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Criminal Justice Committee

Report on the Legislative Consent Memorandum for the Public Service Pensions and Judicial Offices Bill (UK Parliament legislation)



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Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Veterans, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. The [Public Service Pensions and Judicial Offices Bill](#) ("the Bill") was introduced in the House of Lords on 19 June 2021. It is currently awaiting committee stage in the House of Commons.
2. 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.
3. 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](#) which relates to judicial pensions schemes and the ability to add additional devolved offices to the new judicial pension scheme.
4. The [LCM](#) was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 21 December 2021.
5. 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".

Consideration by the Delegated Powers and Law Reform Committee

6. The Delegated Powers and Law Reform Committee ("the DPLR Committee") considered the LCM for the Bill at its meeting on 18 January 2022.
7. The DPLR Committee considered a power conferred on UK Ministers to make subordinate legislation in devolved areas in the Public Service Pensions and Judicial Offices Bill.
8. The LCM explains the Scottish Government's view that "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".
9. The DPLR Committee noted in their [report on the LCM](#) that further legislative work will be required, albeit in the UK Parliament. Where a particular devolved office holder is to be included within the judicial pension scheme, an order requires to be made by the Secretary of State and laid in the UK Parliament. The order will not be subject to scrutiny in the Scottish Parliament.
10. The DPLR Committee also noted that the LCM does not explain why it is considered appropriate for the power to be exercised in this way by UK statutory instrument, rather than by Scottish statutory instrument. Nor does it explain what opportunities there may be for Scottish Parliament scrutiny of the order or the proposals to make it.
11. In keeping with the approach taken in relation to its reports on the LCMs for the [Police, Crime, Sentencing and Courts Bill](#), the [Health and Care Bill](#), and the [Elections Bill](#), the DPLR Committee considers that:
 1. the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
 2. the power amended by the Bill is conferred on the Secretary of State, and not on the Scottish Ministers; and
 3. there is no means by which the Scottish Parliament could scrutinise the order or be notified that they had been laid before the UK Parliament.
12. The Committee notes that the process set out in the SI Protocol 2 would not apply to the exercise of this power by the Secretary of State on the basis that it does not appear to relate to an area formerly within EU competence before the UK fully withdrew from the EU.
13. The DPLR Committee also agreed to write to the Scottish Government. Copies of the letters from the DPLR Committee to the Cabinet Secretary for Justice and Veterans and his response can be found in the Annexes.

Consideration by the Committee and recommendation

14. The Committee considered the LCM at its meeting on 26 January 2022.

15. Members raised no issues of concern.

16. **The Committee agreed 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.

Annex A

20 January 2022

Dear Cabinet Secretary

At the meeting on 18 January, the Delegated Powers and Law Reform Committee considered the [Legislative Consent Memorandum](#) (“LCM”) relating to the [Public Services Pensions and Judicial Offices Bill](#) (“the Bill”).

The Committee has since published its report:

- [Legislative Consent Memorandum: powers conferred on UK Ministers relevant to Scotland in the Public Services Pensions and Judicial Offices Bill](#)

The Committee noted that the LCM explains the Scottish Government’s view that “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”.

The Committee noted that further legislative work would be required, albeit in the UK Parliament. Where a particular devolved office holder is to be included within the judicial pension scheme, an order requires to be made by the Secretary of State and laid in the UK Parliament. The order will therefore not be subject to scrutiny in the Scottish Parliament.

The Committee agreed:

- to seek clarification from you on why the Scottish Government considered it was appropriate for this power to be exercised by order made by the Secretary of State, rather than by Scottish statutory instrument; and
- to highlight the terms of the correspondence between the Committee and the Minister for Parliamentary Business dated 6 and 21 October 2021, in relation to options for Parliamentary scrutiny of the exercise of such powers, given that the process set in SI Protocol 2 would not apply to the exercise of this power by the Secretary of State.^[1]

I understand that the Criminal Justice Committee is due to consider this LCM at its meeting on Wednesday 26 January 2022. I would be grateful therefore if you could respond to this letter by **Monday 24 January and copy your response to the Convener of the Criminal Justice Committee**.

I am also copying this letter to the Convener of the Criminal Justice Committee.

Yours sincerely

Stuart McMillan MSP

Convener of the Delegated Powers and Law Reform Committee

^[1] The SI Protocol 2 applies to instruments relating to an area formerly within EU competence before the UK fully withdrew from the EU

Annex B

24 January 2022

Dear Convener

PUBLIC SERVICE PENSIONS AND JUDICIAL OFFICES BILL – LEGISLATIVE CONSENT MEMORANDUM

Thank you for your letter of 20 January following the Committee’s consideration of the legislative consent memorandum for the Public Service Pensions and Judicial Offices Bill, noting that the memorandum states that “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”.

As the Committee note, UK Government subordinate legislation would be needed should the Scottish Ministers request that devolved judicial offices should be added to the new pension scheme. The Committee asks why the Scottish Government consider it appropriate for this power to be exercised by order made by the Secretary of State, rather than by Scottish statutory instrument.

Pension matters for the Scottish judiciary, like judicial remuneration generally, are closely linked to reserved matters. The Public Service Pensions Act 2013 enables regulations to establish pension schemes in respect of the judiciary, however the provision contains a restriction preventing a holder of a devolved office from falling within the meaning of ‘the judiciary’ within that Act. As a practical solution to this issue and to deal with pensions of devolved office-holders, the UK Government offered the approach set out in the Bill: a power to add devolved judicial office holders to a pension scheme for the Secretary of State but that the power would only be exercised at the request of the Scottish Ministers. In such a case, we would be requesting that devolved judicial office holders be included in a reserved pension scheme.

We consider that ensuring there is a mechanism in place to add devolved offices at the request of Scottish Ministers into reserved pension schemes would be helpful and appropriate in these circumstances. As there are currently so few judicial offices and in turn, judicial office holders, for which responsibility for pensions is a devolved matter and due to the close links to reserved matters, I consider being able to access the reserved pension scheme for devolved offices to be advantageous to avoid unnecessary costs and the administrative burden that would be required to set up a Scottish scheme to mirror UK pension provisions.

I would also be happy to commit to the Committee being notified in writing if such a request is in contemplation and for such notification be made in sufficient time for the Committee to consider the Scottish Ministers’ proposed request and respond before the request is made to the Lord Chancellor.

Keith Brown

