

Criminal Justice Committee

**3rd Meeting, 2022 (Session 6), Wednesday
26 January 2022**

Legislative consent memorandum

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider a Legislative Consent Memorandum (LCM) in relation to the following UK Government Bill:
 - [Public Service Pensions and Judicial Offices Bill](#)
2. The Public Service Pensions and Judicial Offices Bill was introduced in the House of Lords on 19 June 2021. It is currently awaiting committee stage in the House of Commons.

Legislative consent process

3. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998);
or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
4. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill

reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

5. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Public Service Pensions and Judicial Offices Bill

6. The Bill has four parts:

- Part One would remove unlawful discrimination that arose when existing ('legacy') public service pension schemes were closed to certain members in 2014 to 2016 and provide for all scheme members to build up benefits in the new schemes from April 2022.
- Part Two would enable the Treasury to establish new public service pension schemes for the members for two existing pension schemes which provide benefits to former staff members of Bradford and Bingley and Northern Rock, two companies taken into public ownership as a result of the 2007-2008 financial crisis.
- Part Three would increase the mandatory retirement age for judges from 70 to 75 and make changes to their allowances.
- Part Four would provide for regulation-making powers, for the Bill to extend to England and Wales, Scotland and Northern Ireland, and for the dates from which parts of the Bill come into force.

7. Most of the provisions in the Bill relate to **reserved matters**. The **exception** to this is one amendment to the Public Service Pensions Act 2013 explained in the LCM in the Annex which relates to judicial pensions schemes and the ability to add additional devolved offices to the new judicial pension scheme.

Scottish Government Legislative Consent Memorandum

8. An LCM was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 21 December 2021. The LCM can be found in the Annex.
9. In considering whether to support the Bill the Scottish Government reached the following conclusion:

“It is the view of the Scottish Government that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that these changes come into force at the same time for all of the judiciary. This legislative approach will maintain parity for the Scottish judiciary with their UK counterparts in relation to the mandatory retirement age and for the devolved judiciary in relation to their reserved counterparts in Scotland in relation to judicial allowances”

10. The LCM sets out the Scottish Government’s draft motion (Annex, paragraph 20).

Consideration by the Delegated Powers and Law Reform Committee

11. The Committee considered a power conferred on UK Ministers to make subordinate legislation in devolved areas in the Public Service Pensions and Judicial Offices Bill. The Committee agreed to report to the Criminal Justice Committee and write to the Scottish Government.

Action

12. Members are invited to consider whether to agree with the recommendation of the Scottish Government that the relevant provisions of the Public Service Pensions and Judicial Offices Bill, introduced in the House of Lords on 19 July 2021 relating to:

- **enabling devolved judicial offices to be added to a judicial pension scheme at the request of the Scottish Ministers;**
- **the increase in the mandatory retirement age for devolved judicial office holders in Scotland to 75; and**
- **the addition of provisions on the determination and payment of allowances,**

so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

12. Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee’s deliberations.

**Clerks to the Criminal Justice Committee
January 2022**

Legislative Consent Memorandum

Public Service Pensions and Judicial Offices Bill

Background

1. This memorandum has been lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, under Rule 9.B.3.1(a) of the Parliament's Standing Orders. The Public Service Pensions and Judicial Offices Bill was introduced in the House of Lords on 19 July 2021. The latest version of the Bill can be found at:

<https://bills.parliament.uk/bills/3032>

Content of the Public Service Pensions and Judicial Offices Bill

2. The Explanatory Notes¹ accompanying the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the principal legislative measures of the Bill as follows:

- To address discrimination that arose when existing public service pension schemes were closed to certain members between 2014 and 2016;
- To deliver changes to public service pension schemes to ensure that all eligible public service workers have access to high quality defined benefit schemes on a fair and equal basis;
- To ensure there are no reductions to members' benefits following completion of the cost control element of the 2016 valuations;
- To improve the terms for judicial resourcing to support the effective functioning of the judiciary, to meet future demands [includes measures to increase the mandatory retirement age and introduces powers to determine judicial allowances]; and
- To confer powers upon the Treasury to establish a new UK Asset Resolution (UKAR) Limited pension scheme.

3. The provisions within the Bill which relate to public sector pensions, are reserved and do not form part of this legislative consent memorandum. The exception to this is one amendment to the Public Service Pensions Act 2013 explained below which relates to judicial pensions schemes and the ability to add additional devolved offices to the new judicial pension scheme.

Provisions which relate to Scotland

4. Part 3 of the Bill introduces legislative measures relating to the judiciary. Two of these measures include matters within devolved legislative competence. The first is a provision to raise the judicial mandatory retirement age (MRA).

5. The MRA is the upper age at which judicial office holders, including judges, sheriffs and tribunals' non-legal members are required to vacate office. The MRA does not prevent judicial office holders from resigning or retiring earlier should they wish to.

6. The MRA may be seen as an important requirement of judicial office which helps to preserve public confidence in the health and capacity of those appointed, while protecting judicial independence by avoiding the need for individual assessments and the possibility of judicial office holders being removed at the whim of the Executive. It also supports judicial resource planning and promotes the diversity of the judiciary by ensuring a steady flow of new appointments.

7. Although retaining an MRA remains important for the above reasons, it has been over 25 years since the MRA was set at 70 for the majority of judicial office holders. Since then, the structure and operation of courts and tribunals have developed and so have the resourcing needs of the judiciary. Meanwhile, the average life expectancy in the UK has increased significantly and a greater number of people are now working for longer.

8. The previous Cabinet Secretary for Justice, Humza Yousaf MSP, wrote to the Justice Committee on 17 March 2021 explaining he had taken the decision to increase the MRA from 70 to 75, the reasons for this decision and that this would be taken forward in a UK Bill with an LCM brought before the Scottish Parliament.

9. That decision followed a public consultation and consideration of the potential impact on improving the diversity of the judiciary and the importance of parity for the Scottish judiciary with their UK counterparts. While the diversity of the judiciary can only be improved through new appointments, work is currently being undertaken which is aimed at improving the diversity of candidates for judicial appointments, such as initiatives with the legal profession and by the Judicial Appointments Board for Scotland. A higher MRA will allow time for these initiatives to take effect and it is anticipated will increase diversity within the pool of candidates for judicial appointment. A higher MRA will also allow candidates to apply at a later point in their careers, increasing the range of candidates likely to apply for judicial office by allowing more time for potential applicants to acquire the necessary experience for judicial roles. A higher MRA will also enable judicial office holders to work for longer should they wish to do so.

10. The second measure places the determination of judicial allowances on a statutory footing. The determination of allowances for the Scottish judiciary is a mixture of reserved and devolved matters. Determination of allowances for the salaried Scottish court judiciary (apart from summary sheriffs) is a reserved matter while provisions determining allowances for their fee paid equivalents is a devolved matter.

11. Allowances are separate to salary and could be used to recognise work undertaken outside of a judge's core work of hearing cases, such as providing

leadership or significant support to other judges and courts' administrative staff, to address temporary recruitment and retention problems, or to recognise temporary periods of additional responsibility. Allowances are useful as, unlike judicial salaries which are subject to statutory protection, they can be removed when the need for them falls away, for example, a judge stops undertaking leadership responsibilities, and so will be used to make temporary and ad-hoc payments where appropriate.

Provisions which require legislative consent

12. A summary of the clauses in the Bill that make provision which falls within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers and therefore require legislative consent is as follows (clause numbers relate to the print of the Bill on introduction):

Clause 88 makes amendments to the Public Service Pensions Act 2013 relating to the judiciary. UK Ministers have reserved statutory responsibilities for pensions in respect of specified Scottish judicial offices in terms of 2013 Act. There is a current prohibition on including further Scottish devolved judicial offices within the definition of the judiciary in the 2013 Act. The Bill introduces a power for the Secretary of State for Scotland to, in future, include a specified devolved judicial office (for example a devolved tribunal) in the definition of the 2013 Act in response to a request from the Scottish Ministers.

Clause 88(3) amends Schedule 1 (persons in public service: definitions) at paragraph 2 (judiciary) by substituting the existing sub-paragraphs (2) and (3) with new sub-paragraphs. Sub-paragraph 2 provides that an order under subparagraph 1 (which is an order to add a judicial office to a pension scheme) can only specify a devolved office at the request of the relevant national authority. Sub-paragraph 3 substitutes the existing text to set out that the 'relevant national authority' for Scotland is the Scottish Ministers. The existing provisions prohibited any devolved Scottish judicial offices being added to the 2015 judicial pension scheme by order. The new provisions will allow further devolved judicial offices to be added if the Scottish Ministers request these offices are to be added.

Clause 109 provides that Schedule 1 makes provision about the retirement date for holders of judicial offices. The judicial retirement age is a devolved matter.

Clause 110 provides that Schedule 2 makes provision in respect of allowances payable to certain judicial office holders.

Part 1 of Schedule 1 of the Bill makes amendments to legislation which provide the retirement date for judicial office holders to increase the MRA for judicial office holders from 70 to 75 in so far as such provisions are for devolved purposes, in particular the provisions amending the Tribunals (Scotland) Act 2014, the Lands Tribunal Act 1949 and the Judicial Pension and Retirement Act 1993. The changes to the Judicial Pensions and Retirement Act 1993 applies to all offices listed in Schedule 5 to that Act which includes the following judicial offices which are within devolved competence:

- Lord President of the Court of Session

- Lord Justice Clerk
- Judge of the Court of Session
- Temporary Judge of the Court of Session
- Sheriff principal, sheriff or summary sheriff in Scotland
- Temporary sheriff principal in Scotland
- Part-time sheriff in Scotland
- Part-time summary sheriff in Scotland
- Justice of the peace in Scotland
- President or other member of the Lands Tribunal for Scotland
- Chairman or other member of the Scottish Land Court

Schedule 2 makes amendments to legislation to provide for allowances for the judiciary to be determined by the appropriate persons. The determination of allowances for the judiciary is a reserved matter for salaried court judiciary except summary sheriffs. It is a devolved matter for fee-paid court judiciary and members, other than the Chairman, of the Scottish Land Court. The function of paying judicial allowances for salaried and fee-paid judiciary is also a devolved matter.

Paragraph 13 amends Schedule 1 of the Scottish Land Court Act 1993 to provide for the Scottish Courts and Tribunals Service (SCTS) to determine allowances, as well as salary, of other members (apart from the Chairman) of the Court. The amendments also provide that allowances for all members are to be charged on the Scottish Consolidated Fund (SCF).

Paragraph 20 makes amendments to section 20G of the Judiciary and Courts (Scotland) Act 2008. Section 20G provides for the determination of remuneration and expenses for temporary and former judges, which are fee paid judicial offices of the Court of Session. Section 20G is amended to provide that the SCTS is to pay temporary and former judges such allowances as the Scottish Ministers may determine enabling them to determine different amounts of allowance for different individuals or different descriptions of individuals. These amendments place on a statutory basis the power for Scottish Ministers to determine allowances for fee paid judges of the Court of Session.

Paragraph 21 makes amendments to section 16 of the Court Reform (Scotland) Act 2014. Section 16 provides for the determination of and payment of salary and remuneration of the sheriff court judiciary. Section 16 is amended to provide that Scottish Ministers can determine allowances for summary sheriffs enabling them to determine different amounts of allowance for different summary sheriffs. The amendments also provide that the following fee paid judicial officers are to be paid such allowances as Scottish Ministers may determine: temporary sheriff principal; part-time sheriff; parttime summary sheriff; a re-employed sheriff principal, sheriff or summary sheriff, and that allowances are to be paid by the SCTS and are to be charged on the SCF.

Paragraph 21 also amends section 124 of the Courts Reform (Scotland) Act 2014 to provide that allowances for judges of the Court of Session are to be paid by the SCTS and charged on the SCF. This is in addition to the current provision which states that salaries for these judicial office holders are to be paid by the SCTS and charged on the SCF. The determination of allowances

for judges of the Court of Session is a reserved matter carried out by the Lord Chancellor. The function of paying such remuneration as may be so determined is not reserved.

Reasons for seeking legislative consent

13. Scottish Ministers have decided to raise the judicial mandatory retirement age for the devolved judiciary to 75 as has the Lord Chancellor for the UK judiciary. The changes proposed in the Bill enabling devolved judicial offices to be added to a judicial pension scheme at the request of the Scottish Ministers, raising the MRA to 75 for devolved judicial office holders and the determination and payment of allowances for the fee paid court judiciary are devolved matters within the legislative competence of the Scottish Parliament and requiring primary legislation to effect.

14. Allowing the UK Government to introduce legislation on behalf of all devolved administrations in areas that are within the legislative competence of the Scottish Parliament is the most efficient way to ensure the changes are introduced as soon as possible and can be brought into force at the same time throughout the UK thus ensuring consistency and parity of treatment across the judiciary throughout the UK.

15. This helps preserve public confidence in the judiciary and ensure equal opportunities for judicial office holders across jurisdictions.

Consultation

16. The Scottish Government carried out a consultation on raising the judicial mandatory retirement age in autumn 2020. The consultation analysis paper and submitted responses can be found here. The majority of respondents were in favour of raising the mandatory retirement age and raising it to 75. The majority of respondents were also in favour of maintaining parity with the UK judiciary in terms of the judicial mandatory retirement age. The measures concerning allowances place in statute an existing common law power and as such no public consultation was carried out.

Financial implications

17. No significant additional costs to the Scottish Government are envisaged as a result of the provision within the Public Service Pensions and Judicial Offices Bill. Additional costs to the Scottish Government could be incurred under the provisions for judicial allowances in the instance that the Lord Chancellor introduced an allowance which was not specifically funded under the Barnett Formula. The Scottish Government has sought reassurances that Scottish Ministers would be consulted should this situation arise.

Scottish Government view

18. The Scottish Government has considered carefully the provisions of this Bill as it legislates for Scotland and whether to seek legislative consent from the Scottish Parliament. In considering whether supporting this Bill would be in Scotland's best interests the following conclusions have been reached:

- Including the provision within the Bill which provides for devolved judicial offices to be added to judicial pension schemes at the request of Scottish Ministers will allow for this to be exercised by Scottish Ministers at any point in time in the future without the need for further legislative work; and
- Bringing forward the provisions within this Bill on the judicial mandatory retirement age and judicial allowances on a UK wide basis ensures that these changes will come into effect on the same date for the devolved judiciary as the reserved judiciary. As other aspects of policy for the judiciary including salaries and pensions are not devolved this is a sensible approach.

Conclusion

19. It is the view of the Scottish Government that the relevant provisions which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament in order to ensure that these changes come into force at the same time for all of the judiciary. This legislative approach will maintain parity for the Scottish judiciary with their UK counterparts in relation to the mandatory retirement age and for the devolved judiciary in relation to their reserved counterparts in Scotland in relation to judicial allowances.

Draft Legislative Consent Motion

20. The draft motion, which will be lodged by the Cabinet Secretary for Justice and Veterans, is:

“That the Scottish Parliament agrees that the relevant provisions of the Public Service Pensions and Judicial Offices Bill, introduced in the House of Lords on 19 July 2021 relating to enabling devolved judicial offices to be added to a judicial pension scheme at the request of the Scottish Ministers, the increase in the mandatory retirement age for devolved judicial office holders in Scotland to 75 and the addition of provisions on the determination and payment of allowances, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

**Scottish Government
December 2021**