

## **Agenda Supplement – Equality and Social Justice Committee**

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Meeting Venue:

For further information contact:

Video Conference via Zoom

**Alun Davidson**

Meeting date: 1 November 2021

Committee Clerk

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### **– Early papers**

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Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

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#### **6 Legislative Consent Memorandum for the Public Service Pensions and Judicial Offices Bill – consideration of draft report**

(Pages 1 – 15)

Attached Documents:

Public Service Pensions and Judicial Offices Bill LCM – cover paper

Public Service Pensions and Judicial Offices Bill Legislative Consent Memorandum

Public Service Pensions and Judicial Offices Bill LCM – legal advice note

Public Service Pensions and Judicial Offices Bill LCM – draft report



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## LEGISLATIVE CONSENT MEMORANDUM

### PUBLIC SERVICE PENSIONS AND JUDICIAL OFFICES BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Public Service Pensions and Judicial Offices Bill (“the Bill”) was introduced in the House of Lords on 19 July 2021. The Bill as introduced can be found at: [Public Service Pensions and Judicial Offices Bill](#).

#### Policy Objectives

3. The UK Government’s stated policy objectives are to:
  - i. address discrimination that arose when existing public service pension schemes were closed to certain members between 2014 and 2016;
  - ii. deliver changes to public service pension schemes to ensure that all eligible public service workers have access to high quality defined benefit schemes on a fair and equal basis;
  - iii. ensure there are no reductions to members’ benefits following completion of the cost control element of the 2016 valuations;
  - iv. improve the terms for judicial resourcing to support the effective functioning of the judiciary, to meet future demands; and
  - v. confer powers upon the HM Treasury to establish a new UK Asset Resolution (UKAR) Limited pension scheme.

#### Summary of the Bill

4. The Bill is sponsored by HM Treasury.
5. The Bill’s provisions are set out across four parts:
  - i. Part 1 makes provision in relation to public service pension schemes: Chapter 1 concerns schemes other than judicial and local government schemes, for example firefighter schemes; Chapter 2 concerns judicial schemes; Chapter 3 concerns local government schemes; and Chapter 4 makes general provision which includes the closure of legacy schemes to further accrual from 1 April 2022.

- ii. Part 2 makes provision for the establishment of new public pension schemes in respect of banking sector legacy schemes, namely for Bradford & Bingley and Northern Rock which were taken into public ownership in 2007/2008.
- iii. Part 3 makes provision for judicial offices. It imposes a mandatory retirement age of 75 for certain judicial offices and makes provision for judges sitting in retirement (but not beyond the age of 75).
- iv. Part 4 makes general provision, including in relation to extent and application: the Bill's provisions will extend and apply to the whole of the UK; all substantive pension measures will apply UK wide; and some elements of the judicial measures will apply to England and Wales only.

### **Provisions in the Bill for which consent is required**

- 6. The following provisions of the Bill are within the legislative competence of Senedd Cymru:
  - i. Clause 103 (Retirement date for holders of judicial offices etc.) and Schedule 1 make provision to raise the mandatory retirement age to 75 and in some cases impose a new maximum retirement age of 75 for certain judicial offices. The provisions apply UK-wide to judicial offices and apply to the Welsh tribunals listed in section 59 of the Wales Act 2017.
  - ii. Clauses 105 to 109 and Schedules 3 and 4 make provision that applies UK-wide for a new sitting in retirement office for previously salaried and fee-paid judicial office holders who have retired:
    - a. clause 105 (Sitting in retirement offices) establishes a sitting in retirement office for each judicial office listed at Schedule 3, Part 5 of which relates to the Welsh tribunals;
    - b. clause 106 (Appointment to sitting in retirement offices) relates to the appointment of an eligible person to sitting in retirement offices;
    - c. clause 107 (Appointment to sitting in retirement offices: further provision) contains further provisions on sitting in retirement offices and provides that appointment may not extend beyond the age of 75;
    - d. clause 108 (Discipline and removal from office) makes provision in relation to the removal of an appointed person from a sitting in retirement office;

- e. clause 109 (Power to add new offices) confers power on the appropriate national authority (the Welsh Ministers in relation to devolved areas) to add new offices; and
  - f. clause 110 (Consequential etc. provisions) and Schedule 4 makes consequential amendments in connection with sitting in retirement offices.
7. “Tribunals” are reserved to the UK Parliament by paragraph 9 of Schedule 7A to the Government of Wales Act 2006 WA. “Devolved tribunals” however are an exception, meaning that the Senedd can legislate in respect of those tribunals in accordance with paragraph 9(2). “Devolved tribunals” are all of whose functions are functions that are exercisable only in relation to Wales, and do not relate to reserved matters. The Welsh Government considers “devolved tribunals” includes those listed in section 59 of the Wales Act 2017. Section 59 tribunals are all presided over by the President of Welsh Tribunals and administered by the Welsh Tribunals Unit.

#### **Reasons for making these provisions for Wales in the Bill**

8. The relevant provisions in the Bill increase the mandatory retirement age for certain judicial office holders from 70 to 75 and make provision for sitting in retirement, subject to appointments not extending beyond that mandatory age.
9. The current mandatory retirement age which applies in courts and in the majority of reserved tribunals was set some 25 years ago. In recent years, the frequency and volume of judicial recruitment has increased across the UK’s jurisdictions but since 2016, there have been shortfalls in some recruitment exercises. Increasing the mandatory retirement age to 75 is an approach intended to help retain valuable judicial expertise for longer whilst increasing the attractiveness of judicial office to a greater number of potential candidates and from diverse backgrounds.
10. The revised mandatory retirement age will apply to the Welsh tribunals as defined in section 59 of the Wales Act 2017. For those tribunals with a mandatory retirement age, that age will increase from 70 to 75. Those tribunals are: the Agricultural Land Tribunal for Wales; the Mental Health Review Tribunal for Wales; the Residential Property Tribunal for Wales; and the Welsh Language Tribunal for Wales. For the Special Educational Needs Tribunal for Wales and the Adjudication Panel for Wales, with no current mandatory retirement age, the Bill will impose a maximum retirement age of 75.
11. Currently, whilst salaried judges can apply to sit in retirement, this option is not equally available to fee-paid judges. Provisions in the Bill will remedy the differential treatment between salaried and fee-paid judges and provide for flexibility to meet business need through judges sitting in retirement, ensuring the effective administration of justice. It is anticipated

that the higher mandatory retirement age will lead to improvements in recruitment and retention and will, over time, reduce the business need for judges to sit in retirement.

12. A consistent mandatory retirement age and approach to sitting in retirement across England and Wales will avoid jurisdiction picking by candidates for judicial office who may, for example, choose to apply for appointment in England and Wales rather than to a Welsh tribunal if current arrangements were to continue in Wales alone as, on that basis, they would have a shorter and potentially less flexible judicial career in Wales than in England. In addition, a differential position would potentially inhibit cross deployment between judges in the Welsh tribunals and the First-tier and Upper-tier tribunals. For these reasons, there is benefit to the justice system in Wales for the provisions in the Bill to apply to Wales.
13. The on-going Law Commission project on the reform of the Devolved Tribunals in Wales will report in autumn 2021. Taking forward the Law Commission's report will provide the opportunity for the development of new Wales specific policy relating to Welsh tribunals, including on judicial offices, and to consolidate its implementation into Welsh legislation. The changes now set out in the Bill will, however, be made and implemented far sooner than will be the case in respect of any future legislation in response to the Law Commission's report.

### **Financial implications**

14. The UK Government's Impact Assessment for the Bill<sup>1</sup> estimates that increasing the mandatory retirement age to 75 has the potential to generate savings in pension liabilities, depending on judicial recruitment patterns. This is estimated to be between £37 million and £97 million. The financial implications of the related provisions for sitting in retirement are subject to a number of variables, including the specific business need for retired judicial office holders to sit in retirement and the extent that eligible persons may wish to take up those offices in the context of them being able to remain in office as a result of the higher mandatory retirement age. These costs have not, therefore, been assessed.

### **Amendment of the Bill provisions**

15. The Bill may be amended during its passage through Parliament and it may be necessary to review any such amendments to determine whether they raise any competence issues or issues relating to Welsh Minister functions. In these circumstances, and to meet the requirements of Standing Order 29, a supplementary Legislative Consent Memorandum may be required. Amendments to the Bill will, therefore, be kept under review.

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<sup>1</sup> See page 25, paragraph 329 et seq. at [Public Service Pensions and Judicial Offices Bill Assessment of Impacts](#)

## **Conclusion**

16. The UK Government's proposals in the Bill are intended to remedy the differential treatment between salaried and fee-paid judges and provide for flexibility to meet business need through judges sitting in retirement. It is the view of the Welsh Government that it is appropriate to make equivalent provision for the Welsh tribunals as defined in section 59 of the Wales Act 2017, and to utilise the Bill to make the required legislative changes at this time, noting the on-going Law Commission project and the development of Wales specific policy in relation to tribunals in Wales.

**Mick Antoniw MS**  
**Counsel General and Minister for the Constitution**  
**11 August 2021**

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