

EXPLANATORY MEMORANDUM TO

THE JUDICIARY AND COURTS (SCOTLAND) ACT 2008 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2009

2009 No. 2231

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order makes provisions that are necessary and expedient in consequence of the Judiciary and Courts (Scotland) Act 2008 (the “2008 Act”), an Act of the Scottish Parliament. The aim of the 2008 Act is to make provisions concerning the organisation of the Courts in Scotland and provide for the establishment of the Scottish Court Service (“SCS”) as a non-Ministerial office.

2.2 The SCS was established as an Executive Agency of the Scottish Office in 1995 and is responsible for the administration of the Court of Session, the High Court of Justiciary, the Sheriff Courts and, as the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is progressively implemented, the Justice of the Peace Courts.

2.3 In 2006 the SCS changed its corporate structure to establish a new strategic Board with four non-executive directors, two of whom are members of the Judiciary. The 2008 Act changes the status of the SCS to that of a body corporate which it is now intended should become part of the Scottish Administration, but independent of the Scottish Executive. The SCS will no longer come under the direct authority of Scottish Ministers but will operate within a set of priorities agreed with them.

2.4 This Order is required to facilitate the establishment of the SCS as a body corporate by making it part of the Scottish Administration. An important effect of that is that the staff of the SCS will continue to be Civil Servants. The existing staff of the Executive Agency SCS will transfer to the new statutory SCS.

2.5 The membership of the SCS is outlined in paragraph 2 of Schedule 3 to the 2008 Act. Paragraph 2(5) of that Schedule enables Scottish Ministers to, with the consent of the Lord President, by Order modify sub-paragraphs 2(2) and (3) so that there is a flexibility to change the membership make-up of the SCS.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 The Order is to be made in exercise of the powers conferred by sections 104, 112(1), 113(2) and (5) and 114(1) of the Scotland Act 1998 (the “1998 Act”). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of an Act of the Scottish Parliament, in this case the 2008 Act.

3.2 This section 104 Order is expedient in consequence of the 2008 Act as the Scottish Parliament does not have the legislative competence to make provisions concerning the membership of the Scottish Administration.

3.3 Article 2 of the Order makes the body corporate SCS, established by section 60(1) of the 2008 Act, part of the Scottish Administration. This reflects the policy decision that it is the body corporate (which employs the staff of the SCS) that is to be part of that Administration.

3.4 Paragraph 1 of Schedule 3 to the 2008 Act provides that the SCS is the holder of an Office and that Office is also to be known as the SCS. The original intention when preparing this Order was to make the holder of the Office known as the SCS part of the Scottish Administration. However, the policy decision reached during the preparation of this Order was to instead make the body corporate SCS itself part of the Scottish Administration.

3.5 Paragraph 1 of Schedule 3 to the 2008 Act has not been commenced by Scottish Ministers. The decision on the commencement of that provision does not affect the policy behind article 2, which would be the same if that provision were to be commenced.

3.6 The Order will put beyond doubt that the judicial incapacity provisions in the 2008 Act (Chapter 2 of Part 2) have effect in England and Wales and Northern Ireland.

4. Legislative Context

4.1 The 2008 Act received Royal Assent on 29 October 2008. The 2008 Act makes provisions concerning the organisation of the Courts in Scotland and provides for the establishment of the SCS as a body corporate and aims to strengthen the independence of the Judiciary.

4.2 The 2008 Act makes changes to the arrangements for Scotland’s Judiciary and the way in which its Courts are administered and aims to improve the justice system by modernising the arrangements for the Judiciary, and strengthening their role through the greater authority of the SCS. The 2008 Act makes substantive provisions for four main policy areas; judicial independence, the Judiciary, the Courts and the SCS. The 2008 Act also puts the Judicial Appointments Board on a statutory basis, bringing this into line with Northern Ireland and England.

4.3 The Constitutional Reform Act 2005 (the “2005 Act”) makes provisions to guarantee the independence of the Judiciary across the United Kingdom. These provisions were limited in respect of Scotland as a devolved jurisdiction. The provisions in the 2008 Act complement the provisions in the 2005 Act. The 2008 Act sets out a statutory guarantee of judicial independence and makes provisions to change the governance of the SCS to provide the Judiciary with greater strategic control of the administrative service which supports the Courts.

4.4 Articles 2 and 3 will come into force on the day that section 60(1) of the 2008 Act comes into force. Otherwise, this Order will come into force on the 14 September 2009.

5. Territorial Extent and Application

5.1 This Instrument extends to the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State at the Scotland Office has made the following statement regarding Human Rights:

In my view the provisions of the Judiciary and Courts (Scotland) Act 2008 (Consequential Provisions and Modifications) Order 2009 are compatible with the Convention Rights.

7. Policy Background

What is being done and why?

7.1 The overarching aim of the 2008 Act is to improve the justice system by modernising the arrangements for the Judiciary, and strengthening their role through greater authority over the SCS. The 2008 Act makes substantive provisions in relation to four main policy areas; judicial independence, the Judiciary, the Courts and the SCS. The 2008 Act repeals the Senior Judiciary (Vacancies and Incapacity) (Scotland) 2006 Act (the “2006 Act”), which was introduced as an emergency measure, and re-enacts the provisions with some modifications which in the main reflect comments made during the passage of the 2006 Act. It also puts the Judicial Appointments Board for Scotland on a statutory basis.

7.2 The 2008 Act changes the status of the SCS to that of a body corporate which, as a result of this Order, will be part of the Scottish Administration but will not form part of the Scottish Executive. The SCS will no longer come under the direct authority of Scottish Ministers but will operate within a set of priorities agreed with them. It will be accountable to the Scottish Parliament for the efficient use of public resources. The cost of running the SCS will be covered by a separate vote in the annual Scottish Budget Act.

7.3 This Order facilitates the establishment of the SCS as a body corporate by making it part of the Scottish Administration, ensuring that its staff remain as Civil Servants. The Crown Suits (Scotland) Act 1857, which provides that the Lord Advocate may raise or defend an action on behalf of any public department is disapplied in as regards the SCS.

Consolidation

This Order stands alone.

8. Consultation Outcome

8.1 Proposals to reform the arrangements for Scotland's Judiciary were first consulted upon in the paper, *Strengthening Judicial Independence in a Modern Scotland*, published in February 2006. The paper canvassed opinion on a number of proposals to modernise the organisation and leadership of Scotland's Judiciary and to reduce the involvement of the Scottish Executive in the day to day administration of the system.

8.2 The responses to the consultation paper revealed a measure of support for developing the proposals further than had appeared on the face of the consultation paper, by reviewing the arrangements for the SCS. Proposals for reform were developed and refined in light of the responses to the 2006 consultation paper, and set out for further comment in the white paper, *Proposals for a Judiciary (Scotland) Bill*, published in February 2007. Around 350 copies were issued to judicial, legal and Scottish Executive bodies and all who responded to the 2006 consultation document. A total of 26 responses were received, just over half were from the Judiciary and legal profession; the remainder from the public and representative bodies. An ongoing dialogue, which included a number of meetings with the Judiciary and main stakeholder groups, was maintained during the development and passage of the Bill.

9. Guidance

9.1 This Order stands alone, guidance is not considered necessary.

10. Impact

10.1 An Impact Assessment has not been prepared for this Instrument as it has no impact on business, charities or voluntary bodies.

10.2 As far as the public sector is concerned, the intention is to modernise the operational framework for the Judiciary, consolidating and strengthening its independent status, and putting in place a unified Judiciary with the Lord President as head of the Scottish Judiciary responsible for the governance of the SCS. It is intended that these reforms will result in improved public confidence in the Judiciary and Courts and more effective arrangements for managing the business across the Courts.

11. Regulating Small Business

11.1 The legislation does not apply to small business.

12. Monitoring and Review

12.1 This Order will have immediate effect in that the current staff of the SCS who transfer to the new statutory SCS will remain Civil Servants. Monitoring and review is not considered necessary.

13. Contact

13.1 Jennifer Manton at the Scotland Office, Tel: 020 7270 6749, Email: jennifer.manton@scotlandoffice.gsi.gov.uk, can answer any queries regarding the Instrument.

Scotland Office
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