

Status of Magistrates in the Commonwealth

At the CMJA's General Assembly in TCI on 30 September 2009, the following resolution was agreed:

“This General Assembly deplores the fact that in parts of the Commonwealth the independence of the magistracy is inadequately safeguarded and requests Council in collaboration with the Commonwealth Secretariat to take positive steps to eliminate these breaches of the Latimer House Principles wherever they occur.”

The taskforce, set up under the chairmanship of Judge Leona Theron, would be grateful for your answers to the following:

Questionnaire

Responses by the Scottish Justices Association May 2010

1. Do lower levels of the judiciary (such as magistrates, judicial officers of limited jurisdiction) have the same level of constitutional protection as the higher judiciary?

This return relates to Justices of the Peace (“JPs”). The great majority of JPs are lay, in the sense that they are not professional judges. (Some may be legally qualified incidentally, in which case, there are limitations upon them sitting where their firms are in practice). They usually sit singly, but some benches sit in threes, though never with a legally qualified chairman. They must, however, sit with a legally qualified Legal Adviser, who is nevertheless not a decision maker.

There are professional, salaried, full-time and part-time “Stipendiary Magistrates”, but they are believed to number only 4 in all in the whole of Scotland, and have only ever been appointed in one city, in which lay JPs also sit.

Both lay JPs and Stipendiary Magistrates have only a criminal jurisdiction (the latter being significantly larger than the former), taking some quarter to a third of all criminal processes, but having no role in relation to committal proceedings for prosecutions on indictment. (Sheriffs, who are professional judges, and take the majority of all court work, both criminal and civil, and including all committal proceedings, may also be regarded as “lower levels of the judiciary”, as Sheriff Courts are “inferior courts”, and are of “limited jurisdiction”, though the limits are in fact few. However, the term “magistracy” is not one readily applied to the shrieval bench).

JPs enjoy a considerable level of constitutional protection, but not one identical to that of the higher judiciary. These constitutional protections have recently been reformed, as part of major changes to the summary justice system and the judiciary as a whole, and broadly speaking, have been increased (see answer 19).

Also, recent legislation has included a declaratory “guarantee of continued judicial independence”, addressed to the executive, and which applies to the entire judiciary, including JPs: see s1 of the Judiciary and Courts (Scotland) Act 2008 (appended) and s3 of the UK's Constitutional Reform Act 2005 (also appended).

Further, the UK is also subject to the European Convention on Human Rights, article 6 of which secures “an independent and impartial tribunal established by law”, for “the determination of [a person's] civil rights or of any criminal charge against him”, and any legislation of the (devolved) Scottish Parliament in breach of this would be *ultra vires*.

- 2. If not, what are the safeguards for the independence of the more junior levels of judicial officer (please specify relevant legislative documents and where possible supply the CMJA with a copy).**

Safeguards in respect of appointment are dealt with in answers 6-8 below; those in relation to discipline in answers 9 and 10 below; those in relation to security of tenure in answer 12 below; those in relation to financial security in answer 13-15 below; and those in relation to career progression, in answer 16 below.

- 3. Are procedures set down in the legislation or other documents followed in practice?**

YES

- 4. What is the structural or institutional relationship between the lower levels of the judiciary and the executive branch of government? Are they part of the civil or public service or are they separate from the executive?**

JPs are part of a recently unified judiciary, so are not part of the civil service, and are separate from the executive (save insofar as the executive is the formal appointing body: see answer 6 below). Their relationship with the executive (like that of the rest of the judiciary) is chiefly mediated through the Lord President of the Court of Session, the most senior judge in Scotland, who is now formally “Head of the Scottish Judiciary”. In this capacity s/he is responsible for, among other things, “the efficient disposal of business in the Scottish courts”; representing the views of the judiciary to the Scottish Government and Scottish Parliament; and the conduct of the judiciary. The Lord President is supported in this by a new Judicial Office for Scotland, which forms part of the Scottish Court Service (“SCS”).

The other parts of the SCS administer the courts in terms of estate, support staff, etc. It has recently become a statutory body run by a Board chaired by the Lord President, with members from all levels of the judiciary, including JPs, as well as independent non-judicial persons. There is a judicial majority on the Board.

See Judiciary and Courts (Scotland) Act 2008, ss2, 60-70 & Sch 3 (appended).

- 5. What degree of administrative autonomy or independence is enjoyed by the lower levels of the judiciary with respect to matters of administration bearing directly on the exercise of the judicial function? How does that autonomy compare with that enjoyed by the higher judiciary?**

As noted in relation to answer 6, the Lord President is Head of the Scottish Judiciary, with the obligations mentioned, and chairs the SCS which has the responsibilities also mentioned above (and see also the legislation there mentioned).

In addition, at Sheriffdom (ie major judicial district) level, the Sheriff Principal (ie chief judge, with administrative responsibilities, in a Sheriffdom) is “responsible for securing the efficient disposal of business in JP courts in [his/her] sheriffdom”, and may give “a direction of an administrative character” to various persons, including JPs, as well as SCS staff: see Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, s61, as amended by Judiciary and Courts (Scotland) Act 2008, s58. (As “administrative”, such directions are not legislative, and are not published).

It follows that support staff, including most importantly, Legal Advisers, are employed by the SCS, and therefore answerable as employees to SCS, not to the judiciary, save insofar as the judiciary is heavily represented on the SCS Board, and insofar as they may be given “directions of an administrative character” by a Sheriff Principal.

6. What is the procedure for appointments to the lower judiciary?

Appointment of lay JPs is in the name of “Her Majesty” (ie the the Head of State), but made by the (devolved) Scottish Government, under a process governed by secondary legislation made by the Scottish Government. This involves a Justice of the Peace Advisory Committee (“JPAC”) comprising JPs, Sheriffs and lay people appointed by a panel of judicial officers who were themselves appointed by the Sheriff Principal, and acting in accordance with procedures approved by the Judicial Appointments Board for Scotland (“JABS”: an independent advisory body). Appointment is also subject to having undertaken training approved by the Lord President; conditions of office in relation to availability for court business, and training; and not being bankrupt. In practice, there is public advertisement of vacancies, leading to selection for interview and interview, followed where appropriate by nomination for training and training (all these stages organised or carried out by the JPAC) and then appointment.

It must be noted in relation to the conditions of office that there are exiguous requirements in the legislation for training of JPs, requiring a Justices Training Committee (“JTC”) in each Sheriffdom, which must provide an annual training plan for approval by the Lord President and the Sheriff Principal, and fix a minimum training attendance requirement for all JPs. The members of the JTC who are JPs also form the Justices Appraisal Committee (“JAC”) which must “establish a scheme to appraise the performance on the bench of JPs”.

See Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, ss67-73, and Justices of the Peace (Scotland) Order 2007, Scottish Statutory Instrument 2007, No 210, arts 1-7 (appended). (The JPAC procedures, and conditions of office imposed, are not legislative, and are not published).

Existing Stipendiary Magistrates were continued in office when the recent reforms were introduced. However, in future, appointment of “Stipendiary Magistrates” will also be in the name of the Head of State, but by the Scottish Government, and must be from among lawyers of at least five years’ experience, and on the advice of the Sheriff Principal that it is “necessary or expedient for the purposes of the efficient administration of ... the JP courts in that ... sheriffdom”. The Scottish Government must advertise any such vacancy in the legal press, and the relevant Sheriff Principal must set up a Stipendiary Magistrates Appointment Committee (“SMAC”) comprising him/herself, one other “holder of a judicial office”, and one other person, to make a recommendation. The SMAC must consider all applicants, and may interview them. Only a person recommended by a SMAC may be appointed.

See Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, ss74 & 75 and Stipendiary Magistrates (Scotland) Order 2010, Scottish Statutory Instrument 2010, No 142 (appended).

7. What differences, if any, exist in the procedure for the appointment process for the higher judiciary and the lower judiciary?

The processes for appointing the higher judiciary (and sheriffs) are considerably more complicated than those for JPs.

The Lord President and the Lord Justice Clerk (the two most senior judges) are appointed by “Her Majesty” (ie the Head of State), on the recommendation of the Prime Minister of the United Kingdom, of a person nominated by the First Minister of the Scottish Government, who must have consulted the existing Lord President and Lord Justice Clerk (the second most senior judge in Scotland). The First Minister is also obliged to set up a “panel” with lay and judicial membership to make recommendations to him/her. See Scotland Act 1998, s95, and Judiciary and Courts (Scotland) Act 2008, ss19, 20 & Sch 2 (neither appended).

The rest of the higher judiciary (and sheriffs) are also appointed by the Head of State, on the recommendation of the First Minister who must have consulted the Lord President. However, in this case, appointment may only be made on the recommendation of JABS, which advertises vacancies, and invites applications. Both the Lord President and the Scottish Government may issue “guidance” to JABS on its procedures, and it “must have regard to the need to encourage diversity”, though its recommendations may only be made on the ground “solely of merit”, of people “of good character”, after interview by the judicial members of JABS (though JABS “must have regard to the need to encourage diversity”). See Scotland Act 1998, s95 and Judiciary and Courts (Scotland) Act 2008, ss9-18 & Sch 1 (not appended).

Sheriffs are appointed by the Head of State, on the recommendation of the First Minister, but also *via* the JABS procedures. See Sheriff Courts (Scotland) Act 1907, s11, as amended, and Judiciary and Courts (Scotland) Act 2008, ss9-18 & Sch 1 (not appended).

8. For what term are members of the lower judiciary appointed, ie until an age of retirement, a fixed term or during the pleasure of government?

Appointment of lay JPs is for five years, but automatically renewable, in effect, to the age of 70, unless the JP becomes bankrupt, or the Sheriff Principal recommends non-renewal on specified grounds, ie that s/he “has inadequately performed the functions of a JP”; “has, without good reason, failed to meet [a] condition [of office, ie in relation to availability or training]”; “does not ordinarily reside in the sheriffdom of appointment or within 15 miles of it”; or “such other ground as the sheriff principal considers relevant”: see Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, ss70, 73 (appended).

Appointment of full-time Stipendiary Magistrates is “without limit of time” to the age of 70, but that of part-time ones is for five years, renewable to the age of 70: see Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, s74 (appended).

9. Who is responsible for the discipline, transfer and/or removal of members of the lower judiciary?

The Lord President is principally responsible for discipline and removal, but the relevant Sheriff Principal has a role (see answer 10). Questions of transfer do not apply.

10. What are the grounds for disciplining, transferring or removing such judicial officers?

In relation to disciplining JPs, no legislation lays down any specific grounds, save by implication from the conditions of office (see answer 6 above).

However, the Lord President may make published rules for investigating and determining “any matter concerning the conduct of judicial office holders” (which include JPs). These rules may, specifically, concern complaints and procedures for dealing with complaints. If an investigation

is carried out and so recommends, the Lord President may give “formal advice”, a “formal warning” or a “reprimand” to the JP. There is also a Judicial Complaints Reviewer, appointed by the Scottish Government with the consent of the Lord President, who may review the “handling” of an investigation, publish reports on investigations, and make representations to the Lord President about the rules on investigations. Draft rules for investigation and determination of complaints are currently being consulted upon. In addition, it is clearly stated in the legislation that the Lord President is not restricted from taking action “informally” in the absence of recommendation, investigation, or even complaint, though no range of informal sanctions is listed. See Judiciary and Courts (Scotland) Act 2008, ss28-33 (appended).

In relation to removal of JPs, the grounds are that a JP (i) is “unfit for that office” or “unfit for performing judicial functions”, in either case “by reason of inability, neglect of duty or misbehaviour”; or (ii) “has inadequately performed the functions of a JP”; or “has, without good reason, failed to meet a condition [of office, ie in relation to availability or training]”.

In this regard, the Lord President may appoint a tribunal comprising a Sheriff Principal from another Sheriffdom, a lawyer of 10 years standing, and another third person. Rules for such a tribunal’s procedure, etc, have been laid down by the Scottish Government, and permit the JAC to recommend to the Sheriff Principal investigation of a JP; require certain procedure, including written notice to the JP and the reasons for it, allowing it to take oral and written evidence (though without *subpoena* powers); allow the JP to make representations in person or through a representative, etc; but otherwise allow it to operate its own procedures. During investigation by the tribunal, the JP may be suspended. The tribunal may order the removal of that JP if it finds any of the above grounds. See Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, s71 and District Courts and Justices of the Peace (Scotland) Order 2007, Scottish Statutory Instrument 2007 No 480 (appended).

In neither of the above procedures is there provision for funding representation of the JP.

11. What, if any, protections are there against the abolition of courts of the lower judiciary and the non-appointment of a judicial officer of an abolished court to another judicial office?

It would always be open to the executive to formulate proposals that would do away with any court and such proposals might be passed by the legislature, to which extent, the protections are political rather than legal. (Indeed, the present JP Courts replace the former District Courts, which were recently abolished, they having replaced the preceding Burgh Courts and Justice of the Peace Courts, which were abolished a generation ago: see answer 19). However, article 6 ECHR would continue to impose the obligations mentioned in answer 1. As lay judges, JPs are not eligible to be appointed to another judicial office which would require legal qualification.

12. What differences, if any, exist in relation to the security of tenure of the higher judiciary and the lower judiciary with reference to the matters raised by questions 6 to

Security of tenure for the higher judiciary are more exiguous, though in some ways parallel. They may only be removed by the Head of State, on the recommendation of the First Minister, provided the Scottish Parliament has so resolved. In order to make a motion for the Scottish Parliament to consider, the First Minister must if requested by the Lord President, or otherwise may, set up a tribunal, containing some members holding “high judicial office” and at least one who does not and is not a lawyer, to consider whether the judge is “unfit for office by reason of

inability, neglect of duty or misbehaviour". See Scotland Act 1998, s 95 and Judiciary and Courts (Scotland) Act 2008, ss35-39 (not appended).

Security of tenure of sheriffs is also more exiguous, and parallel. The First Minister may remove a sheriff from office on the same grounds as above, following the report of a similar tribunal: see Sheriff Courts (Scotland) Act 1971, ss12A-12F (not appended).

13. How are the salaries, allowances and benefits of members of the lower judiciary fixed i.e. by the legislature, executive or a tribunal or committee?

Lay JPs are unsalaried, but have allowances for travel, subsistence and loss of earnings, ie reimbursement of expenses, determined by the legislature: see Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, s68 (not appended).

It is understood that full time Stipendiary Magistrates are salaried at approximately half the level of a Sheriff's salary (which is currently £126,400), while part time Stipendiary Magistrates are salaried at a level related to that.

14. What, if any, protections are there against a reduction or freezing of the remuneration, allowances and benefits of such judicial officers?

For lay JPs, there are no protections against freezing of allowances. At present they are reviewed irregularly which can and has led to them being frozen for a number of years. It is believed that they have not been reviewed for a decade.

It is understood that the salaries of full time Stipendiary Magistrates are now the responsibility of the Scottish Government, and that there are continuing discussions as to how they fit into the arrangements made in connection with the Senior Salaries Review Board (a United Kingdom Government advisory body). Judicial salaries in the United Kingdom are paid out of the Consolidated Fund (ie the United Kingdom Government's bank account, but on which the Scottish Government draws for devolved functions) without specific appropriation, in order to avoid parliamentary debate, and thus threats to judicial independence, upon them. It is assumed that full time Stipendiary Magistrates will be paid from this.

It is also understood that the salaries of part time Stipendiary Magistrates are the responsibility of SCS (as are those of part time Sheriffs).

15. What differences, if any, exist in relation to the financial security of the higher judiciary and lower judiciary with reference to the matters raised by questions 13 and 14?

In relation to JPs, the question does not arise.

In relation to Stipendiary Magistrates, the information currently available to the writer does not permit clear comparison. However, it is not thought that any problem exists.

16. Is career progression possible from the lower to the higher judiciary?

For lay JPs, "career progression" is not an applicable concept, as the office is not a "career". In any event, they are not eligible for any higher judicial office as this requires legal qualification. However, some lay JPs have been made Honorary Sheriffs by their Sheriff Principal, and may deal with custody cases (ie cases of those recently arrested who must therefore be brought before court) in isolated courts.

For Stipendiary Magistrates, it is in principle possible for them to apply to become Sheriffs or judges, but it is unlikely that this has ever occurred, or will ever occur. However, this should be seen in the context of the non-hierarchical nature typical of common law jurisdictions. Sheriffs are very unlikely to become judges, and judges have normally gone onto the appeal court bench by seniority.

17. What is the interaction between the lower and the higher judiciary in relation to training, mentoring or meeting?

The Lord President, as Head of the Scottish Judiciary, is “responsible ... for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders” (including JPs) and in carrying out this responsibility, “must require any judicial office holder, or class of judicial office holder, to attend such training as [he] determines”: see Judiciary and Courts (Scotland) Act 2008, s2 (appended).

In practice, oversight of training for all levels of the judiciary lies with the Judicial Studies Committee (“JSC”), a national body functioning under the authority of the Lord President. However, while the JSC runs courses for judges and sheriffs, and produced a “Bench Book” for lay JPs, actual training for lay JPs is organised by Sheriffdom JTCs (see answer 6 above), subject to the approval of the Lord President and the Sheriff Principal.

There is at present no mentoring in the lower judiciary by the higher, and no specific interaction between them, though there is lay JP representation on the Judicial Council (a non-statutory body comprising representatives from all levels of the judiciary), and the Judicial Council is currently considering a scheme for mentoring newly appointed judges at all levels.

In relation to answer (a) below, the Judicial Council comprises the only formal interaction between lower and higher judiciary.

(a) Does your jurisdiction have joint meetings between the higher judiciary and the lower judiciary?

NO

(b) Is government funding available to all levels of the judiciary to participate in international judicial training?

NO. Money previously available for JP attendance at CMJA conferences has now been withdrawn, and in future attendance will depend upon economic climate and venue. The JSC is a member of the European Justice Training Network and has participated in European Union judicial training exchanges, but is subject to the same limitations.

(c) How is the lower judiciary addressed in court (please tick one of the following)

- My Lord/My Lady
 Justice
 Your Honour
 Your Worship
 Other – please specify

19. Please specify any other concerns you have in relation to the status of magistrates in your jurisdiction.

There are no obvious threats to the constitutional status of any courts in Scotland, subject always to executive desires to obtain more convictions for less money. This has, even more than in the rest of the United Kingdom, produced devices to obtain what amount to guilty pleas without involving the courts, by permitting prosecutors to make offers of non-prosecution, conditional upon payment of a fine, and/or compensation, or of unpaid work, fixed (within limits) by the prosecutor. These are now referred to in Scotland as “direct measures”.

There is also the interesting question of the relationship between lay JPs and the professionally qualified Legal Advisers without whom, the court may not sit.

Beyond that the most important fact in relation to “the status of magistrates” in Scotland is, perhaps, that the importance of the professional Sheriff Court has, in the last generation or so, taken much the greatest proportion of cases before the courts, currently about twice the proportion taken by the JP Courts. This may, however, change.

It should also be mentioned that a recent report of summary justice recommended the replacement of lay courts by, in effect, junior Sheriffs. However, this recommendation was rejected by the Scottish Government, which introduced the current more national system of “JP Courts”, together with many other reforms in relation to training and competence, and the new system, though still bedding down, is probably a good deal more satisfactory (see answer 11).

STATUTORY APPENDIX**European Convention on Human Rights****Article 6 (emphases added)**

1. **In the determination of** his civil rights and obligations or of **any criminal charge against him, everyone is entitled to a fair and public hearing** within a reasonable time **by an independent and impartial tribunal established by law**. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - o (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - o (b) to have adequate time and the facilities for the preparation of his defence;
 - o (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - o (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - o (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Criminal Proceedings, Etc (Reform) (Scotland) Act 2007, ss67-75*Appointment of JPs etc.***s67 Appointment of JPs**

(1) Justices of the peace are to be appointed by name on behalf of and in the name of Her Majesty by instrument under the hand of the Scottish Ministers.

(2) A JP is to be appointed for a sheriffdom.

(3) An appointment of a JP is to be for a term of 5 years.

(4) However, a JP—

(a) may resign from office by giving notice to the Scottish Ministers,

(b) ceases to hold office on reaching the age of 70 years.

(5) In making appointments of JPs, except—

(a) appointments under subsection (7)(b),

(b) reappointments under section 70(2),

the Scottish Ministers must comply with such provision as to procedure and consultation as they may by order make.

(6) Provision in an order under subsection (5) may, in particular, relate to—

(a) the participation in the appointments process of persons who are not—

(i) legally qualified,

(ii) involved in the administration of the law or of government,

(b) the manner in which vacancies in office are publicised.

(7) A person who, on the coming into force of this section, holds the office of justice of the peace under the 1975 Act—

(a) ceases to hold that office under that Act on such day as the Scottish Ministers may by order specify for the purpose of this subsection, and

(b) is, on the day so specified, to be appointed as a JP under subsection (1) unless the person declines the appointment.

(8) Subsection (7)(b) applies only in relation to the full justices (within the meaning given by section 9 of the 1975 Act) whose names were included in a duty rota of justices (that is, such a rota as approved under section 16(1)(b) of that Act) for any time during the 12 months ending on the day specified as mentioned in that subsection.

s68 Conditions of office

(1) A person is not to be appointed as a JP for a sheriffdom, except where eligible for reappointment under section 70(1)(a), unless the person ordinarily resides in the sheriffdom or within 15 miles of it.

(2) Appointments of JPs are to be made subject to conditions which—

(a) by reference to the JP court business (and business to which signing functions relate) in the sheriffdom, relate to availability to exercise judicial (and signing) functions commensurate to that business,

(b) by reference to an order made under section 69, relate to training and appraisal.

(3) For the purpose of subsection (2)(a)—

(a) the JP court (or signing) business,

(b) any need for availability to exercise judicial (or signing) functions in connection with that business,

means the likely amount as assessed by the sheriff principal.

(4) The Scottish Ministers are, in accordance with a scheme devised by them, to pay allowances to JPs.

(5) A scheme under subsection (4) may, in particular—

(a) by reference to functions, specify rates or amounts of allowances,

(b) specify circumstances in which—

(i) allowances are not payable,

(ii) a rate or amount of allowances payable is reduced,

(b) provide for procedure for claiming and paying allowances.

s69 Training and appraisal of JPs

(1) The Scottish Ministers may by order make provision as to—

(a) training arrangements for JPs and future JPs, and

(b) appraisal of JPs.

(2) An order under subsection (1) may, in particular, confer functions on the Lord President of the Court of Session.

(3) An order under subsection (1) may, in particular, establish committees to—

(a) adopt or develop suitable—

(i) training schemes or courses of instruction,

(ii) appraisal systems,

(b) secure—

(i) the provision of such schemes or courses,

(ii) the application of such systems,

(c) provide advice about training and appraisal.

(4) An order under subsection (1) may not be made without the Lord President's prior approval of the provision contained in the order.

s70 Reappointment of JPs

(1) A person—

(a) whose 5-year term of appointment as a JP has expired, or

(b) who has resigned from office as a JP,

is eligible for reappointment.

(2) And a person who is eligible under subsection (1)(a) is to be reappointed except where—

(a) the person declines the reappointment,

(b) the person is aged 69 years or over,

(c) the person is disqualified under section 73,

(d) the sheriff principal for the sheriffdom for which the person was appointed as a JP makes a recommendation to the Scottish Ministers against the reappointment.

(3) A recommendation for the purpose of subsection (2)(d) may be made—

(a) on the ground that the JP has inadequately performed the functions of a JP,

(b) on the ground that the JP has, without good reason, failed to meet a condition imposed under section 68(2),

(c) on the ground that the JP does not ordinarily reside in the sheriffdom of appointment or within 15 miles of it,

(d) on such other ground as the sheriff principal considers relevant.

s71 Removal of JPs

(1) A JP may be removed from office by, and only by, an order made under subsection (2).

(2) A tribunal appointed by the Lord President of the Court of Session may order the removal of a JP from office.

(3) The tribunal is to consist of three members, namely—

(a) a sheriff principal,

(b) a person who is, and has been for at least 10 years, a solicitor or advocate,

(c) another person.

(4) The sheriff principal member of the tribunal must not be—

(a) the sheriff principal for the sheriffdom for which the JP is appointed,

(b) a temporary sheriff principal.

(5) The sheriff principal member of the tribunal is to chair the tribunal.

(6) The tribunal may make an order under subsection (2) only if, after investigation carried out at the instance of the sheriff principal for the sheriffdom for which the JP is appointed, it finds that—

(a) the JP is—

(i) unfit for that office, or

(ii) unfit for performing judicial functions,

by reason of inability, neglect of duty or misbehaviour,

(b) the JP has inadequately performed the functions of a JP,

(c) the JP has, without good reason, failed to meet a condition imposed under section 68(2).

(7) The Scottish Ministers may by order make provision—

(a) as respects the tribunal,

(b) authorising a specified body or class of persons to recommend (by reference to information provided with the recommendation) to a sheriff principal that an investigation for the purposes of subsection (6) be carried out.

(8) Provision in an order under subsection (7)(a) may, in particular—

(a) prescribe the tribunal's procedures,

(b) enable the tribunal, at any time during an investigation, to suspend a JP from office or from acting as a JP.

(9) A person who is removed from office as a JP is ineligible for reappointment as a JP.

s72 Disqualification of solicitors who are JPs

(1) A solicitor who is a JP is disqualified from acting (whether directly or indirectly) as a solicitor in, or in connection with, any proceedings before a JP court in the sheriffdom for which the appointment as JP is made.

(2) A disqualification of a solicitor under subsection (1)—

(a) extends to any member of staff of the solicitor,

(b) where the solicitor is a partner of a partnership or is a member of a limited liability partnership, extends to any—

(i) member of staff of the partnership,

(ii) any other partner or (as the case may be) member of the partnership.

s73 Disqualification where sequestration or bankruptcy

(1) A person is disqualified from being appointed as, or acting as, a JP if—

(a) the person's estate has been sequestrated in Scotland, or

(b) the person has been adjudged bankrupt outwith Scotland.

(2) Where a person is disqualified under subsection (1)(a), the disqualification ceases if—

(a) the award of sequestration is recalled or reduced, or

(b) the person is discharged by virtue of the Bankruptcy (Scotland) Act 1985 (c. 66).

(3) Where a person is disqualified under subsection (1)(b), the disqualification ceases if—

(a) the adjudication of bankruptcy against the person is annulled, or

(b) the person is discharged.

s74 Appointment of stipendiary magistrates

(1) Stipendiary magistrates are to be appointed by name on behalf of and in the name of Her Majesty by instrument under the hand of the Scottish Ministers.

- (2) A stipendiary magistrate is to be appointed for a sheriffdom.
- (3) But a stipendiary magistrate may be appointed only if the Scottish Ministers, on the advice of a sheriff principal, consider that the appointment is necessary or expedient for the purposes of the efficient administration of any or all of the JP courts in that sheriff principal's sheriffdom.
- (4) A stipendiary magistrate may be appointed as a full-time or part-time magistrate.
- (5) A person is not to be appointed as a stipendiary magistrate unless the person is, and has been for at least 5 years, a solicitor or advocate.
- (6) A stipendiary magistrate may, by reason of holding that office—
- (a) exercise judicial and signing functions in the same manner as a JP, and
 - (b) use the title of office of JP in relation to the exercise of those functions.
- (7) An appointment of—
- (a) a full-time stipendiary magistrate is to be without limit of time,
 - (b) a part-time stipendiary magistrate is to be for a term of 5 years.
- (8) However, a stipendiary magistrate—
- (a) may resign from office by giving notice to the Scottish Ministers,
 - (b) ceases to hold office on reaching the age of 70 years.
- (9) In making appointments of stipendiary magistrates, except—
- (a) appointments under subsection (12)(b),
 - (b) reappointments by virtue of section 75(3)(b) as it relates to section 70(2),
- the Scottish Ministers must comply with such provision as to procedure and consultation as they may by order make.
- (10) Provision in an order under subsection (9) may, in particular, relate to—
- (a) the participation in the appointments process of persons who are not—
 - (i) legally qualified,
 - (ii) involved in the administration of the law or of government,
 - (b) the manner in which vacancies in office are publicised.
- (11) In making an appointment of a part-time stipendiary magistrate, the Scottish Ministers must have regard to the desirability of the magistrate having the opportunity of sitting on not fewer than 20 days, and not more than 100 days, in each successive period of 12 months beginning with the day of appointment.
- (12) A person who, on the coming into force of this section, holds the office of stipendiary magistrate under the 1975 Act—
- (a) ceases to hold that office under that Act on such day as the Scottish Ministers may by order specify for the purpose of this subsection, and
 - (b) is, on the day so specified, to be appointed as a stipendiary magistrate under subsection (1) unless the person declines the appointment.

s75 Stipendiary magistrates: further provision

(1) Stipendiary magistrates are entitled to such remuneration, allowances and pension provision as the Scottish Ministers may determine.

(2) The Scottish Ministers are to pay the expenditure arising in consequence of subsection (1).

(3) In relation to stipendiary magistrates—

(a) section 68(2)(a) applies,

(b) section 70, except subsection (3)(a) and (c), applies,

(c) section 71, except subsection (6)(b), applies,

(d) sections 72 and 73 apply,

as if a stipendiary magistrate were a JP (and references in those sections to JPs are to be read accordingly).

Judiciary and Courts (Scotland) Act 2008, ss1, 2, 28-33 & 60-70**JUDICIAL INDEPENDENCE****s1 Guarantee of continued judicial independence**

- (1) The following persons must uphold the continued independence of the judiciary—
- (a) the First Minister,
 - (b) the Lord Advocate,
 - (c) the Scottish Ministers,
 - (d) members of the Scottish Parliament, and
 - (e) all other persons with responsibility for matters relating to—
 - (i) the judiciary, or
 - (ii) the administration of justice,

where that responsibility is to be discharged only in or as regards Scotland.

- (2) In particular, the First Minister, the Lord Advocate and the Scottish Ministers—
- (a) must not seek to influence particular judicial decisions through any special access to the judiciary, and
 - (b) must have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions.
- (3) In this section “the judiciary” means the judiciary of—
- (a) the Supreme Court of the United Kingdom,
 - (b) any other court established under the law of Scotland, and
 - (c) any international court.
- (4) In subsection (3)(c) “international court” means the International Court of Justice or any other court or tribunal which exercises jurisdiction, or performs functions of a judicial nature, in pursuance of—
- (a) an agreement to which the United Kingdom or Her Majesty’s Government in the United Kingdom is a party, or
 - (b) a resolution of the Security Council or General Assembly of the United Nations.

HEAD OF THE SCOTTISH JUDICIARY**s2 Head of the Scottish Judiciary**

- (1) The Lord President is the Head of the Scottish Judiciary.
- (2) As Head of the Scottish Judiciary the Lord President is responsible—
- (a) for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts,
 - (b) for representing the views of the Scottish judiciary to the Scottish Parliament and the Scottish Ministers,

(c) for laying before the Scottish Parliament written representations on matters that appear to the Head of the Scottish Judiciary to be matters of importance relating to—

- (i) the Scottish judiciary, or
- (ii) the administration of justice,

(d) for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders, and

(e) for making and maintaining, in accordance with section 28, appropriate arrangements for—

- (i) the investigation and determination of any matter concerning the conduct of judicial office holders, and
- (ii) the review of such determinations.

(3) If, in carrying out the responsibility mentioned in subsection (2)(a), the Lord President gives a direction of an administrative character to a sheriff principal, the sheriff principal must comply with the direction.

(4) In carrying out the responsibility for making and maintaining arrangements for training mentioned in subsection (2)(d) the Lord President must require any judicial office holder, or class of judicial office holder, to attend such training as the Lord President determines.

(5) References in this section to the Scottish judiciary are references to the judiciary of any court established under the law of Scotland (other than the Supreme Court of the United Kingdom).

(6) In this section, “the Scottish courts” means—

- (a) the Court of Session,
- (b) the High Court of Justiciary,
- (c) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983 (c. 2),
- (d) the election court in Scotland constituted under section 123 of that Act,
- (e) the Lands Valuation Appeal Court,
- (f) the sheriff courts,
- (g) justice of the peace courts, and
- (h) such other courts as the Scottish Ministers may by order specify.

(7) Before making an order under subsection (6)(h), the Scottish Ministers must consult the Lord President.

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JUDICIAL CONDUCT
Judicial conduct

s28 Rules about investigations etc.

(1) The Lord President may by rules make provision for or in connection with—

- (a) the investigation and determination of any matter concerning the conduct of judicial office holders,
 - (b) reviews of any such determinations.
- (2) Rules under subsection (1) may in particular contain provision about—
- (a) circumstances in which an investigation must or may be undertaken,
 - (b) the making of complaints,
 - (c) steps to be taken by a complainant before a complaint is to be investigated,
 - (d) the conduct of an investigation (including in particular steps to be taken by the office holder under investigation or by a complainant or other person),
 - (e) time limits for taking any step and procedures for extending time limits,
 - (f) persons by whom an investigation or part of an investigation is to be conducted,
 - (g) matters to be determined by the person conducting an investigation (or part of an investigation), the Lord President or any other person,
 - (h) the making of recommendations by persons conducting investigations (or parts of investigations),
 - (i) the obtaining of information relating to complaints,
 - (j) the keeping of records of investigations,
 - (k) confidentiality of communications or proceedings,
 - (l) the publication of information or its provision to any person.
- (3) Rules under subsection (1)—
- (a) may make different provision for different cases,
 - (b) are to be published in such manner as the Lord President may determine.

s29 Powers of Lord President

- (1) Where subsection (2) applies in relation to a judicial office holder, the Lord President may, for disciplinary purposes, give the judicial office holder—
- (a) formal advice,
 - (b) a formal warning, or
 - (c) a reprimand.
- (2) This subsection applies where—
- (a) an investigation has been carried out in accordance with rules under section 28(1), and
 - (b) the person carrying out the investigation has recommended that the Lord President exercise a power mentioned in subsection (1).
- (3) This section does not restrict what the Lord President may do—
- (a) informally,
 - (b) for other purposes, or
 - (c) where any advice or warning is not given to a particular judicial office holder.

*Judicial Complaints Reviewer***s30 Judicial Complaints Reviewer**

- (1) The Scottish Ministers may, with the consent of the Lord President, appoint a person (to be known as the “Judicial Complaints Reviewer”) for the purpose of carrying out the functions mentioned in subsection (2).
- (2) Those functions are—
- (a) on the request of the complainant or the judicial office holder to whom an investigation carried out in pursuance of section 2(2)(e)(i) relates, to review the handling of the investigation to determine whether the investigation has been carried out in accordance with rules under section 28(1),
 - (b) in any case where the Reviewer considers that such an investigation has not been carried out in accordance with those rules, to refer the case to the Lord President,
 - (c) as directed by the Scottish Ministers, to prepare and publish reports on investigations carried out in pursuance of section 2(2)(e)(i), and
 - (d) to make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of judicial office holders.
- (3) For the purposes of subsection (2)(a) “the complainant”, in relation to an investigation, means the person whose complaint led to the carrying out of the investigation.
- (4) The Lord President must have regard to any written representations made under subsection (2)(d).
- (5) A person is disqualified from appointment, and from holding office, as the Judicial Complaints Reviewer if the person is or becomes—
- (a) a member of the House of Commons,
 - (b) a member of the Scottish Parliament,
 - (c) a member of the European Parliament,
 - (d) a Minister of the Crown,
 - (e) a member of the Scottish Executive,
 - (f) a civil servant,
 - (g) a person who is, or has been, a judicial office holder, or
 - (h) a solicitor, advocate or barrister (in any case whether practising or not).

s31 Judicial Complaints Reviewer: tenure etc.

- (1) The Scottish Ministers are to determine with the consent of the Lord President—
- (a) the period for which a person is appointed as the Judicial Complaints Reviewer, and
 - (b) subject to subsection (2), the other terms and conditions on which a person is so appointed.
- (2) The Scottish Ministers may pay to the Judicial Complaints Reviewer such fees and expenses as they may determine.

- (3) The Judicial Complaints Reviewer may resign office by giving notice in writing to the Scottish Ministers.
- (4) If—
- (a) the Scottish Ministers are satisfied that subsection (5) applies, and
 - (b) the Lord President consents,
- the Scottish Ministers may, by notice in writing, remove the Judicial Complaints Reviewer from office.
- (5) This subsection applies if—
- (a) the Judicial Complaints Reviewer has failed without reasonable excuse to carry out the functions of that office for a continuous period of 6 months,
 - (b) the Reviewer has been convicted of an offence,
 - (c) the Reviewer has become insolvent, or
 - (d) the Reviewer is otherwise unfit to be the Judicial Complaints Reviewer or unable for any reason to carry out the functions of that office.
- (6) For the purposes of subsection (5)(c), the Reviewer becomes insolvent on—
- (a) the approval of a voluntary arrangement proposed by the Reviewer,
 - (b) being adjudged bankrupt,
 - (c) the Reviewer's estate's being sequestrated, or
 - (d) the Reviewer's granting a trust deed for creditors.
- (7) A person who is or has been the Judicial Complaints Reviewer may be reappointed for further periods.
- (8) A person holding office by virtue of subsection (7) may not hold office for periods (whether or not consecutive) totalling more than 5 years.

s32 Guidance

- (1) The Judicial Complaints Reviewer must comply with any guidance that the Scottish Ministers issue about the carrying out of the Reviewer's functions.
- (2) Before issuing any such guidance, the Scottish Ministers must consult the Lord President.
- (3) The Scottish Ministers must publish any guidance issued under subsection (1).

33 Lord President's powers on referral

- (1) Subsection (2) applies where a case is referred to the Lord President by virtue of section 30(2)(b).
- (2) The Lord President may—
 - (a) vary or revoke the determination made in the case (or part of the determination),
 - (b) cause a fresh investigation to be carried out,
 - (c) confirm the determination in the case, or
 - (d) deal with the referral in such other way as the Lord President considers appropriate.

*Suspension***s34 Suspension**

- (1) If the Lord President considers that it is necessary for the purpose of maintaining public confidence in the judiciary, the Lord President may suspend a judicial office holder—
- (a) from acting as a judge as mentioned in paragraph (b) or (c) of the definition of “judicial office holder” in subsection (1) of section 43, or
 - (b) from any of the judicial offices mentioned in subsection (2) of that section.
- (2) Such a suspension lasts for such period as the Lord President may specify when suspending the judicial office holder.
- (3) Nothing in subsection (1) affects any remuneration payable to, or in respect of, the judicial office holder.
- (4) The Lord President’s functions under this section may be carried out—
- (a) where the Lord President is unavailable, by the Lord Justice Clerk,
 - (b) where both the Lord President and the Lord Justice Clerk are unavailable, by the senior judge of the Inner House.
- (5) In subsection (4)(b) the reference to the senior judge of the Inner House is to be construed by reference to seniority of appointment to a Division of the Inner House.

THE SCOTTISH COURT SERVICE

Establishment

60 The Scottish Court Service

- (1) There is established a body corporate to be known as the Scottish Court Service (referred to in this Part as “the SCS”).
- (2) Schedule 3 makes further provision about the SCS.

Functions

61 Administrative support for the Scottish courts and judiciary

- (1) The SCS has the function of providing, or ensuring the provision of, the property, services, officers and other staff required for the purposes of—
- (a) the Scottish courts, and
 - (b) the judiciary of those courts.
- (2) In carrying out that function, the SCS must—
- (a) take account, in particular, of the needs of members of the public and those involved in proceedings in the Scottish courts, and
 - (b) so far as practicable and appropriate, co-operate and co-ordinate activity with any other person having functions in relation to the administration of justice.
- (3) In this Part, “the Scottish courts” has the meaning given by section 2(6).

62 Administrative support for other persons

- (1) The SCS has the function of providing, or ensuring the provision of, the property, services and staff required for the purposes of—
- (a) the Lord President in the carrying out of—
 - (i) functions conferred on the Lord President as Head of the Scottish Judiciary, and
 - (ii) other non-judicial functions of the Lord President,
 - (b) any judicial office holder in the carrying out of functions delegated to the office holder by the Lord President,
 - (c) the sheriffs principal in the carrying out of their functions under sections 15 to 17 of the 1971 Act,
 - (d) the Public Guardian (established by section 6 of the Adults with Incapacity (Scotland) Act 2000 (asp 4)),
 - (e) the Court of Session Rules Council (being the Rules Council mentioned in section 8 of the Court of Session Act 1988 (c. 36)),
 - (f) the Criminal Courts Rules Council,
 - (g) the Sheriff Court Rules Council, and
 - (h) such other persons, or persons of such description, as the Scottish Ministers may by order specify.
- (2) Before making an order under subsection (1)(h), the Scottish Ministers must consult the Lord President.

63 Appointment etc. of office holders

- (1) The Scottish Ministers' functions in relation to the officers mentioned in subsection (2) are transferred to the SCS.
- (2) Those officers are the holders of the following offices—
- (a) Accountant of Court,
 - (b) Principal Clerk of Session,
 - (c) other Clerk or officer of the Court of Session,
 - (d) Principal Clerk of Justiciary,
 - (e) Depute, Assistant or other Clerk in the Justiciary Office of the High Court of Justiciary,
 - (f) Macer in the Court of Session and Macer in the High Court of Justiciary,
 - (g) sheriff clerk,
 - (h) sheriff clerk depute, and
 - (i) clerk or assistant clerk of a justice of the peace court.
- (3) Those officers are also members of the staff of the SCS and, accordingly, references in this Act to the staff of the SCS include, except where the context requires otherwise, reference to those officers.
- (4) Schedule 4 contains amendments of enactments consequential on this section.

64 Payment of remuneration etc. of certain judicial office holders

- (1) In section 11(8) (remuneration and allowances of temporary sheriffs principal) of the 1971 Act, for “Secretary of State” in the first place those words appear substitute “Scottish Court Service”.
- (2) In section 11A(8) (remuneration and allowances of part-time sheriffs) of the 1971 Act—

(a) for “Scottish Ministers” substitute “Scottish Court Service”, and

(b) for “they” substitute “the Scottish Ministers”.

(3) In section 22(5) (remuneration and allowances of re-employed retired judges) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73)—

(a) for “Scottish Ministers” substitute “Scottish Court Service”, and

(b) for “they” substitute “the Scottish Ministers”.

(4) In paragraph 10 (remuneration of temporary judges of the Court of Session) of Schedule 4 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40)—

(a) for “Scottish Ministers” substitute “Scottish Court Service”, and

(b) for “they” substitute “the Scottish Ministers”.

Provision of advice etc. to the Scottish Ministers

65 Provision of advice etc. to the Scottish Ministers

(1) The SCS may give information or advice, or make proposals, to the Scottish Ministers on matters relating to—

(a) the functions of the SCS, or

(b) the administration of justice in Scotland.

(2) The Scottish Ministers must have regard to such information, advice or proposals.

(3) This section is without prejudice to paragraph 15(2)(c) of schedule 3.

Plan and report

66 Corporate plan

(1) The SCS must, before the beginning of each planning period, prepare and submit to the Scottish Ministers for approval a corporate plan describing how the SCS proposes to carry out its functions during the period.

(2) The plan must—

(a) be prepared in such form,

(b) contain such information, and

(c) be submitted by such time,

as the Scottish Ministers may direct.

(3) The Scottish Ministers may approve the plan subject to such modifications as may be agreed between them and the SCS.

(4) The SCS must, as soon as possible after the approval of a corporate plan—

(a) lay before the Scottish Parliament a copy of the plan as approved, and

(b) publish the plan in such manner as it thinks fit.

(5) During the planning period to which a corporate plan relates, the SCS—

(a) may, or

(b) if the Scottish Ministers so direct, must,

review the plan and submit a revised corporate plan to the Scottish Ministers for approval.

(6) In carrying out its functions in any planning period, the SCS must have regard to the corporate plan for the period.

(7) Subsections (2) to (6) apply to a revised corporate plan as they apply to a corporate plan.

(8) In this section, “planning period” means—

(a) the period beginning with the day on which section 61 comes into force and ending on a date specified by order made by the Scottish Ministers, and

(b) each subsequent period of 3 years.

(9) The Scottish Ministers may by order substitute for the period specified in subsection (8)(b) such other period as they consider appropriate.

67 Annual report

(1) As soon as practicable after the end of each financial year, the SCS must—

(a) prepare and publish a report on the carrying out of its functions during that year,

(b) send a copy of the report to the Scottish Ministers, and

(c) lay a copy of the report before the Scottish Parliament.

(2) It is for the SCS to determine the form and content of each report and the manner in which it is to be published.

(3) In subsection (1), “financial year” means—

(a) the period beginning with the establishment of the SCS and ending on 31 March next occurring, and

(b) each subsequent period of a year ending on 31 March.

Ministerial powers

68 Provision of information

The SCS must provide the Scottish Ministers with such information relating to the carrying out of its functions as the Scottish Ministers may require.

69 Guidance

The SCS must, in carrying out its functions, have regard to any guidance issued by the Scottish Ministers.

70 Default power

(1) Subsection (2) applies if the Scottish Ministers consider—

(a) that the SCS is—

(i) failing to carry out its functions to such an extent that there is a significant risk to the efficient and effective functioning of the Scottish courts, or

(ii) is carrying them out in such a way that there is such a risk, and

(b) that in order to avoid or mitigate that risk it is necessary that the functions be carried out instead by them.

(2) Where this subsection applies, the Scottish Ministers may by order provide for the functions of the SCS to be carried out instead by them.

(3) So far as necessary for the purpose of the carrying out by the Scottish Ministers of the functions of the SCS by virtue of subsection (2)—

(a) references in any enactment to the SCS are to be read as references to the Scottish Ministers,

- (b) staff of the SCS are to be treated as if they were staff of the Scottish Ministers, and
- (c) property and liabilities of the SCS are to be treated as property and liabilities of the Scottish Ministers.
- (4) Subsection (3) is subject to any provision made in an order under subsection (2).
- (5) A statutory instrument containing an order under subsection (2) (other than one to which subsection (7) applies)—
 - (a) is to be laid before the Scottish Parliament after being made, and
 - (b) unless earlier revoked, ceases to have effect at the end of the period of 40 days beginning with the day on which it is made if it is not by then approved by resolution of the Parliament.
- (6) Subsection (7) applies to a statutory instrument containing an order under subsection (2) consisting only of—
 - (a) provision revoking an earlier order under subsection (2), or
 - (b) such provision and provision made by virtue of section 71(2).
- (7) A statutory instrument to which this subsection applies is subject to annulment in pursuance of a resolution of the Parliament.
- (8) If an order under subsection (2) ceases to have effect by virtue of subsection (5)(b)—
 - (a) that does not affect—
 - (i) the validity of anything done by or in relation to the Scottish Ministers by virtue of the order, or
 - (ii) the power to make a further order under subsection (2), and
 - (b) the Scottish Ministers may by order make such consequential provision as they consider necessary or expedient.
- (9) In calculating a period of 40 days for the purpose of subsection (5)(b), no account is to be taken of any time during which the Parliament is—
 - (a) dissolved, or
 - (b) in recess for more than 4 days.