

**EXPLANATORY MEMORANDUM TO**  
**THE SCOTTISH ADMINISTRATION (OFFICES) ORDER 2018**  
**2018 No. 781**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This Order specifies the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and auditors of the sheriff court as offices in the Scottish Administration which are not ministerial offices for the purposes of the Scotland Act 1998.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

*Other matters of interest to the House of Commons*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.
- 3.3 Previous Orders made under section 126(8)(b) of the Scotland Act 1998 have not included an extent provision. Therefore these Orders notionally extend to all UK jurisdictions but the practical effect is limited to Scotland. It is not considered that any Welsh or Northern Irish interests are engaged.

**4. Legislative Context**

- 4.1 The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”) implements those recommendations made in Sheriff Principal James Taylor’s 2013 Review of the Expenses and Funding of Civil Litigation in Scotland which require primary legislation and some remaining recommendations from the 2009 Scottish Civil Courts Review (“the SCCR”) headed by the Rt Hon Lord Gill.
- 4.2 Part 3 of the 2018 Act makes provision for auditors of court (the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditors of sheriff courts) to be appointed by the Scottish Courts and Tribunal Services (“SCTS”). Section 14 of the 2018 Act gives all auditors of court a statutory basis. Subsections (3) and (4) provide that SCTS is responsible for the appointment of individuals to these offices and the terms of appointment. Subsection (5) sets out that all these auditors of court will be members of SCTS staff. The effect of these provisions is that the auditors of court will become salaried positions and they will be employed by the SCTS. Subsection (6) provides that the Auditor of the Court of Session will continue to be a member of the College of Justice.

- 4.3 This Order is to be made in exercise of the power conferred by section 126(8)(b) of the Scotland Act 1998. Section 126(8)(b) of that Act enables Her Majesty by Order in Council to specify offices in the Scottish Administration which are not ministerial offices, in addition to those specified in section 126(8)(a) of that Act.

## **5. Extent and Territorial Application**

- 5.1 This instrument extends to the United Kingdom.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### *What is being done and why*

- 7.1 The SCCR set out a comprehensive programme of reform of the Scottish civil courts. The remit of the SCCR was to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods.
- 7.2 One of the main issues raised in the SCCR report was that the appointment processes for auditors in both the Court of Session and the sheriff court did not conform to standard appointment procedures. The SCCR consultation responses raised a number of concerns about whether sheriff clerks in particular had the necessary skills and training. A further problem raised was the inconsistency of approach, firstly, between the Auditor of the Court of Session and sheriff court auditors and, secondly, between different individual sheriff court auditors and a general lack of transparency of arrangements.
- 7.3 At present, sheriff court auditors are commissioned by the sheriff principal. Some are employed by SCTS, but some are independent practitioners (for example, ex-sheriff clerks or ex-sheriff clerk deputes, or in the case of Edinburgh, two solicitors). The appointment process does not include a formal assessment of skills to carry out the role of auditor. The independent practitioner auditors who currently provide this service to the sheriff courts are remunerated by means of a fee based on a percentage of account submitted for taxation. The Auditor of the Court of Session is currently appointed by the Scottish Ministers.
- 7.4 In its response to the SCCR Report, the Scottish Government outlined broad agreement to the recommendations made about auditors of court, including the Auditor of the Court of Session, and particularly that they should be salaried posts.
- 7.5 As mentioned in paragraph 4.2 above, part 3 of the 2018 Act makes provision for auditors of court to be appointed by the SCTS and for them to be members of the staff of the SCTS. It is the policy objective of the Scottish Government that these offices will be office holders of the Scottish Administration in the same way that other officers of court are members of the Scottish Administration, such as the offices of the procurator fiscal and procurator fiscal depute, and sheriff clerks and their deputes. Bringing the Auditor of the Court of Session, auditor of the Sheriff Appeal Court and

auditors of the sheriff court within the SCTS will enable a consistent approach to be taken to the delivery of the auditor function and the courts more widely.

- 7.6 This Order is required to enable the provision as offices of the Scottish Administration fall within the UK Civil Service, which is a reserved matter. The Scottish Government expects that these offices becoming offices of the Scottish Administration will lead to greater transparency, accuracy and consistency of approach, whilst preserving the adversarial character and integrity of the auditing regime. The Scottish Government considers that this will help enhance confidence in the taxation process.
- 7.7 This Order will come into force on the date that section 14 of the 2018 Act comes into force.

### ***Consolidation***

- 7.8 This Order stands alone.

## **8. Consultation outcome**

- 8.1 Although there has been no public consultation specific to the provisions 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. The specification of offices in the Scottish Administration contained in this Order have the approval of Cabinet Office.
- 8.2 With regard to wider consultation, the potential provisions for inclusion in the 2018 Act were the subject of the Scottish Government's 'Consultation on Expenses and Funding of Civil Litigation Bill' published on 30 January 2015. Questions around the status of employment of auditors of court were included in this Scottish Government consultation paper, to which this Order pertains. There were 23 responses on the issue, with the majority (19 (83%)) in favour of the proposal to make the Auditor of the Court of Session and auditors in the sheriff courts into salaried public appointments. The four responses against salaried appointments came from either current auditors or their representatives. Reference was made to the current potential conflict of the Auditor of the Court of Session's fee being calculated as a percentage of the whole judicial account, not just the part in dispute.

## **9. Guidance**

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

## **10. Impact**

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 A Business and Regulatory Impact Assessment and an Equality Impact Assessment have been carried out by the Scottish Government on the impact of the provisions of the 2018 Act which this Order will help enable in part.
- 10.4 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

**12. Monitoring & review**

12.1 Monitoring and review of this Order is not considered necessary.

**13. Contact**

13.1 Olivia Dalseme-Stubbs at the Office of the Secretary of State for Scotland (telephone: 02072706811 or email: [olivia.dalseme-stubbs@scotlandoffice.gsi.gov.uk](mailto:olivia.dalseme-stubbs@scotlandoffice.gsi.gov.uk) ) can answer any queries regarding the instrument.