Scottish Ministers. There is no requirement for there to be legislative competence on the part of the Scottish Parliament or Administration in relation to the subject-matter of the functions in question. In the case of this Order no new legislative powers are being conferred on Scottish Ministers. Rather, the Order itself applies the effect of the 2006 Regulations made by Scottish Ministers, and the associated provisions of Part 1 of the 2005 Act, to certain ships regulated under the MSA.

3.5 Section 54 of the 1998 Act defines the meaning of references in the 1998 Act to the exercise of a function being within or outside “devolved competence” by reference to the legislative competence of the Scottish Parliament. This Order does not alter that definition, and in any event that section is not relevant to the powers under which this Order is made. Instead, by applying the enforcement provisions of the 2006 Regulations and the 2005 Act to certain ships regulated under the MSA, the Order itself (made by a UK Minister, not Scottish Ministers) confers on the enforcement bodies concerned functions that would be outside the devolved competence of Scottish Ministers. The legislative competence of the Scottish Parliament and Schedule 5 to the 1998 Act remain unchanged. In any event, section 54 is not a general provision for all purposes and is not an all-encompassing definition of what Scottish Ministers may do with respect to reserved matters.

3.6 It is therefore the Department’s view that nothing in section 54 of the 1998 Act precludes the enforcement provisions of the 2006 Regulations and Part 1 of the 2005 Act from being applied by this Order to ships which are regulated under the MSA and which are on voyages which remain in Scotland or which commence in Scotland and return to Scotland without visiting a port or destination outside Scotland. It would be illogical to read the 1998 Act as permitting a section 104 order to create offences but as preventing it from conferring corresponding enforcement functions on appropriate Scottish bodies.

4. Legislative Background

4.1 This Order applies provisions of Part 1 of the 2005 Act and the 2006 Regulations to certain ships in Scotland which are covered by the MSA. The subject matter of the MSA is a reserved matter under section E3 of Part II of Schedule 5 to the 1998 Act.

4.2 The 2005 Act received Royal Assent on 5th August 2005. Part 1 introduced a ban on smoking in premises in Scotland. No-smoking premises are wholly or substantially enclosed premises prescribed in regulations made under the Act. The 2006 Regulations which prescribed which premises are no-smoking premises for the purposes of Part 1 of the 2005 Act, were made on 28th February 2006 and came into force on the 26th March 2006. Regulation 3 states that no-smoking premises for the purposes of Part 1 of the 2005 Act are those premises or classes of premises listed in Schedule 1. The 2006 Regulations define premises as including vehicles, and vehicles as including vessels.

4.3 The 2005 Act and the 2006 Regulations however apply the ban to vessels but do not distinguish between vessels which are regulated under the MSA and those vessels which are not.

4.4 By virtue of section 101 of the 1998 Act the provisions in the 2005 Act and the 2006 Regulations are to be read as narrowly as required for them to be within competence and are to have effect accordingly. Accordingly, but for the present Order the 2005 Act and the 2006 Regulations would fall to be read as if the term vessel applies only to those vessels which are not covered by the MSA.

5. Extent

5.1 This instrument extends to the United Kingdom.

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

7.1 In November 2004 the Scottish Executive took the decision to ban smoking in enclosed public places in Scotland. This resulted in the 2005 Act. When drafting this legislation, the Scottish Executive examined the smoking ban in enclosed spaces on ferries in Irish territorial waters which came into effect in March 2004 and determined that a similar ban should apply in Scotland. However, not all vessels are covered by the 2006 Regulations as some are regulated under the MSA which is a reserved matter under the 1998 Act and therefore the Scottish Executive could not by itself impose a ban on all vessels.

7.2 In 2004, the Scottish Executive launched a public consultation on the proposed smoking ban in Scotland. There were 52,441 personal responses to the consultation and 1,033 responses from groups, organisations and businesses. Analysis of these responses indicated that 82% of all respondents thought that further action was needed to reduce people's exposure to second-hand smoke, whilst 80% supported legislation to make enclosed public spaces smoke-free. Fifteen public seminars were also held throughout Scotland in order to listen directly to the views of people in their own communities. The majority of participants, including health professionals, supported the need to increase smoke-free provisions, but the licensed trade representatives stressed their opposition. In addition, the Scottish Executive also conducted an opinion poll in September 2004, held a national conference with international speakers, and discussed the proposal in a range of focus groups. There was a general consensus from these consultations.

7.3 In December 2005, the Scottish Executive sought the Secretary of State's agreement to enable the ban to be applied to certain ships covered by the MSA, but not those with a port of departure, destination or call outside Scotland.

8. Impact

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

8.2 There is no impact on the public sector.

9. Contact

David Best at the Department for Transport Tel: 020 7944 4779 or e-mail: David.Best@dft.gsi.gov.uk can answer any queries regarding the instrument.