

POLICY NOTE

THE SCOTTISH ADMINISTRATION (OFFICES) ORDER 2018

SI 2018/781

The above instrument is to be made in exercise of the powers conferred by section 126(8)(b) of the Scotland Act 1998. The instrument is subject to annulment in pursuance of a resolution of either House of Parliament, or of the Scottish Parliament.

Background

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. The latter Review was mainly implemented by the Courts Reform (Scotland) Act 2014.

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 become salaried positions appointed and employed 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. Subsection (6) provides that the Auditor of the Court of Session will continue to be a member of the College of Justice.

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.

Policy objectives

What is being done and why

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.

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.

Auditors of court perform important functions in resolving disputes about expenses in which considerable amounts of money may be at stake. The 2018 Act makes provision for auditors

of court to become salaried public positions within SCTS. It obliges the Auditor of the Court of Session to issue guidance to auditors of court about the exercise of their functions, including the types and levels of expenses that may be allowed in an account of expenses. It also places a duty on SCTS to publish details of the number of taxations carried out by auditors and the fees received for that work. The Scottish Government considers that these reforms will enhance confidence in the taxation process.

At present, sheriff court auditors are commissioned by the sheriff principal. Some are employed by SCTS, but some are independent practitioners (ex-sheriff clerks or ex-sheriff clerk deputies, 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. 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.

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. This will in effect bring this role under the remit of the UK Civil Service, which is a reserved matter, and in turn provide an opportunity to develop and share knowledge, experiences and skills within a team of professionals, led by a head of profession, who will be the Auditor of the Court of Session. The Scottish Government expects this to 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 the reforms proposed will enhance confidence in the taxation process.

The policy objective of this instrument is thus to ensure that auditors of court will be office holders in the Scottish Administration in the same way that sheriff clerks and their deputies are at present. Section 64(3) of the Scotland Act 1998 requires office-holders in the Scottish Administration to pay sums received into the Scottish Consolidated Fund. In the case of auditors of court this will include receipts from extra-judicial taxations.

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.

There is no requirement in the Scotland Act 1998 to consult on this matter. The Scottish Ministers have the agreement of the Secretary of State for Scotland to this Order.

Impact Assessments

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.

No further Impact Assessments have been prepared for this instrument.

Financial Effects

The Minister for Community Safety and Legal Affairs confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Justice Directorate

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