

# ENERGY ACT 2004

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## EXPLANATORY NOTES

### THE ACT

#### Part 1: the Civil Nuclear Industry

##### Summary and Background

11. Proposals for most of this Part were published for pre-legislative scrutiny as the draft Nuclear Sites and Radioactive Substances Bill in June 2003. Principal exclusions were Chapter 3, covering the Civil Nuclear Constabulary and the provisions on nuclear security, devolution, tax and structure and finance of transferee companies. The House of Commons Select Committee on Trade and Industry published a report on these proposals in October 2003 which can be found at:

<http://www.parliament.the-stationery-office.co.uk/pa/cm/cmtrdind.htm> - reports

##### *Chapters 1 and 2: Nuclear Decommissioning and Transfers Relating to Nuclear Undertakings*

12. [Chapter 1](#) and its related Schedules deal with the establishment of the NDA, its functions (including its strategy, plans and reports in respect of its functions), powers and statutory duties and the funding of its activities.
13. The creation of the NDA and its functions will not affect the existing regulatory regime in respect of nuclear sites and storage and disposal of radioactive waste under the [Nuclear Installations Act 1965 \(c.57\)](#) and the [Radioactive Substances Act 1993 \(c.12\)](#) respectively. The powers of the Health and Safety Executive as the licensing authority and the Environment Agency and the Scottish Environment Protection Agency to enforce those requirements are also unaffected.
14. [Chapter 2](#) gives the Secretary of State powers to make transfer schemes both to facilitate the restructuring of BNFL and to enable the NDA, where appropriate, to improve arrangements for the management of the nuclear sites for which it is given responsibility. It also consolidates the power of the Secretary of State to make transfer schemes under the [Atomic Energy Authority Act 1995 \(c.37\)](#).
15. The Government has also published other documents relating to the proposed NDA, so as to give stakeholders a better understanding of the overall framework within which the NDA would operate. Principal amongst these are a draft management statement outlining the intended relationship between Government and the NDA and a draft Memorandum of Understanding between the NDA and the nuclear regulators. These can be found at:

[www.dti.gov.uk/nuclearcleanup/pdfs/draftmou.pdf](http://www.dti.gov.uk/nuclearcleanup/pdfs/draftmou.pdf) and

[www.dti.gov.uk/nuclearcleanup/pdfs/ndastatement.pdf](http://www.dti.gov.uk/nuclearcleanup/pdfs/ndastatement.pdf)

### **Chapter 3: Civil Nuclear Constabulary**

16. Chapter 3 implements proposals in the White Paper, “*Managing the Nuclear Legacy – A Strategy for Action*” (Cm. 5552), to reform the governance arrangements for the UKAEA Constabulary, and to set it up on a statutory basis similar to that for other police forces.
17. The UKAEA Constabulary operates in England, Scotland and Wales but not in Northern Ireland. Accordingly the Constabulary provisions (with some minor exceptions) extend only to England, Wales and Scotland.
18. The [Atomic Energy Authority Act 1954 \(c.32\)](#) conferred power on UKAEA to nominate persons to be special constables for the purposes of section 3 of the [Special Constables Act 1923 \(c.11\)](#). The body of special constables so nominated by UKAEA and appointed under section 3 forms the existing UKAEA Constabulary. Members of the existing Constabulary have police powers to enable them to protect certain civil licensed nuclear sites and nuclear material in transit. The Constabulary is currently part of UKAEA, and is fully funded by the nuclear site licensees whose sites it polices (currently UKAEA, BNFL and URENCO). It is overseen by a non-statutory committee of UKAEA – the UKAEA Constabulary police authority - composed of representatives of the nuclear site licensees, the Director of the Office for Civil Nuclear Security (part of the DTI), an expert police adviser and another representative of DTI. The Chair rotates on an annual basis between UKAEA and BNFL.
19. sites and escorts sensitive nuclear material in the course of transport. It has a specialist anti-terrorist policing role focussed on the protection of proliferation-sensitive nuclear material. It is an integral part of the civil nuclear security framework and works within security parameters set by the Director of Civil Nuclear Security on behalf of the Secretary of State. The Constabulary has limited contact with the public or with general crime for which Home Office and Scottish Executive forces continue to have operational responsibility within the areas in which the Constabulary operates.
20. The Act provides for the separation of the UKAEA Constabulary from UKAEA, and its transfer to a statutory Police Authority (a Non-Departmental Public Body) created by the Act, to become the new Civil Nuclear Constabulary. The Police Authority will be accountable to the Secretary of State and have overall supervisory responsibility for the force and for ensuring that it carries out its role effectively.
21. The [Anti-terrorism, Crime and Security Act 2001 \(c.24\)](#) (the “ACTS Act”) modified and extended the UKAEA Constabulary’s jurisdiction to bring it into line with its core nuclear security role. This Act essentially restates those provisions (with the consequent repeal of the relevant ATCS Act provisions). It makes minor changes to the Constabulary’s current jurisdiction to focus this more firmly on its specialist nuclear security role, and gives the Constabulary police powers and privileges throughout Great Britain for any purpose connected with the core jurisdiction set out in section 56(1) to 56(4). It also enables a senior officer of the Civil Nuclear Constabulary to authorise, under section 44 of the [Terrorism Act 2000 \(c.11\)](#), stop and search for articles which could be used in connection with terrorism without grounds for suspicion, and extends the offences of assault on constables and impersonation of police to members of the Civil Nuclear Constabulary. The existing staff of the UKAEA Constabulary (both constables and civilian support staff) will be transferred to the new Police Authority under the provisions of the Act. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”) will apply to the transfer, and employees will continue to be eligible for membership of the UKAEA pension scheme.
22. Members of the Constabulary will be prohibited from joining trade unions (subject to limited exceptions). In this and other respects the Act puts on a statutory footing the current informal arrangements, and brings those arrangements into line with the long established principles incorporated in other police legislation. For example, it will also be made an offence to induce a member of the Constabulary to withhold his services.

The Act also makes provision for recognition of a Civil Nuclear Police Federation, and requires the Police Authority to align any provision it makes about conditions of service with the provision made on such matters by police regulations (unless differences are justified due to the circumstances and structure of the Constabulary). Civilian staff are not affected by these arrangements.

#### ***Chapter 4: Authorisations Relating to Radioactive Waste***

23. Chapter 4 makes amendments to the [Radioactive Substances Act 1993 \(c.12\)](#) which will allow the Environment Agency, the Scottish Environment Protection Agency and the chief inspector in Northern Ireland to use a streamlined and simplified process in dealing with applications for the transfer of radioactive discharge authorisations when there is a change of operator at a nuclear site. The changes will improve the effectiveness and efficiency of regulation whilst maintaining the robustness of the discharge authorisation process.

#### ***Chapter 5: Miscellaneous Provisions Relating to Nuclear Industry***

##### **Nuclear Liability**

24. Section 76 gives the Secretary of State a power to amend UK legislation by order in respect of the UK's international obligations governing third party liability in the event of nuclear accidents (Paris and Brussels Conventions).

##### **Nuclear Security**

25. Section 77 extends the scope of the enabling power in section 77 of the [Anti-terrorism, Crime and Security Act 2001 \(c.24\)](#) to make regulations to ensure the security of the UK's civil nuclear industry. The territorial application of this provision is the same as section 77 of the ATCS Act i.e. to the United Kingdom. Nuclear security is a reserved matter in Scotland, an excepted matter in Northern Ireland and is not a transferred matter in Wales.
26. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of equipment capable of being used to enrich uranium or software containing information relating to uranium enrichment (including uranium enrichment carried out overseas) held outside nuclear premises, and the security of this equipment and software when they are being held, transported or transmitted. Uranium enrichment technology is used in the civil nuclear industry and has been sought by States seeking to develop nuclear weapons.
27. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of sensitive nuclear information being held, transported and transferred by carriers, where such carriers are not directly involved in activities on or in relation to nuclear sites or other nuclear premises.
28. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of holdings of sensitive nuclear information in the United Kingdom, where (a) such information is held in relation to uranium enrichment activities outside the United Kingdom, and the transport and transmission of such information; and (b) the person holding the information is not involved in activities on or in relation to nuclear sites or other nuclear premises in the United Kingdom.

##### **Authorisation of Government expenditure**

29. As part of the restructuring of British Energy ("BE"), the Government has agreed to enter into a series of principal agreements with the company. The agreements detail the arrangements by which British Energy and HMG will contribute to the costs of discharging BE's nuclear liabilities going forward.

30. The Secretary of State intends to give effect to most of his obligations under the agreements using his powers under Schedule 12 to the Electricity Act 1989, as amended by the [Electricity \(Miscellaneous Provisions\) Act 2003 \(c.9\)](#) (“EMPA”), and as to be amended by section 34 of the Act. He will also have available additional, free-standing powers conferred by EMPA.
31. [Section 79](#) gives the Secretary of State explicit statutory authority to incur expenditure as a result of options included in the documents. The provision is general, but goes further than the free-standing provisions in EMPA by authorising spending on two elements of the agreements not currently covered by legislation:
- in circumstances where British Energy has sold one of its nuclear power stations to a third party, the acquisition of the power station from that third party and subsequently operating it. This would follow the exercise of an option on the part of HMG to acquire the station for this purpose; and
  - the acquisition of British Energy’s shareholding in Nirex, and to incur expenditure on any consequences of such an acquisition.
32. As a matter of law, the Appropriation Acts give the Secretary of State the authority to spend money on the exercise of his functions, but as a matter of practice, the agreement with Parliament known as the Baldwin agreement and the guidance set out by the Treasury in Government Accounting have the effect that new functions involving significant and continuing expenditure should normally be identified by an Act other than the Appropriation Act.

### **Option to purchase BE’s nuclear stations from third party**

33. As part of the restructuring documentation, British Energy will grant the Secretary of State an option to acquire any of its power stations. The option may be exercised in relation to any of the nuclear power stations currently owned by British Energy. The option can be exercised at a time when British Energy, or a third party purchaser, chooses to shut them, and the reason for exercising the option would be either to prolong the operation of the station or stations where it is economically advantageous to do so, or to decommission them within the private sector.
34. The [Electricity \(Miscellaneous Provisions\) Act 2003 \(c.9\)](#) provides specific statutory authority for the Secretary of State to spend money on the acquisition of assets of British Energy and on carrying on an undertaking using such assets. However, it does not authorise expenditure on acquiring or running assets which at the time they are acquired no longer belong to a BE company. This section will provide such authority.

### **Option for the Secretary of State to acquire BE’s shares in Nirex**

35. As part of the restructuring documentation British Energy will grant an option for the Secretary of State to acquire British Energy's shares in Nirex. Nirex is a company formed jointly by British Energy, BNFL and UKAEA to manage the UK’s intermediate level radioactive waste. If he exercises the option, the Secretary of State will acquire the company’s shares in Nirex, its rights and benefits under loans made by the company to Nirex and British Energy’s liabilities, as a Nirex shareholder, under its research and advisory contracts with Nirex.
36. This section again gives the Secretary of State specific statutory authority to incur expenditure in connection with the acquisition of any securities in Nirex or in consequence of such an acquisition.