

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 5 – Removal from office

Judges

Section 35 – Tribunal to consider fitness for judicial office

77. This section provides that the First Minister must set up a tribunal to investigate and report on whether a person is unfit to hold judicial office by reason of inability, neglect of duty or misbehaviour where requested to do so by the Lord President or in other such circumstances as he thinks fit.
78. Section 95 of the Scotland Act 1998 provides for the removal of a judge of the Court of Session and the Chairman of the Scottish Land Court. Subsection (8) of that section provides that the Scottish Parliament may make provision by Act for a tribunal to investigate and report on whether such a judge is unfit for office by reason of inability, neglect of duty or misbehaviour and for the report to be laid before the Parliament. Subsection (9) of that section states what must be covered by such provision and subsection (11) provides that the tribunal must comprise of at least three persons. A temporary order was made in 1999, namely the [Scotland Act \(Transitory and Transitional Provisions\) \(Removal of Judges\) Order 1999 \(SI 1999/1017\)](#), pending the coming into force of an Act of the Scottish Parliament dealing with those matters. The provisions in this part of the Act are to replace those transitory provisions.
79. Subsections (4) to (7) of this section provide that the tribunal is to consist of two judge members (including one member of the Judicial Committee of the Privy Council and one judge or former judge of the Court of Session), one advocate or solicitor with at least 10 years experience and one lay person.

Section 36 - Suspension during investigation

80. This section provides for the suspension of a judge who is being or is to be investigated by a tribunal at the instigation of the Lord President or the First Minister. Suspension is by the former where the Lord President has initiated the investigation and by the latter where the tribunal has recommended it. As with suspension under section 34, suspension under this section does not affect the payment of salary of those judges. Section 95(9) of the Scotland Act 1998 provides that provision may be made for suspension.

Section 37 – Further provision about tribunals

81. This section provides that a tribunal may require any person to attend its proceedings to give evidence or may require any person to produce documents and for the enforcement of these requirements by providing that if a person fails to comply with either or both of these requirements the tribunal may make an application to the Court of Session. The Court of Session may in turn make an order enforcing compliance or deal with the matter as if it were contempt of court. This section also provides that the Court of Session may, by act of sederunt, set out the procedures which will apply to these tribunals; and that the Scottish Ministers may pay such remuneration and expenses as are reasonably required. The rules of procedure may cover, for example, notification of the constitution of a tribunal to the judge who is to be investigated; time limits for responding to requests for information; any set form for responding to such requests; and how and by whom the matter is to be investigated.

Section 38 – Report of tribunal

82. Section 95(8) of the Scotland Act 1998 provides that provision is to be made for a report from a tribunal to be laid before Parliament and this section makes that provision.

Section 39 – Temporary judges: removal from office

83. This section sets out the different arrangements for removal from office of temporary judge. Temporary judges are treated differently because they are appointed in a different way to permanent judges. The Scottish Ministers may appoint a temporary judge under section 35(3) of the 1990 Act and these provisions enable the First Minister to remove a temporary judge. Temporary judges are subject to the same tribunal arrangements as permanent judges and may only be removed if the tribunal has reported that they are unfit to hold that office.