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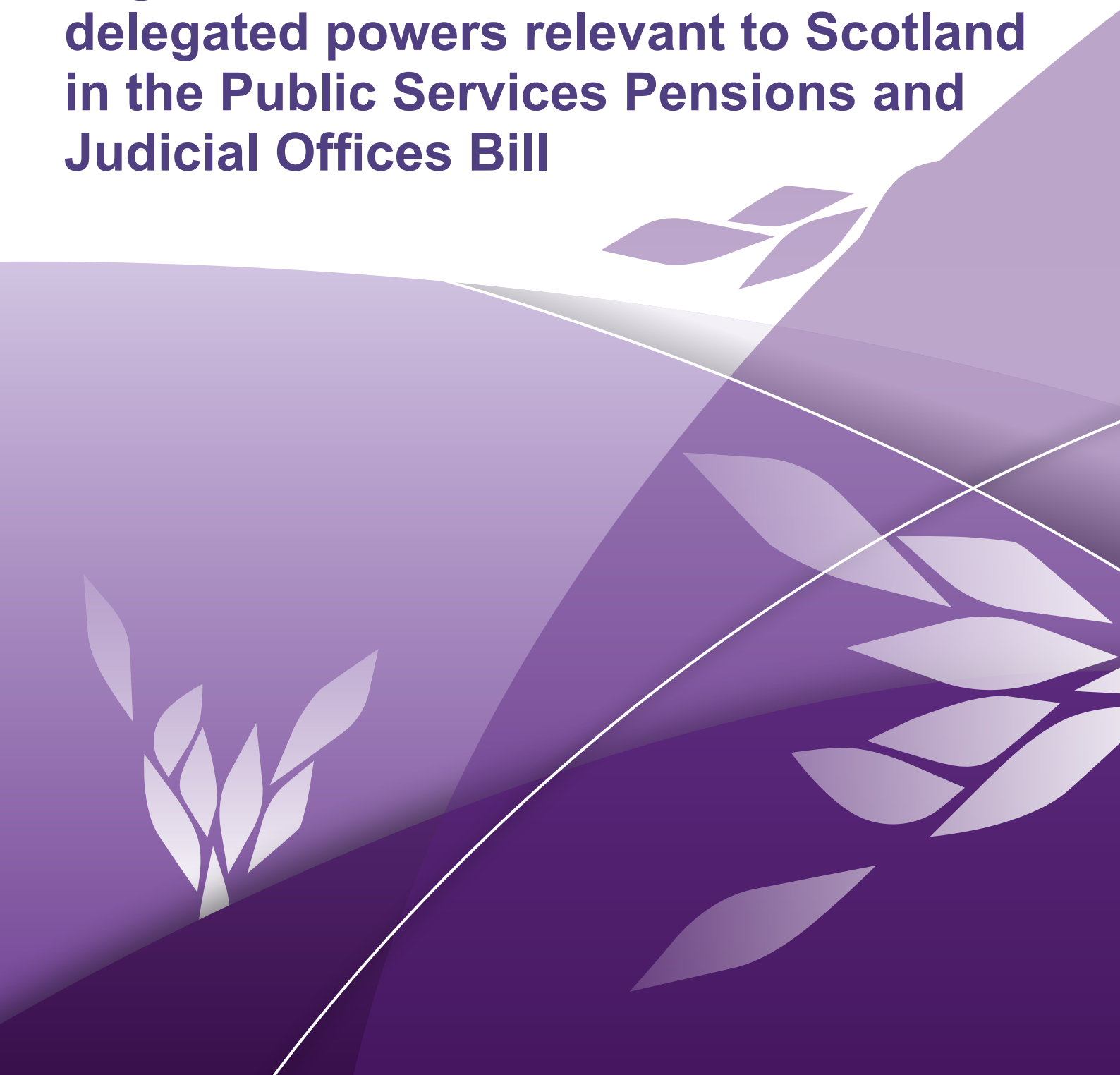
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## **Delegated Powers and Law Reform Committee**

# **Legislative Consent Memorandum: delegated powers relevant to Scotland in the Public Services Pensions and Judicial Offices Bill**



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# Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



[dplr.committee@parliament.scot](mailto:dplr.committee@parliament.scot)

# Committee Membership



**Convener**  
**Stuart McMillan**  
Scottish National Party



**Deputy Convener**  
**Bill Kidd**  
Scottish National Party



**Graham Simpson**  
Scottish Conservative  
and Unionist Party



**Craig Hoy**  
Scottish Conservative  
and Unionist Party



**Paul Sweeney**  
Scottish Labour

# Introduction

1. At its meeting on 18 January 2022, the Committee considered the Legislative Consent Memorandum (“LCM”) for the [Public Services Pensions and Judicial Offices Bill](#).
2. The Public Services Pensions and Judicial Offices Bill is a UK Government Bill introduced in the House of Lords on 19 July 2021 by the Treasury Department. Having completed passage through the House of Lords, the Bill is currently at the Committee stage in the House of Commons.
3. The Scottish Government lodged an [LCM](#) on 21 December 2021.
4. Although the Bill does not contain any delegated powers conferred on Scottish Ministers, Rule 6.11.1(b) and (c) of Standing Orders provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills “or other proposed legislation”; and general questions relating to powers to make subordinate legislation.
5. The lead Committee for this LCM is the Criminal Justice Committee.

# Overview of the Bill

6. The Bill has 120 sections and four schedules. However, much of the Bill's provision is reserved. It makes provision about public service pension schemes, including retrospective provision to rectify unlawful discrimination in the way in which existing schemes were restricted under the Public Service Pensions Act 2013 ("the PSPA 2013") and corresponding Northern Ireland legislation; establishes new public pension schemes for members of occupational pension schemes of bodies that were brought into public ownership under the Banking (Special Provisions) Act 2008 and makes provision about the remuneration and the date of retirement of holders of certain judicial offices and judicial service after retirement of office holders.
7. The Bill makes provision in relation to three matters which either fall within the legislative competence of the Scottish Parliament, or alter Scottish Ministers' executive competence. The legislative consent of Scottish Ministers is sought in relation to the following matters:
  1. provision which removes the prohibition on including devolved Northern Irish and Scottish judicial offices within the definition of the judiciary for the purposes of the PSPA 2013, enabling them to be brought within the scope of the new judicial pension scheme proposed by the Bill, at the request of the Scottish Ministers,
  2. provisions which raise the minimum retirement age for judicial office holders from 70 to 75, insofar as the judicial office is within Scotland, and
  3. provisions which enable the Scottish Court and Tribunal Service to determine the amount and arrangements for payment of allowances to judicial office holders in Scotland, over and above the payment of their salaries or fees.

# Review of powers conferred on UK Ministers exercisable in devolved areas

8. There is one clause in the Bill which amends a power exercisable within legislative competence.

## Amendments relating to the judiciary

### Clause 88(3):

#### Power conferred on: the Secretary of State

#### Power exercisable by: order

#### Parliamentary procedure: negative

#### *Provision*

9. Clause 88(3) of the Bill amends a power conferred on the Secretary of State for Scotland in Schedule 1(2) of the PSPA 2013. Schedule 1(2) currently enables the Secretary of State to specify Scottish judicial office holders as subject to the judicial pension scheme, but not where the office is a devolved office. An office is “devolved” if or to the extent that provision about pensions payable to or in respect of the holder of the office is not a reserved matter within the meaning of the Scotland Act 1998<sup>i</sup>.
10. The amendment proposed by the Bill removes the prohibition on including devolved Northern Irish and Scottish judicial offices within the definition of the judiciary for the purposes of the PSPA 2013. This will enable devolved judicial offices to be included in the reformed judicial pension scheme. The mechanism for achieving that is for the Secretary of State for Scotland, by order, to specify a devolved Scottish judicial office to be included in the pension scheme, in response to a request from the Scottish Ministers.
11. The Explanatory Notes to the Bill<sup>ii</sup> explain that judicial pensions policy falls within the devolved competence of Scotland where the judicial pension scheme is not reserved to Westminster. The LCM states at paragraph 13 that “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 [...] the are devolved matters within the legislative competence of the Scottish Parliament and requiring primary legislation to effect”.

#### *Committee consideration*

12. The LCM explains the Scottish Government’s view that “including the provision

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<sup>i</sup> PSPA 13, s.37. The LCM for the Bill which became the PSPA 13 explains that (at that time) there were “a small number (six) of individual judicial pensions responsibility for which is currently devolved (those for Stipendiary Magistrates and certain tribunal chairs)”, (para.11).

<sup>ii</sup> Explanatory Notes, para. 83



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”.

13. The Committee noted 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.
14. The 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.

15. **The Committee agreed to write to the Scottish Government to:**
  1. **ask why it is considered appropriate for the power to be exercised by order made by the Secretary of State, rather than by Scottish statutory instrument; and**
  2. **to highlight 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.**
16. **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 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.**
17. **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.**
18. **The Committee highlights the correspondence between the Committee and the Minister for Parliamentary Business dated 6 and 21 October in relation to options for Parliamentary scrutiny of the exercise of such powers .**

