

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 3 - Judicial Appointments

Section 9 - The Judicial Appointments Board for Scotland

32. Subsection (1) establishes the Judicial Appointments Board for Scotland (“the Board”) as a statutory body. The Board is an advisory non-departmental public body which is not a body corporate.
33. Subsection (2) provides that the functions of the Board are to recommend individuals for appointment to the judicial offices within the Board’s remit, listed at section 10(1), and to provide advice on those appointments. The Board makes recommendations and provides advice to “members of the Scottish Executive”. This expression is used because some judicial appointment functions are exercised by the First Minister individually (e.g. appointment of judges of the Court of Session, sheriffs principal and sheriffs) and some by the Scottish Ministers collectively (e.g. appointment of temporary judges and part-time sheriffs). It would therefore be misleading to simply refer here to “the Scottish Ministers” as that would fail to catch appointments functions exercised by the First Minister alone. “Members of the Scottish Executive” also addresses the fact that functions placed on the Scottish Ministers collectively may in practice be exercised by a particular Minister (section 52(3) of the [Scotland Act 1998 \(c.46\)](#) (“the Scotland Act 1998”) provides that “Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Executive”).
34. Subsection (3) makes it clear that the work of the Board is not subject to either the direction or the control of any member of the Scottish Executive or any other person. This ensures that the Board may not be directed or controlled by anyone outside the Board, including the First Minister when he or she exercises appointment powers alone, the Scottish Ministers when they act collectively, junior Scottish Ministers (who are not members of the Scottish Executive by virtue of section 44 of the Scotland Act 1998) and the Lord President.
35. Subsection (4) refers to Schedule 1 which sets out matters relating to the Board such as membership, fees and expenses, administrative support and procedures. Schedule 1 is further explained below.

Section 10 - Judicial offices within the Board’s remit

36. The judicial offices within the Board’s remit are listed at subsection (1). Two of the offices listed (“office of temporary judge” and “office of part-time sheriff”) are defined by reference to statutory provision in section 72. The Board’s remit does not extend to

the offices of Lord President and the Lord Justice Clerk for which separate provision is made at sections 19 and 20. Subsection 1(c) provides that the office of temporary judge falls within the Board's remit except where a candidate already holds or has held a judicial office as set out in subsection (1A). This means that a person who has already been or is a judge in the Court of Justice of the European Communities in Luxembourg, a judge in the European Court of Human Rights in Strasbourg, a sheriff, a sheriff principal or the Chairman of the Scottish Land Court may be appointed as a temporary judge without having to be interviewed or selected by the Board.

37. Subsection (1)(g) enables the Scottish Ministers by order to add other judicial offices to the Board's remit only in so far as either the First Minister or the Scottish Ministers are able to make appointments to that office or nominate or recommend individuals for appointments to that office. Under subsection (3) the judicial offices that may be added to the Board's remit by way of this order-making power include tribunal membership, part-time offices and temporary offices.

Section 11 - Recommendations of the Board

38. Subsection (1) ensures that only individuals who have been recommended by the Board for appointment to judicial office may be nominated or recommended by the First Minister or Scottish Ministers as applicable.
39. Subsections (2) to (5) set out a formal process to be followed if the relevant Minister decides not to accept a recommendation of the Board. The Minister must explain his or her decision in a notice to the Board and the Board must reconsider the matter and make a further recommendation. These provisions are intended to enable the Minister to seek clarification or further information in respect of the Board's recommendations.
40. Subsection (6) recognises that both the First Minister and the Scottish Ministers have, in different circumstances, the function of making appointments or nominating or recommending individuals for appointment to judicial office.

Section 12 - Selection criteria

41. Subsection (2) makes it clear that selection must be solely on merit. This is intended to prevent selection on other grounds (e.g. seniority). Merit has not been defined but would encompass the applicants' abilities and competencies in respect of the criteria for the particular judicial office. It is wider than professional knowledge and would extend to attributes such as strong interpersonal skills.
42. In addition, subsection (3) requires that an individual may only be selected if he or she is of good character. This is a test that all candidates must meet after which merit is the sole criterion.

Section 13 - Assessment of legal knowledge, skills and competence

43. Subsection (1) provides that only the legal and judicial members of the Board may assess the legal competence of a candidate. Nevertheless, under subsection (2) the decision about whether to recommend an individual for appointment remains a matter for the Board as a whole.

Section 14 - Encouragement of diversity

44. Subsection (1) places a specific duty on the Board to encourage diversity. This is to ensure that the pool of candidates for recommendation to judicial office is as wide as possible and is representative of the communities in which they will serve. Under the duty, the Board could, for example, promote schemes to encourage a diverse range of applicants for each post. Subsection (2) makes clear that, notwithstanding subsection (1), merit remains the sole criteria for selection and the person selected must be of good character.

Section 15 - Guidance

45. Subsections (1) and (2) confer powers on both the Scottish Ministers and the Lord President to issue guidance to the Board. The power is conferred on both because both have an interest in the work of the Board.
46. Subsection (3) provides a non-exhaustive list of examples of the sorts of issues which may be included in the guidance.
47. Under subsection (4) the Board is required to have regard to any guidance issued under this section. This means that the Board is required to consider the guidance, but the Board is not obliged to follow the guidance provided that the decision not to follow it is not unreasonable.
48. To ensure transparency, subsections (8) and (9) require that guidance issued under this section must be published and laid before the Scottish Parliament.

Section 16 – Guidance: procedure

49. This section provides for Parliamentary scrutiny of guidance issued under section 15 by providing that such guidance must be laid in draft before the Scottish Parliament for a period of at least 21 days and that the Scottish Ministers or the Lord President (depending on whose guidance it is) must have regard to any recommendations made by the Parliament.

Section 17 - Confidentiality of information

50. This section recognises that the Board will be dealing with sensitive and personal information. Subsection (1) prohibits unauthorised disclosures by the Board, its staff or indeed anyone who has been privy to confidential information relating to the appointment to judicial office process. For example, a candidate's referee, who has provided information to the Board, is prohibited from disclosing that information unless the disclosure is authorised, that is, unless subsection (3) applies.
51. Subsection (2) clarifies that in this context, confidential information is information that relates to an identified or identifiable individual. Subsection (4) makes it clear that information given by one person about another person (for example, a reference) is confidential information about both persons.
52. Subsection (3) sets out the limited circumstances in which disclosure of information is authorised, which includes when the subject of the information is content for the information to be disclosed. In the case of a reference, the effect of subsection (4) is that both the candidate and the referee would have to agree to the disclosure. Disclosure is also authorised where either the Board or the Scottish Ministers need to disclose certain information in order to carry out their functions in connection with a judicial appointment (for example, when inviting references or arranging criminal records checks).
53. Under subsection (5), disclosure of confidential information that has already been in the public domain would not breach the subsection (1) duty against unauthorised disclosure.
54. Subsection (6) provides that a disclosure of confidential information which is not authorised under subsection (3), or which discloses information not already in the public domain in terms of subsection (5), is actionable in the civil courts by the subject of the information where he or she can establish that loss or damage has resulted from the disclosure. For example, the situation might arise that Queens Counsel X was a candidate for judicial office and this was disclosed to solicitor Y who would otherwise have appointed X to a complex and lengthy case but decides not to on the basis that X, if successful, would be unable to commit to the case. If X was not successful in obtaining a judicial appointment and later discovered that he or she had been Y's initial

choice and had effectively lost out on a significant case, X would be likely to be able to establish loss and would therefore have a right of action.

55. To the extent that information is prohibited from disclosure by this section it is exempt from disclosure under a freedom of information request, by virtue of section 26(a) of the [Freedom of Information \(Scotland\) Act 2002 \(asp 13\)](#). That Act applies to the Board by virtue of paragraph 21 of schedule 1 to the Act.

Section 18 - Annual report

56. This section places a requirement on the Board to produce and publish a report which sets out how they have carried out their functions during the year. The Board is required to submit the report to the Scottish Ministers and in turn the Scottish Ministers are required to lay a copy of the report before the Scottish Parliament.

Lord President and Lord Justice Clerk

Section 19 - Appointment

57. The arrangements for selecting a Lord President and a Lord Justice Clerk when these respective offices are vacant are set out in section 19 and schedule 2 which require the First Minister to establish a selection panel with the function of making a recommendation to the First Minister about those individuals deemed suitable for appointment.
58. The arrangements for appointing to these offices are set out in section 95 of the Scotland Act 1998. This provides that it is for the Prime Minister to recommend to The Queen the appointment of a person as the Lord President or the Lord Justice Clerk. However, the Prime Minister cannot recommend any person who has not been nominated by the First Minister. In recognition of the role of the panel established under subsection (2), subsection (4) places a duty on the First Minister to wait until the panel has made its recommendation before nominating any individual for appointment and subsection (5) requires the First Minister to have regard to the panel's recommendation.

Section 20 - Selection criteria

59. This section is a similar provision to section 12. Subsection (2) makes it clear that selection to either of these offices must be solely on merit in order to ensure the integrity of the process. In addition, subsection (3) requires that an individual may only be selected if he or she is of good character.

Other Court of Session judges

Section 21 – Eligibility of solicitors for appointment as judges

60. At present those who are eligible for appointment as a judge of the Court of Session are: in terms of article xix of the Union with England Act 1707 advocates of 5 years standing and Writers to the Signet of 10 years standing who have passed the civil law exam two years before appointment; and by paragraph 1 of schedule 4 to the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990 \(c.40\)](#) ("the 1990 Act") sheriffs principal and sheriffs who have served 5 years and solicitors with rights of audience in *both* the Court of Session and High Court of Justiciary for 5 years.
61. This section amends schedule 4 of the 1990 Act to further extend eligibility to include solicitors with rights of audience for 5 years in *either* the Court of Session or the High Court of Justiciary. Recommendation for appointment to judicial office is the function of the Judicial Appointments Board for Scotland.

Section 22 – Temporary judges: tenure

62. Section 35(3) of the 1990 Act gives the Scottish Ministers the power to appoint temporary judges, if it appears expedient to do so, after consulting the Lord President. Those appointed have the full powers of a judge of the Court of Session. Paragraphs 5 to 11 of schedule 4 to the 1990 Act make provision in respect of their terms and conditions of appointment. This section amends paragraph 5 of schedule 4 of the 1990 Act by inserting new subparagraphs (2) to (9) bringing the provisions for the tenure of a temporary judge in line with the existing provisions relating to part-time sheriffs as set out at section 11B of the 1971 Act.

Section 23 - Re-employment of retired judges

63. Provision in relation to the re-employment of retired judges is made at section 22(1) of the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1985 \(c.73\)](#) (“the 1985 Act”) which enables the Lord President of the Court of Session, with the consent of the Scottish Ministers, to appoint retired judges so that they can give assistance to the Court of Session and the High Court of Justiciary. This section amends section 22(1) of the 1985 Act to remove the requirement on the Lord President to obtain the consent of the Scottish Ministers and to prevent a judge of the Court of Session who has been removed from office under section 95(6) of the Scotland Act 1998, from being re-employed under this section. Such re-employment does not fall within the remit of the Judicial Appointments Board. Similar provision is made in section 25 for the re-employment of retired sheriffs principal and sheriffs.

Sheriffs principal, sheriffs and part-time sheriffs

Section 24 – Appointment of temporary sheriffs principal

64. Section 11 of the 1971 Act provides that the Scottish Ministers may appoint temporary sheriffs principal where a vacancy occurs in the office of sheriff principal and the appointment of a temporary replacement would be expedient. This section amends section 11 to provide that such appointments are made by the Scottish Ministers at the request of the Lord President.

Section 25 - Re-employment of retired sheriffs principal and sheriffs

65. This section adds a new section 14A to the 1971 Act to provide for the re-employment of retired sheriffs principal and sheriffs. The new section 14A provides that a sheriff principal may, as a temporary measure, appoint a former sheriff principal or sheriff to act as a sheriff in that sherriffdom. However, a former sheriff principal or sheriff is not eligible for such re-employment if he has been removed from office under section 12E of the 1971 Act (as inserted by section 38 of the Act) or if he or she is 75 years of age or older. Subsection (8) provides that, where such a sheriff reaches the age of 75 whilst he or she is continuing to deal with a particular case, the appointment can continue until that case is completed.

Section 26 – Appointment of part-time sheriffs

66. This section amends section 11A of the 1971 Act to place a requirement on the Scottish Ministers to consult the Lord President prior to appointing a part-time sheriff.

Section 27 – Sheriffs and part-time sheriffs: official oaths

67. This section requires sheriffs and part-time sheriffs to take the oath of allegiance to the Queen and the judicial oath on appointment. This is done by amending Part 2 of the Schedule of the Promissory Oaths Act 1868 to include them in the list of judicial office holders who are required to take this oath.