# POLICY NOTE

# THE JUDICIAL PENSIONS AND RETIREMENT ACT 1993 (PART-TIME SHERIFF, STIPENDIARY MAGISTRATE AND JUSTICE OF THE PEACE) ORDER 2014

## SSI 2014/155

The above instrument is made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and sections 26(9)(a) and 29(3) of the Judicial Pensions and Retirement Act 1993. The instrument is subject to the affirmative procedure.

## Policy Objective

The purpose of this instrument is to equalise provision as respects retirement so that all judicial office holders retire at 70 and, in certain circumstances, can continue in office or sit in retirement up until the age of 75. This instrument is not about any general increase in retirement age but for providing equal treatment across salaried, permanent and fee-paid or non–paid part-time members of the judiciary.

European Community Council Directive 2000/78 on equal treatment in employment and occupation requires that there must be no indirect discrimination on grounds of age unless this can be objectively justified. Following the judgment in O'Brien v Ministry of Justice in February 2013, the UK Supreme Court agreed that Mr O'Brien, a Recorder, was a "worker" for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which transposes the EU obligations. It also considered he should receive the same access to a judicial pension as Mr O'Brien's full time comparator.

Early last year the Scottish Government used powers under the European Communities Act to amend the retirement age of members of the Scottish Land Court from 65 to 70 (SSI 2013/002).

In Scotland certain judicial office holders are treated differently in relation to retirement ages and the opportunity to continue in office or sit in retirement. In the light of the decision in O'Brien it is considered necessary to provide for equality of opportunity in relation to retirement ages and the opportunity to continue in office or sit in retirement.

## Proposal

The order will remove the provisions that allow part-time sheriffs, stipendiary magistrates and JPs not to be reappointed if their 5-year term of appointment ends while they are 69. These are found in section 11B(6)(b) of the Sheriff Courts (Scotland) Act 1971 and section 70(2)(b) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

The order will also add these offices to Schedule 5 to the Judicial Pensions and Retirement Act 1993. This means that holders of these offices will continue to retire at 70, but under the provisions of this Act, rather than the specific provision made in respect of those offices. This will also mean that section 26(4) to (6) of the 1993 Act will apply to these posts. These provisions allow the Scottish Ministers, if they consider it desirable in the public interest, annually to continue a judge in office past their 70$^{th}$ birthday until the age of 75.

The order will also give these judicial office holders the opportunity to be re-employed once they have left office, for temporary periods. This is done at the request of the sheriff principal, if that sheriff principal considers it expedient as a temporary measure to facilitate the disposal of business in the sheriff courts. This is an opportunity available to sheriffs principal and sheriffs under section 14A of the Sheriff Courts (Scotland) Act 1971. Section 14A will be amended so that it now also covers part-time sheriffs. New sections 71A and 71B will be added to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 to cover stipendiary magistrates and JPs.

Section 12 of the Courts Reform (Scotland) Bill contains provision which will replace some amendments made by this order. When the Bill is brought into force, the re-employment of former part-time sheriffs will take place under section 12, rather than under the 1971 Act. The office of stipendiary magistrate will be abolished by section 118 of the Bill and the office-holders will, unless they decline appointment, be appointed as summary sheriffs. When the Bill is brought into force, the re-employment of former summary sheriffs will take place under section 12 of the Bill.

Paragraph 8 of schedule 4 to the Bill amends the 1993 Act. These amendments are now to be made by this order, and so the Government will lodge amendments at Stage 2 to remove these provisions from the Bill.

**Consultation**

Informal consultation has been carried out with the Lord President's office, the Sheriffs Principal, the Sheriffs Association, the Part-Time Sheriffs Association, the stipendiary magistrates, the Scottish Justices Association and the Ministry of Justice.

**Impact Assessments**

An Equality Impact Assessment has been completed. No Business and Regulatory Impact Assessment has been completed as the instrument has no financial effects on the Scottish Government, local government or on business.

**Choice of Procedure**

While it is considered that all provision in this instrument is made under sections 26(9) and 29(3) of the 1993 Act, to the extent that Scottish Ministers require to rely on other powers, it is made under section 2(2) of the European Communities Act 1972, pursuant to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 02.12.2000).

The Scottish Government is therefore relying on a combination of powers, including powers under the European Communities Act 1972 to make the necessary changes. While section 29(3) of the Judicial Pensions and Retirement Act 1993 provides for an order under section 26(9)(a) of that Act to be subject to the negative procedure, section 2(2) of the European Communities Act 1972 enables the Scottish Ministers to elect for an instrument to be subject to the affirmative or negative procedure. This instrument is being made under the affirmative procedure since section 2(2) of the European Communities Act 1972 is being relied upon to

make substantive amendments to the Sheriff Courts (Scotland) Act 1971 and the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

As this means that the changes involved using two powers that are subject to different procedures, the Scottish Government has decided that the powers in the European Communities Act 1972 should be used to enable the changes to be dealt with in one instrument that is subject to the affirmative procedure.

Scottish Government Justice Directorate
April 2014