EXPLANATORY MEMORANDUM TO

THE COURTS REFORM (SCOTLAND) ACT 2014 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2015

2015 No. XXXX

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

This Order contains provision which is necessary or expedient in consequence of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"), to give that Act full effect and make provision where the Scottish Parliament does not have competence. The Order will: permit the Scottish Courts and Tribunals Service ("SCTS") to pay compensation for loss of office or loss or diminution of emoluments in consequence of an order under section 2(1) of the 2014 Act (power to alter sheriffdoms, sheriff court districts and sheriff courts); allow the designation of specialist judiciary and courts in reserved areas; allow the powers of the Court of Session to be used to make provision special to reserved matters; exclude actions for winding up of companies from the exclusive jurisdiction of the sheriff court; set down the requirement of the second appeals test in an application for judicial review which relates to a decision of the UK Upper Tribunal; amend UK Tribunal legislation to ensure that the UK Upper Tribunal deals with the permission stage when cases are remitted to it from the Court of Session; transfer the administration of the Pensions Appeal Tribunal Scotland to the Scottish Courts and Tribunals Service; and make consequential modifications to existing UK legislation.

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

None.

4. Legislative Context

4.1 The 2014 Act implements the majority of the recommendations of the Scottish Civil Courts Review 2009, which was an independent review chaired by Lord Gill, who was at that time the Lord Justice Clerk and is now the current Lord President of the Court of Session. The 2014 Act is intended to make the civil justice system in Scotland more efficient, with most of that Act focusing on a restructure of the civil courts system in Scotland, and additional provisions relating to criminal matters. This Order gives the 2014 Act full effect and make provision where the Scottish Parliament does not have the legislative competence so to do.

Article 2

4.2 Sections 2(3) and 3(4) of the Sheriff Courts (Scotland) Act 1971 ("the 1971 Act") provide for the payment of compensation to a person who suffers loss of employment or loss or diminution of emoluments as a consequence of an order under section 2 (power of Secretary of State to alter sheriffdoms) or 3 (sheriff court districts and places where sheriff courts are to be held) of that Act. These provisions on alteration of sheriffdoms, sheriff court districts and sheriff courts are consolidated and restated, with modifications, in section 2 of the 2014 Act. The Order consolidates and re-enacts the compensation provisions in section 2(3) and 3(4) of the 1971 Act, providing for the payment by SCTS of such compensation as the Secretary of State may determine, and consequentially repeals those provisions of the 1971 Act.

Article 3

4.3 Sections 34 and 35 of the 2014 Act provide for the Lord President of the Court of Session to direct certain categories of sheriff court case as suitable to be dealt with by specialist judiciary, and for the Lord President or the sheriff principal of a sheriffdom to be able to designate particular members of the sheriff court judiciary as specialists in one or more areas. The Order provides for these powers to be exercisable in relation to categories of case which relate to reserved matters.

Article 4

4.4 Section 39(1) of the 2014 Act (exclusive competence) provides that civil proceedings which a sheriff has competence to deal with and in which orders of value are sought of an aggregate value of less than £100,000 may be brought only in the sheriff court. The Order prevents section 39(1) from applying to proceedings for winding up of a company, with the consequence that such proceedings will remain competent in the Court of Session regardless of any order for value sought.

*Article 5*4.5 The jurisdiction of a sheriff is generally restricted to the territory of the sheriffdom. Section 41(1) of the 2014 Act (power to confer all-Scotland jurisdiction for specified cases) permits the Scottish Ministers by order to designate types of civil proceedings which may be dealt with by a sheriff court having all-Scotland jurisdiction. The Order permits this power to be used to specify a type of civil proceedings which relates to a reserved matter.

Articles 6 and 7

4.6 Section 89 of the 2014 Act (judicial review) inserts new sections 27A to 27D of the Court of Session Act 1988. These provisions include the application of a second appeals test (consistent with the Supreme Court case of *Eba v Advocate General for Scotland*) applying to applications for review of decisions of the Upper Tribunal for Scotland, in terms of which an application may only proceed if the Court is satisfied that the applicant can demonstrate a sufficient interest in the subject matter of the application; that the application has a real prospect of success; and either the application would raise an important point of principle or practice or there is some other compelling reason for allowing the application to proceed. The 2014 Act also provides that where an application is transferred to the Upper Tribunal for Scotland, it is for the Upper Tribunal to determine

whether the application has been made timeously and whether to grant permission for the application to proceed. The Order extends both of these provisions to apply to the (UK) Upper Tribunal in the same way as they apply to the Upper Tribunal for Scotland.

Article 8

4.7 The Court of Session may make rules to regulate procedure and fees in both the Court of Session and the sheriff court. The principal powers under which these rules are made are section 5 of the Court of Session Act 1988 (in relation to rules of the Court of Session) and section 32 of the 1971 Act. As powers which were conferred upon the Court by pre-devolution statutes, these rule-making powers cover both reserved and devolved matters. This means that the Court has been able to make special rules governing practice and procedure in relation to reserved areas of the law such as immigration, financial services and terrorism. The Court's rule-making powers are now contained in sections 103 to 106 of the 2014 Act. The Order provides that these powers may be used to make provision which relates to a reserved matter, or which modifies the law on reserved matters (i.e. provision modifying existing special rules relating to reserved matters). This preserves the pre-existing ability of the Court to regulate practice and procedure regardless of whether the subject matter of the proceedings in question is devolved or reserved.

Article 9

4.8 From 1st April 2015, the functions of the Scottish Tribunals Service (STS) will be transferred to the Scottish Court Service (established by section 60(1) of the Judiciary and Courts (Scotland) Act 2008), with that body being renamed the Scottish Courts and Tribunals Service (SCTS). It is intended that this transfer will protect the independence of the administration of devolved tribunals by separating it from the Scottish Government. It will also create a joint independent administration for both courts and tribunals, with one Board chaired by the Lord President as head of the judiciary for both courts and tribunals. The Pensions Appeals Tribunal for Scotland (PATS) was established under the Schedule to the Pensions Appeal Tribunals Act 1943. Whilst pensions are a reserved matter, PATS is currently administered by the STS since the non-statutory function of providing administrative support was executively devolved to the Scottish Ministers under section 5 and paragraph 2(a)(iv) of Schedule 2 to the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750). The present Order transfers the administration of PATS from the Scottish Ministers to the SCTS.

Article 10 and the Schedule to the Order

4.9 The Schedule (introduced by article 10) contains several consequential amendments to UK legislation. The House of Commons Disqualification Act 1975 and the Northern Ireland Disqualification Act 1975 are amended to reflect the abolition of stipendiary magistrates and the introduction of summary sheriffs and part-time summary sheriffs. Amendments to these Acts are a common feature of Orders made under section 104 of the Scotland Act 1998 and are necessary to update the list of those persons who are disqualified for membership of the House of Commons or the Northern Ireland Assembly.

4.10 The 2014 Act has repealed several pieces of legislation so far as Scots law is concerned. An example of which is the repeal of the Judicial Offices (Salaries, &c.) Act 1952 by paragraph 42 of schedule 4 to the 2014 Act. The Schedule to this Order replicates these repeals for the rest of the UK, tidying up of the UK statute book; in this example by repealing the 1952 Act as it applies in the rest of the UK.

4.11 The Schedule amends the Judiciary and Courts (Scotland) Act 2008 (Consequential Provisions and Modifications) Order 2009; one of the effects of this Order was to make the Scottish Court Service part of the Scottish Administration. The 2009 Order is amended to reflect the effect of section 60 of the 2014 Act, which renamed the Scottish Court Service as the Scottish Courts and Tribunals Service.

4.12 Section 134 of the 2014 Act updates the definition of "sheriff' in the Interpretation and Legislative Reform (Scotland) Act 2010 in light of the 2014 Act. The amendment to the Interpretation Act 1978 in the Schedule is consequential tidying up. The existing Interpretation Act provision is not wrong, nor incompatible with section 134(2) of the 2014 Act, but is no longer complete, since the term now has the broader meaning given by this section.

5. Territorial Extent and Application

5.1 Except as outlined in 5.2 to 5.4, this instrument extends to the United Kingdom.

5.2 Articles 2 to 6, 8 and 9, and paragraph 12(3) of the Schedule to this Order extend to Scotland only.

5.3 Paragraphs 1, 2, 5, 6, 7, 11 and 13 of the Schedule to this Order do not extend to Scotland.

5.4 Paragraphs 4 and 12(1) and (2) of the Schedule to this Order extend to England, Wales and Scotland.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

> *"In my view the provisions of the Courts Reform (Scotland) Act 2014 (Consequential Provisions and Modifications) Order 2015 are compatible with the Convention rights."*

7. Policy background

7.1 As stated in paragraph 4.1 above, the 2014 Act implements the majority of the recommendations of the Scottish Civil Courts Review 2009, the independent review

chaired by Lord Gill, the current Lord President. The Scottish Civil Courts Review 2009 recommended substantial changes to modernise and improve the structure and operation of the civil courts. It recommended a clearer jurisdiction for the Court of Session and for the Sheriff Court, greater judicial specialisation, and increasing the ability of the courts to control the pace and conduct of litigation – all designed to make the courts more efficient and effective. In summary, that review recommended:

- Establishment of a Civil Justice Council for Scotland;
- Creation of a new tier of judiciary (summary sheriffs);
- Establishment of a national Sheriff Appeal Court;
- Establishment of a national Personal Injury Court;
- Changes to the process for Judicial Review;
- A shift of business from the Court of Session to the Sheriff Courts; and
- A raft of changes to civil court rules to support modernisation of civil court procedures

7.2 The majority of the 2014 Act focuses on a restructuring of the civil courts system in Scotland, with additional provisions on criminal matters: summary crime and a new Sheriff Appeal Court for both civil appeals from the Sheriff Court and summary criminal appeals. The 2014 Act also provides for the merger of the Scottish Court Service with the Scottish Tribunals Service. This Order is required to give full effect to the 2014 Act.

8. Consultation outcome

8.1 Although there has been no public consultation specific to the provisions and amendments of this Order, the UK Government departments with responsibility for the legislation which this Order affects have been consulted during the drafting of this Order. All provisions and amendments contained in this Order have the approval of the relevant departments.

8.2 With regard to wider consultation, the Scottish Government ran its *'Making Justice Work: Courts Reform (Scotland) Bill - A consultation paper'* from 27th February 2013 – 24th May 2013. That consultation sought views on proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. On 13th September 2013, the Scottish Government published its analysis of the 115 responses to that consultation. That analysis showed there to be a very clear majority support for almost all proposals and concepts detailed in the consultation. The *'Courts Reform (Scotland) Bill - analysis of consultation responses'* can be viewed here: http://www.scotland.gov.uk/Publications/2013/09/8038

9. Guidance

This Order stands alone, guidance is not necessary.

10. Impact

10.1 This instrument has no impact of a regulatory nature on the private sector or civil society organisations and will not impose or reduce costs.

10.2 A full regulatory impact assessment has not been produced for this instrument as no, or no significant, impact on the private or voluntary sector is foreseen.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

The effect of this Order is purely consequential. It does not create new policy or frameworks and therefore no monitoring or review of the effects of this Order are required.

13. Contact

Emma Lopinska at the Scotland Office (Tel: 0131 244 9016 or email: emma.lopinska@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.