

# JUDICIARY AND COURTS (SCOTLAND) ACT 2008

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## EXPLANATORY NOTES

### THE ACT

#### Part 2 – the Judiciary

##### *Chapter 1 - Head of the Scottish Judiciary*

##### *Section 2 – Head of the Scottish Judiciary*

12. This section unifies the judiciary under the Lord President by establishing the Lord President as the head of the Scottish judiciary and placing a number of responsibilities on the Lord President. These responsibilities are: the efficient disposal of business in the Scottish courts; representation of the views of the Scottish judiciary to the Scottish Parliament and to the Scottish Ministers; the laying of written representations before Parliament on matters of importance relating to the Scottish judiciary or to the administration of justice in Scotland; the welfare, training, guidance of judicial office holders; and establishment and operation of a conduct scheme for the judiciary.
13. In order to facilitate the efficient disposal of business in the courts, subsection (3) gives the Lord President a power to give directions to sheriffs principal and places a duty on sheriffs principal to comply with such directions. These directions relate to administrative matters, so that the business of the courts may run efficiently. This power would not, for example, enable the Lord President to give a direction concerning a judicial decision. This power is mirrored in sections 44 and 55 which amend the [Sheriff Courts \(Scotland\) Act 1971 \(c.58\)](#) (“the 1971 Act”) and the [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007 \(asp 6\)](#) (“the 2007 Act”) respectively to give the same power to sheriffs principal in relation to sheriffs, justices of the peace, stipendiary magistrates and staff of the SCS. This power of the sheriffs principal is subject to the Lord President’s overarching power of direction.
14. In making and maintaining appropriate arrangements for training as required by subsection (2)(d), subsection (4) places a duty on the Lord President to require judges to attend training.

##### *Section 3 - Delegation of functions*

15. This section enables the Lord President to delegate his or her functions as set out in section 2(2) to other judges (referred to as “judicial office holders” in the Act and defined in section 39). Subsection (2) places restrictions on this delegation, namely that the following functions cannot be delegated: the Lord President’s function of making and maintaining arrangements to secure the efficient disposal of business in sheriff courts and justice of the peace courts (“JP courts”); and the Lord President’s function of making rules for the judicial conduct scheme under section 28(1).

## **Chapter 2 – Senior Judiciary: Vacancy, Incapacity and Suspension**

### **Section 4 - Lord President**

16. This section makes various provisions for when the office of the Lord President of the Court of Session – the most senior judge in Scotland – is vacant, or when the Lord President is either incapacitated or suspended. This section together with sections 5, 6, 7 and 8 re-enact, with minor modifications, the [Senior Judiciary \(Vacancies and Incapacity\) \(Scotland\) Act 2006 \(asp 9\)](#) which is repealed by paragraph 6 of Schedule 5.
17. In any of these circumstances, subsection (2) provides that the functions of Lord President will be carried out instead by the Lord Justice Clerk, and that the functions of the office of Lord Justice Clerk will, in turn, be carried out by the senior Inner House judge. Subsection (2) also makes clear that all of the functions of the Lord President and the Lord Justice Clerk are covered. For example, the Lord President has statutory functions in relation to a wide range of tribunals, he has responsibility for making appointments to, for example, the Lands Tribunal for Scotland and he also has various rule-making powers. There are a number of provisions that require others to consult with the Lord President, or seek his approval, in the course of their activities. For example Ministers must consult with the Lord President before they appoint persons as temporary judges. All of these functions are covered in addition to his judicial functions.
18. Subsections (3)(a) and (4) provide for a decision that the Lord President is incapacitated. It is for the judges of the Inner House to decide this, and a majority of their number must sign a written declaration to this effect, which must be supplied to the First Minister. A majority of judges is calculated in accordance with section 7(3). The Lord Justice Clerk must be one of those judges except where subsection (5) applies, that is, where the Lord Justice Clerk is incapacitated, suspended or there is a vacancy in the office in terms of section 5, or where the judges making the declaration are satisfied that the Lord Justice Clerk is incapacitated in terms of section 7(4). Once the written declaration is received by the First Minister, the provisions of the Act for incapacity take effect.
19. No procedure is required in the case of a vacancy or suspension. As soon as the office of Lord President becomes vacant for any reason (for instance on the death, resignation, removal or retirement of the office holder) or when the Lord President is suspended, subsection (2) will take effect.
20. The powers under the Act will cease to have effect on one of three events occurring. The first would be the assumption of office of a new Lord President where there has been a vacancy. The second is when the First Minister receives a written declaration signed by a majority of Inner House judges that they are satisfied the Lord President is no longer incapacitated. This is provided for in subsection (3)(b). There is no requirement that the same judges sign both declarations. The third is if the Lord President's period of suspension ceases and he or she resumes office.
21. Subsection (6) requires the First Minister to send a copy of either declaration concerning incapacity received from the judges to the Presiding Officer of the Scottish Parliament.
22. Subsection (7) prevents the Lord Justice Clerk, whilst he or she is undertaking the functions of the Lord President during a period of vacancy, incapacity or suspension, from deputising for the Lord President on a panel constituted under section 19(2) to recommend appointment to the office of Lord Justice Clerk.

### **Section 5 - Lord Justice Clerk**

23. This section makes similar provision for the incapacity or suspension of the Lord Justice Clerk and provides in such eventuality for his or her functions to be carried out by the senior judge of the Inner House.

**Section 6 - Periods when both sections 4 and 5 apply**

24. Section 6 makes provision for what would happen were both the Lord President and the Lord Justice Clerk to be incapacitated or suspended at the same time or in the event of both posts being vacant. It provides that in such a situation their functions would be carried out by the two most senior judges of the Inner House. In particular the most senior would carry out the Lord President's functions and the other (i.e. "the second senior judge") would carry out the Lord Justice Clerk's functions .
25. By way of illustration - the Inner House comprises the Lord President, the Lord Justice Clerk, and, in order of seniority, Judges 1, 2, 3, 4, 5, 6, 7, 8 and 9. The Lord President is incapacitated. The Lord Justice Clerk is carrying out the functions of that office, with Judge 1 carrying of the functions of the Lord Justice Clerk. The Lord Justice Clerk becomes incapacitated before the Lord President returns to duty. Following the scheme of this section, Judge 1 then "steps up" and exercises the functions of the Lord President; Judge 2 assumes powers to carry on the functions of the Lord Justice Clerk.

**Section 7 - Supplementary**

26. Subsections (1) and (2) deal with the possibility that at the point when it becomes necessary to invoke the provisions of sections 4, 5 or 6, the judge of the Inner House who would have taken on the functions, is unavailable. The provisions provide that, in such circumstances, the next most senior judge who is available should take the place of his or her more senior colleague. So using the illustration in paragraph 25, if Judge 2 had been unavailable when the Lord Justice Clerk became incapacitated, Judge 3 would have stepped up to carry out the functions of the Lord Justice Clerk. This will only last during the currency of any such unavailability. This provision may assist in situations where the next most senior judge has judicial or other commitments which would prevent him or her from taking on the additional functions.
27. Subsection (3) sets out which judges will count towards the total number of judges for the purposes of calculating the majority of judges required to sign the declaration in sections 4(3) and 5(3).
28. Subsection (4) makes provision for circumstances when both the Lord President and the Lord Justice Clerk are incapacitated, to address a potential difficulty with the arrangements for declaring incapacity: if the Lord Justice Clerk were to become incapacitated at the same time as or shortly after the Lord President, the declaration of the Lord President's incapacity under section 4(3)(a) could not proceed because the Lord Justice Clerk would be unable to participate as required by section 4(4) and would not yet have been declared incapacitated under section 5(3)(a) such that section 4(5)(b) would apply. In these circumstances, subsection (3) enables the declaration to proceed without the participation of the Lord Justice Clerk. The provision works in a similar way as regards declarations of incapacity under section 5.
29. Subsection (5) makes it clear that during periods when a judge is carrying out the functions of the Lord President or the Lord Justice Clerk under sections 4 and 5, that judge will continue to receive his or her usual remuneration and will not receive any remuneration due to the Lord President or the Lord Justice Clerk.

**Section 8 – Interpretation of Chapter 2**

30. This section gives certain words specific meanings for the purposes of Chapter 2. Subsection (1) makes clear that incapacity arises only on the grounds of ill health. Subsection (2) makes clear that it is seniority of appointment to the Inner House that is relevant to which judge is most senior in terms of the Act procedure. Subsection (3) recognises that the Lord President is also the holder of the office of Lord Justice General. The effect is that the functions relating to that office can also be carried on under the provisions of the Act.

31. Subsection (4) preserves the provisions that already exist in statute allowing the Lord Justice Clerk to carry out a function of the Lord President or Lord Justice General. One example is section 2(1) of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#). This provides that the High Court will sit at such places as the Lord Justice General whom failing the Lord Justice Clerk shall determine. By applying section 4(2) to such existing statutory provisions, subsection (2) makes clear that in the event of a vacancy or the incapacity of the Lord Justice General, such a function of the Lord Justice General may be exercised by the Lord Justice Clerk “whom failing” the senior judge of the Inner House acting as Lord Justice Clerk under the Act provisions.

### ***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 sheriffdom. 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.

### ***Chapter 4 – Judicial Conduct***

#### **Judicial conduct**

#### ***Sections 28 and 29 - Rules about investigations etc. and Powers of the Lord President***

68. These sections enable the Lord President to establish a judicial conduct scheme and are pursuant on the Lord President’s responsibility in section 2(2)(e) of making and maintaining appropriate arrangements for the investigation and determination of any matter concerning the conduct of judicial office holders and the review of such determinations.



69. **Section 28(1)** provides that the Lord President may make rules for the investigation and determination of issues of judicial conduct and for reviews of any such determinations. Subsection (2) contains a non-exhaustive list of the matters that may be covered by the rules. Subsection (3)(a) would enable the Lord President to, for example, make provision in the rules in terms of subsection (2)(f) for different people to conduct investigations dependent on whether a judge or sheriff was the subject of the investigation. Subsection (3)(b) provides for the publication of these rules.
70. **Section 29** enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out at subsection (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and subsection (3) makes it clear that this does not restrict what the Lord President may do informally.

## **Judicial Complaints Reviewer**

### ***Sections 30, 31, 32 and 33 – Judicial Complaints Reviewer, tenure, guidance and the Lord President’s powers on referral***

71. **Section 30** provides for the appointment by the Scottish Ministers (with the consent of the Lord President) of a Judicial Complaints Reviewer (“the Reviewer”). Under subsection (5), certain categories of persons are disqualified from appointment as the Reviewer. This is to ensure the independence of the person appointed from political, ministerial or judicial influence. The functions of the Reviewer are: on request of the complainant or of the judicial office holder who has been the subject of the investigation, to review the handling of an investigation in terms of procedure; where the procedure has not been followed to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures. The Reviewer role is only procedural. The Reviewer is not given the function of reviewing the merits.
72. **Section 31** sets out the details of the Reviewer’s appointment. Subsection (1) gives the Scottish Ministers the power to determine, with the consent of the Lord President, the period of tenure and the terms and conditions of appointment of the Reviewer. The circumstances in which the Reviewer may be removed from office are set out at subsection (5). Provision is made at subsection (4) for the Scottish Ministers to effect such a removal and for the consent of the Lord President to be obtained before a removal can take place. Whilst the Reviewer may be re-appointed (subsection (7)) a limit of 5 years is placed on their total, consecutive or otherwise, period of office by subsection (8).
73. **Section 32** provides that the Reviewer must comply with any guidance that the Scottish Ministers may issue about the carrying out of the Reviewer’s functions. Subsection (2) places a duty on the Scottish Ministers to consult the Lord President before issuing any such guidance.
74. **Section 33** provides for the end of the process. It provides that where the Reviewer refers a case to the Lord President under section 30(2)(b) the Lord President may vary or revoke the determination (or part thereof); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers appropriate.

## **Suspension**

### ***Section 34 – Suspension***

75. This section makes provision for suspension of judicial office holders where the Lord president considers it necessary for the purpose of maintaining public confidence in the judiciary. Subsection (4) provides that the suspension would be done by the Lord Justice

Clerk if the Lord President is unavailable, or where both are unavailable by the senior judge of the Inner House. Such suspension does not affect a judicial office holder's salary. An example of the type of situation in which this might be used is where an alleged incident of a serious nature involving a judicial office holder is reported widely in the press.

76. This power is separate from the suspension provisions in Chapter 5 of Part 2 of the Act. Suspension under this section is not dependent upon a tribunal having been convened.

## ***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.

## **Sheriffs**

### ***Section 40 – Consideration of fitness for, and removal from, shrieval office***

84. This section substitutes sections 12A to 12F in place of the existing section 12 of the 1971 Act bringing the provisions into line with that proposed for judges in Part 2 Chapter 5. Section 12 of the 1971 Act provided for the removal of sheriffs from office. No provision is made in the Scotland Act 1998 for removal of sheriffs unlike the position with judges. Section 11C of the 1971 Act (removal of part-time sheriffs from office) is repealed by paragraph 4(3) of Schedule 5 to the Act as these new sections also cover part-time sheriffs.
85. New Section 12A 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. Subsection (2) of the new section 12A provides that sheriffs principal, sheriffs and part-time sheriffs are all subject to the jurisdiction of such tribunals. Subsection (3) of the new section 12A provides that a tribunal may only be constituted if the Lord President has been consulted. Subsections (4) to (8) provide that the tribunal is to consist of 1 judge who must be a member of the Judicial Committee of the Privy Council, 1 sheriff principal or sheriff, 1 advocate or solicitor of 10 years experience and 1 lay member; that the selection of members is to be made by the First Minister with the agreement of the Lord President and that the member of the JCPC is to chair the tribunal.
86. New section 12B provides for the suspension by the Lord President or the First Minister of the sheriff principal, sheriff or part-time sheriff who is being or is to be investigated. The Lord President has the power to suspend where he or she has requested the First Minister to set up a tribunal. The First Minister has the power to suspend where the tribunal recommends to him or her that the person should be suspended.
87. New section 12C makes the same provision to that for judges in section 37.
88. New section 12D makes the same provision to that for judges in section 38.
89. New section 12E provides that the First Minister may remove a sheriff principal, sheriff or part-time sheriff from office following a report from a tribunal to the First Minister that the person is unfit by reason of inability, neglect of duty or misbehaviour. That report must be laid before the Scottish Parliament. In addition, the First Minister may only remove a sheriff principal or sheriff from office by order made by statutory instrument.

## **Justices of the Peace**

### ***Section 41 - Provision relating to tribunal considering fitness for office of justices of the peace***

90. This section amends section 71 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (“the 2007 Act”) to provide that the provisions as respects the tribunal (including procedures for the tribunal and the tribunal’s ability to suspend a JP during an investigation) and authorising a specified body or class of persons to recommend that an investigation be carried out should be made by the Court of Session by act of sederunt instead of by Scottish Ministers.

### ***Chapter 6 - Training and appraisal of justices of the peace***

#### ***Section 42 – Training and appraisal of justices of the peace***

91. This section amends section 69 of the 2007 Act to transfer responsibility for training and appraisal of justices of the peace from Scottish Ministers to the Lord President.