

Proposals for a Judiciary (Scotland) Bill



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Draft Judiciary (Scotland) Bill



FOREWORD by the Minister for Justice

These proposals for a Judiciary Bill mark another important chapter in our ongoing programme to reform and improve Scotland's justice system. People in Scotland want a modern, responsive system of justice that serves the needs of all their communities. We have shown in our actions, and through results, that we are on their side.

We have reformed the way the most serious cases are dealt with in the High Court, giving greater certainty to those who come into contact with the system as witnesses, jurors and victims. We have brought about the most far reaching changes in recent times to the way summary justice is delivered. We have provided much-needed support to children and vulnerable adults to help them give their best evidence. Drug and youth crime has been targeted through specialist courts, and we have introduced measures to stamp out anti-social behaviour in our communities.

Delivering these changes is, of course, much more than just a job for government. In implementing these changes we have been greatly assisted by the co-operation of those working within the legal system – and at the very heart of improvements has been the assistance of the independent judiciary.

Scotland's judges and sheriffs play a key role in the justice system. That is why it is important that legislative provisions and other arrangements are in place for the judiciary which reflect the modern day circumstances and considerations they face. We believe this is not the case at present and that these arrangements require modernisation. That was why, in 2006, we published our proposals for change in the document *Strengthening Judicial Independence in a Modern Scotland*.

I was very encouraged when in response to our proposals the Lord President expressed a desire to become involved in the management of the Court Service. The more active involvement of the judiciary in the justice system is in my view a potential benefit.

But the current framework within which our judiciary operate hinders their ability to participate more fully in the development and operation of the system. So turning a desire to become involved into a reality needs a new modern approach. In this paper we set out how we propose to do it.

There are two parts to the paper. The first is a draft Bill which deals with important aspects of the relationship between the judiciary and the main branches of government. At the forefront is our commitment to the continued independence of the judiciary. We are also fulfilling our commitment to place the Judicial Appointments Board on a statutory basis.

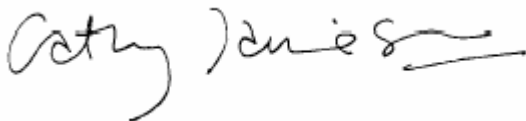
And we are modernising the arrangements that would be used if it were ever necessary to remove a judge or sheriff from office. These provisions alone strengthen the independence of the judiciary.

But we want to do more and our plans are set out in the second part of the paper which accompanies the draft Bill. We are discussing with the judges how we can bring together our proposals for the unification of the judiciary with the Lord President's wish to take a role in the governance of the Court Service. There are many issues to consider, and we need to take time to develop the best arrangements. We are also conscious that the governance of the Court Service was not discussed in the consultation paper, although some commentators did mention it in their responses. We want to hear views from all who have an interest in this before reaching firm conclusions.

Until we reach decisions on the role of the Lord President in the governance of the Court Service, we cannot take a firm view on the subsequent legislation that would be necessary to address the many practical issues that would flow from it. These include arrangements for managing the business across the courts, and the development of schemes for the deployment, welfare, training and conduct of the judiciary.

We have refined our proposals in these important areas, taking account of what was said to us during the consultation. We have also said where, in light of the consultation, we have decided not to proceed with a proposal, or to proceed in a different way.

We welcome your comments on all aspects of the paper, including the draft provisions in the Bill. We will take account of these in finalising a draft Bill which would then be ready for any new Administration to introduce into the Scottish Parliament. This is now an opportunity for further thought and reflection – but I believe this paper would provide options for action by a future Administration in what is a vital area of our justice system.

A handwritten signature in black ink, appearing to read 'Cathy Jamieson', with a horizontal line underneath the name.

CATHY JAMIESON MSP
Minister for Justice
February 2007

CHAPTER 1

INTRODUCTION

1.1 In February 2006 we published the consultation paper *Strengthening Judicial Independence in a Modern Scotland* (“the consultation paper”).¹ In that paper we invited views on proposals to improve our justice system by modernising the arrangements made for the judiciary, and strengthening their role in the system. We divided our proposals into six areas:

- (i) the creation of a unified judiciary presided over by a Lord President with responsibilities and powers concerning the disposal of business in both the inferior and superior courts, and the training, welfare, deployment and conduct of the judiciary;
- (ii) the provision of a statutory basis for the Judicial Appointments Board;
- (iii) the arrangements for the removal of judges and sheriffs;
- (iv) the introduction of a scheme to deal with issues of conduct;
- (v) the arrangements for retired and temporary judicial office holders;
- (vi) the grounds of eligibility for appointment as a judge of the Court of Session.

1.2 These proposals had different origins. Those for a statutory appointments board reflected the commitment we gave when the current Board was set up in 2002. The proposals for the removal of judges met a need to replace transitional provisions made at the time of devolution. Others reflected informal discussions with the senior judiciary within the context of the constitutional changes taking place in England and Wales, which have now been made law: the Constitutional Reform Act 2005.

1.3 The responses to the consultation were varied. There was support for many of our proposals, but differences of view were evident. There was recognition that there is generally a good relationship between the judiciary and the Executive, and that there is no crisis in connection with the independence of the judiciary in Scotland. However, the judges of the Court of Session noted that it was important to consider from time to time the balance of powers between the various branches of government, and they welcomed our consultation as a timely opportunity to examine the present arrangements. The Lord President commented that a unique opportunity now existed for the Scottish Parliament, in a Bill arising from this consultation, to pass a law of constitutional importance for the benefit of the people of Scotland. We share this sentiment, and in this paper we explain how we are taking forward our proposals.

1.4 A summary of the responses to the consultation will be published shortly. Some consultees asked that their response be kept confidential. The non-confidential responses are available on the Scottish Executive website² or through the Scottish Executive Library.³

¹ <http://www.scotland.gov.uk/Resource/Doc/90982/0021845.pdf>

² <http://www.scotland.gov.uk/Publications/2006/06/13143517/0>

³ K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3DX: Tel - 0131 244 4565

1.5 Some who responded, notably the Faculty of Advocates and the Law Society of Scotland, felt that the matters under consideration were of such importance that a more thorough and independent assessment was warranted. This view was not, however, universally held and, on balance, we have decided that an independent inquiry is not necessary. Such an inquiry would take time, and duplicate work that has already been done to establish the views of those interested. The Parliamentary process will provide in due course a rigorous and independent scrutiny of what is proposed. However, we have reflected on what has been said in the consultation and recognise that a number of the issues will benefit from an opportunity for further reflection and consideration at this time. We have therefore refined and focused our proposals and present these in this paper as a basis for further discussion and comment.

1.6 Our work has been informed by the consultation that has taken place, and we are not repeating that full consultation. Comments on specific aspects of our proposals are however welcome. These should be sent to:

John Anderson
Scottish Executive Justice Department
5th Floor
Hayweight House
23 Lauriston Street
Edinburgh, EH3 9DQ

If you would prefer to use e-mail, the address is: JudicialBillTeam@scotland.gsi.gov.uk

Please let us have any comments by 14 May 2007.

1.7 Copies of comments received will be made available to the public on request, unless respondents indicate that all or part of their response is confidential.

CHAPTER 2

THE INDEPENDENCE OF THE JUDICIARY

What was proposed?

2.1 In Chapter 2 of the consultation paper we stated our commitment to the independence of the judiciary, and our intention to strengthen that commitment with a statutory guarantee. We noted that such a guarantee was now part of the law in the rest of the United Kingdom.⁴ We invited views on what form of commitment would be appropriate in Scotland.

What views were expressed in the consultation?

2.2 Some respondents welcomed our proposal; others questioned whether a statutory statement of what is already a recognised constitutional principle would add anything of value. The Lord President and the judges pointed out that a statutory provision by itself was not an effective guarantee; practical measures were also required. They considered that introducing a predominant role for the judiciary in the strategic management of the Scottish Court Service was necessary to achieve the institutional independence of the judiciary which would protect the independence of individual judges. Other respondents also commented that providing the judiciary with the resources to carry out their functions independently of the Executive was an essential element of independence. In Chapter 12 we describe where we have reached in the discussions with the judiciary on the arrangements for managing the Court Service.

2.3 Notwithstanding the hesitancy about what a statutory guarantee would add to the present arrangements, there was still a feeling that it would not be right if Scotland were to be the only part of the United Kingdom in which the Executive was not fully bound by such a statutory guarantee. The balance of view overall favoured some provision being made.

How do we intend to proceed?

2.4 We have included a statutory guarantee as section 1 of the draft Bill.⁵ This pre-eminent position reflects the fundamental importance of this principle, and distils into statute what has long been a matter of convention and common law. It is a powerful and obvious reminder to those in the executive branch of government, as well as elsewhere, of the constitutional significance of judicial independence. It emphasises to all concerned the need to bear this principle in mind at all times. The provision is consistent with the similar provisions in the other parts of the United Kingdom, to the extent that is appropriate.

⁴ Section 3 of the Constitutional Reform Act 2005; section. 1 of the Justice (Northern Ireland) Act 2002

⁵ See page 25

CHAPTER 3

THE LORD PRESIDENT

What was proposed?

3.1 In Chapter 3 of the consultation paper we introduced proposals to bring the judiciary under a single judicial head with overall responsibility for the management of the business in all courts, and for the training, welfare, deployment and conduct of the judiciary. We proposed that the Lord President of the Court of Session should be the head of the judiciary.

3.2 We said in the consultation paper why we believed those proposals would strengthen the independence of the judiciary, and lead to improvements in the system that would enhance public confidence in the judiciary and the justice system. A core strength was the opportunity the new structure would give the head of the judiciary to develop arrangements in the areas outlined, many of which are unregulated, or currently involve a degree of Executive involvement. We recognised that the Lord President would require powers to fulfil the new functions. He or she would also require additional support. We sought views on how this might be provided.

What views were expressed in the consultation?

3.3 There was considerable support for conferring the status of head of the judiciary upon the Lord President. However, there were concerns about the additional responsibility this would place on an already burdensome office, and that the nature of the office could be changed by those responsibilities from one that was essentially judicial, to one that was predominantly administrative.

3.4 There was a range of views about whether the Lord President should have statutory responsibilities for the disposal of court business. Many were cautious about this, commenting on the need to balance the responsibilities being proposed with the provision of adequate resources over which the Lord President had control. The current Lord President and the judges considered that it was of fundamental importance to resolve the question of the future governance of the Court Service before considering in detail the nature of the responsibilities that should fall on the Lord President, and what arrangements should be put in place to fulfil them. Others expressed a similar view. However, overall it was accepted that, if formally recognised as head of the judiciary, the Lord President should have some responsibility for these matters. Whether that should be a direct responsibility or a duty of oversight should remain for discussion.

3.5 Proposals to give the Lord President overall responsibility for judicial training and welfare were welcomed, and there was support for the proposal to transfer deployment from the Executive to the Lord President. While there were some anxieties about a power to transfer compulsorily in the interests of the administration of justice, those members of the judiciary with experience of administering the system broadly supported such a power. There was also support for giving the Lord President responsibility for dealing with issues of conduct.

3.6 There was little enthusiasm for any formal involvement of the Lord President in the strategic work of the Executive, and a range of views on how the judiciary should be

involved in the management of the Court Service. There was a strong body of opinion that before detailed arrangements could be examined, the fundamental relationship between the judiciary, the Executive and the Court Service had to be considered, and a structure put in place that would give the judiciary the resources to fulfil the duties required of it free from Executive influence.

How do we intend to proceed?

3.7 Creating a single judicial office with overall responsibility for the courts and for the management of the judiciary is central to these reforms. We are therefore working with the judiciary on what changes should be made to the way the Court Service is governed to provide an appropriate structure that enables the Lord President to fulfil the new responsibilities proposed for that office. We say more about this in Chapter 12.

3.8 As discussions with the judiciary are continuing, it would be premature to set down anything other than broad descriptions of what, at this time, seem to us to be the main areas requiring legislation. These represent a refinement of our original proposals, taking account of what has been said in the responses to the consultation. Some points raised in the responses will require to be discussed with the Lord President before proposals can be formulated. And we may need to make changes in light of further comment received in response to this paper.

3.9 The matters to be provided for in a draft Bill would be these.

1. The Lord President of the Court of Session would become Head of the Judiciary in Scotland. The person appointed Lord President would, on taking up that appointment, assume the role of Head of the Judiciary.
2. The Head of the Judiciary would have statutory responsibility for:
 - a) representing the views of the judiciary to Parliament and to Ministers;
 - b) laying before the Scottish Parliament written representations on matters that appear to him or her to be matters of importance relating to the judiciary or otherwise to the administration of justice;
 - c) maintaining arrangements to secure the efficient disposal of business in the courts of Scotland;
 - d) maintaining appropriate arrangements for the deployment of the judiciary;
 - e) maintaining appropriate arrangements for the welfare, training and guidance of the judiciary;
 - f) exercising disciplinary powers over members of the judiciary, and maintaining a scheme for dealing with issues of conduct that arise, including a power to make rules to regulate the procedure of such a scheme.

3.10 The following paragraphs provide more information about some of these proposals.

Written representations to the Scottish Parliament

3.11 This complements the provision in section 5 of the Constitutional Reform Act 2005 that allows the Lord President to make written representations to the United Kingdom Parliament.

Maintaining arrangements for the efficient disposal of business

3.12 We believe a judicial structure in which there is a single judicial head is a powerful arrangement for developing and improving the justice system. A responsibility to maintain arrangements that would secure the efficient disposal of business in the courts would give that element of judicial leadership and allow flexibility in how the responsibility was discharged. We would not wish to interfere with that flexibility and we do not propose therefore to give any part of the system a prior claim to resources. Nor do we do propose to take from sheriffs principal their current responsibility for securing the speedy and efficient disposal of business in their respective sheriffdoms.⁶ However we would need to make the necessary amendments to the Sheriff Courts (Scotland) Act 1971 to recognise the Lord President's overall responsibility. We would also need to reflect the intention to reduce Ministerial involvement in judicial administration by making appropriate amendments to the 1971 Act.

Deployment of the judiciary

3.13 The scheme in the 1971 Act would be amended to reduce the involvement of Ministers in the deployment of sheriffs. At present Ministers have power, after consulting the Lord President, to direct that a sheriff shall cease to hold the office of sheriff of one sheriffdom and become a sheriff of another sheriffdom. This power is in practice used only to facilitate voluntary transfers; nevertheless we consider this arrangement does not sit easily with the principles of judicial independence and we would propose to transfer the power to the Lord President. We would retain a residual power to re-deploy a sheriff where the business of the court had reduced to such a level that the full time attendance of that sheriff was no longer required. Such re-deployment would take place only after consultation with the Lord President and the sheriff principal.

3.14 There are also powers currently to require a sheriff to sit in another court for a temporary period. These are intended to deal with occasions when a sheriff is absent, there is a vacancy or the administration of justice in that court might otherwise be delayed. These powers should be available to the Lord President if he or she is to have responsibility for the courts, and we would transfer these. We would also propose to give the Lord President a power to deploy a sheriff on a compulsory basis.

Training, welfare, guidance and conduct

3.15 Effective training for our judges and sheriffs is a key element of the arrangements that need to be in place for the judiciary, and it is right therefore that the Lord President, as Head of the Judiciary, should have responsibility for overseeing the development and provision of judicial training. We would therefore give the Lord President an overall power to direct the

⁶ Section 15(1) of the Sheriff Courts (Scotland) Act 1971

activities of the Judicial Studies Committee. We do not propose to make the Committee a statutory body. We would also provide power to enable the Lord President to make such arrangements as he or she considered appropriate under the general heading of welfare (which would not be defined) and to issue guidance to the judiciary on such matters as he or she considered appropriate. Judicial conduct is discussed in Chapter 8.

CHAPTER 4

A JUDGES' COUNCIL

What was proposed?

4.1 In Chapter 4 of the consultation paper we asked whether a statutory Judges' Council should be established.

What views were expressed in the consultation?

4.2 There was considerable support for the setting up of a Judges' Council, chaired by the Lord President. However, there was much less support for giving the Council a statutory basis. A non-statutory arrangement was generally considered preferable. Views on membership and remit were varied. The consensus favoured representatives from all levels of the judiciary, although some thought widening the membership would be useful. Views on the remit also varied, although there were common themes. These were: communication within the judiciary, co-ordinating the judiciary's views on issues and providing guidance on matters relevant to the administration of justice.

How do we intend to proceed?

4.3 The Lord President has taken forward consultation with the judiciary. He has decided that a non-statutory body, to be known as the Judicial Council for Scotland, should be established.

4.4 The remit of the Council will be to provide the Lord President of the day (who will chair the body) with a means to seek and obtain the views of Scottish judges at all levels. The Council will complement the existing representative bodies, such as the Sheriffs' Association and the District Courts Association.

4.5 We welcome this initiative and share the Lord President's expectation that this development will offer opportunities for improved communication between the judiciary and the Executive. Once the Council has become established we will invite the Lord President to agree arrangements for engaging with the Council that ensure the most productive outcome for the judiciary and the Executive.

CHAPTER 5

ADMINISTRATIVE RESPONSIBILITIES FOR JUDGES

What was proposed?

5.1 In Chapter 5 of the consultation paper we welcomed the Lord President's initiative to delegate aspects of the management of the day to day business before the superior courts to a judge. We recognised that the Lord President would require to delegate certain of his responsibilities for managing the business, and we invited views on whether creating a statutory administrative role for judges would be desirable.

What views were expressed in the consultation?

5.2 While there was general support for judges taking an active role in the management of business to reduce delay, there was little support for creating the kind of statutory role envisaged. The Lord President did not consider that it was necessary to have a statutory provision setting out administrative roles for judges in support of the Lord President, although a general provision making clear that the Lord President could delegate aspects of his responsibilities to judges would be appropriate. The judges observed that they operate as a collegiate body and the Lord President is able to obtain assistance from judges when required.

How do we intend to proceed?

5.3 In view of the comments we have received we do not propose to make any provision for an administrative role for judges. However, we will include within the provisions that establish new responsibilities for the Lord President a general power enabling him or her to delegate functions to judges.

CHAPTER 6

JUDICIAL APPOINTMENTS

What was proposed?

6.1 In 2002 we set up a judicial appointments board as part of our reforms to the way judges and sheriffs are appointed. We said that after some experience of this new arrangement we would place the board on a statutory footing. In Chapter 6 of the consultation paper we set out our proposals for doing that. Much of what we proposed was informed by the positive experience of the present Board. We said that we did not intend to depart from the balance of lay and legal membership which we believed to be a particular strength of the present arrangements. We sought views on a range of matters including membership, how members should be appointed, their term of office, the extent to which Ministers should be able to offer guidance to the board, the board's remit, and whether the board should have a role in the appointment of two most senior judges, the Lord President and the Lord Justice Clerk.

What views were expressed in the consultation?

6.2 The responses to this part of the consultation were varied. A transparent process for appointing judges was seen as being essential for public confidence in the system. There was a strong body of opinion that favoured giving the board a statutory remit, and for that remit to make clear that merit was the sole basis for appointment.

6.3 The precise balance of lay and legal members was seen as unnecessary by some, and a number of respondents considered that one half of the board should be members of the judiciary. There was no consensus about how many Court of Session judges should be amongst the membership. Some favoured an increase; others, including the present Board, were concerned that this would create an imbalance, and give one particular body disproportionate representation. The present Board felt that the reasons given in the consultation paper in support of the proposed increase failed to take account of the manner in which the Board conducted its work.

6.4 There was considerable unease about the proposal that Ministers should be able to issue guidance. Some were strongly opposed to this in principle; others, including the present Board, recognised that there may be matters on which guidance would be of assistance. However the present Board stressed that guidance should not contain any material that could be regarded as compromising its independence when assessing the suitability of candidates. Some, including the present Board, felt that a statutory board would have a greater independence if it were to appoint its own staff.

6.5 Almost all who responded on whether the board should recommend appointment to the Inner House of the Court of Session considered that the board should not take on this function. A shortcoming in the present procedures was, however, commented on, and we may need to make an adjustment to the present arrangements in light of further discussions with the judiciary. There was a body of opinion that favoured the board's having a role in the appointment of temporary judges, although this was balanced by strong contrary views that favoured the present arrangement. The proposal to provide formally for a panel to advise on the suitability of candidates for selection to the two most senior judicial offices was welcomed. Views on membership of this panel varied quite considerably.

How do we intend to proceed?

6.6 We have developed our proposals in light of the responses to this important aspect of the consultation. These now form Part 2 and Schedules 1 and 2 of the draft Judiciary (Scotland) Bill.

6.7 We have recognised the force of the arguments for giving the board a statutory remit and for making clear that merit is the sole basis on which a recommendation for appointment should be made. We have included a statutory statement of independence in section 5, and made provision to encourage diversity in those coming before the board. We have taken account of the views expressed about guidance. We have restricted this to procedural matters, provided a requirement to consult on a draft and lay a draft before the Scottish Parliament. Any guidance issued would be published.

6.8 We have considered very carefully the conflicting views on whether recommending for appointment as a temporary judge of the Court of Session should fall within the board's remit. In doing so we have made the assumption that the office of temporary judge will remain a feature of the reformed judicial structure.

6.9 We accept that the present arrangements for appointing temporary judges allow appointments to be made quickly. However, the arrangements are not entirely consistent with the principles of equality of opportunity and transparency of process that are now features of all other judicial appointments. We consider it anomalous that a qualified person is able to apply for the office of full time judge, but not for appointment as a temporary judge. While we acknowledge there are important differences, this does not compare favourably with the shrieval bench where those wishing to serve as part-time sheriffs may apply to the Board. We also recognise that those who bring their cases before the highest courts have an expectation that there is consistency in the way the judges are appointed. On balance therefore we consider that the judicial appointments board has a role in the appointment of temporary judges. However we feel a distinction can properly be made in the case of those who have been appointed to judicial office, such as serving and retired sheriffs principal and sheriffs, and are then appointed a temporary judge. Such individuals will have already satisfied the Board or have many years of judicial experience. The draft provisions we are now bringing forward require only those who have not held shrieval office to make application to the board. This approach offers flexibility to act swiftly when necessary, by appointing a member of the shrieval bench at short notice, and also opens the prospect of creating a wider pool of temporary judges to be called upon to meet planned commitments.

6.10 Schedule 1 to the draft Bill provides for the membership and practical aspects of the board. We have decided not to make any change to the composition of the membership. The experience of the Board established in 2002 is that the existing balance of membership works very well. The balance of legal and lay membership, and the steps the Board has taken to develop its practices so as to ensure equality of participation by members, are particular strengths which we would not wish to disturb at this time. However, we recognise that circumstances in the future may justify a change in the composition of the legal membership, and we are providing a power that will allow Ministers to alter the number in any of the categories: paragraph 2(3).

6.11 In paragraph 10 of the Schedule we are committing Ministers to providing the staff and resources to enable the board to carry out its functions. The payment of fees for members is provided for separately in paragraph 9. We are satisfied that these provisions, together with the statutory guarantee of independence in section 5 of the Bill, are adequate to continue the independence of operation which the present Board enjoys. The four staff of the present Board, although civil servants, are assigned to work exclusively for the Board. They occupy separate premises which have been made available for the Board, and can make use of the various support arrangements available within the Scottish Executive. We do not consider it would be justified to impose on public funds the additional expenditure that would arise if the board were to be established as a free standing body.

6.12 Recommending to the First Minister individuals who are suitable for appointment to one of the two most senior judicial offices, Lord President or Lord Justice Clerk, will not be a function of the judicial appointments board. We are providing separately for a panel to be established on each occasion to carry out this task. The chair of the board, and a second lay member of the board will, however, participate in such a panel. Provision is made in sections 11, 12 and Schedule 2 .

CHAPTER 7

REMOVAL FROM OFFICE

What was proposed?

7.1 A power to remove a judge of the Court of Session, and the Chairman of the Scottish Land Court, was introduced by section 95 of the Scotland Act 1998. That section left it to the Scottish Parliament to make provision for a tribunal to investigate fitness for office. A temporary order was made at the time of devolution to deal with any situation that might arise before the Scottish Parliament legislated.⁷ In Chapter 7 of the consultation paper we set out our proposals for that provision. We also proposed that the arrangements in the Sheriff Courts (Scotland) Act 1971 for investigating questions of fitness of a sheriff and a part-time sheriff should be amended to bring them into line with the tribunal proposed for Court of Session judges. We asked for views on when it would be appropriate to suspend a judge or sheriff while an investigation was taking place.

What views were expressed in the consultation?

7.2 Our proposals for membership of the tribunal were broadly supported although there was some opposition to the presence of non-judicial members. There was support for the proposal that power should be given to the Lord President to make rules of procedure for the tribunal. There was a strong view that our proposals for suspension did not go far enough; a more general power to suspend was preferred. The Sheriffs' Association were strongly opposed to any change to the current arrangements for investigating the fitness of a sheriff set out in section 12 of the Sheriff Courts (Scotland) Act 1971. They considered that any such change would undermine the security of tenure of the office of sheriff and consequently the independence of that office. However, this concern was not shared by all respondents, and there was a view that the procedure in section 12 was in need of reform.

How do we intend to proceed?

7.3 We have developed the proposals into draft legislative provisions. These form Part 3 of the draft Bill.

7.4 We have taken account of the responses to the consultation and broadened the provisions for suspension of judicial office holders. Both the Lord President and the First Minister are given the power to suspend. The Lord President is given an unqualified power, and we would anticipate that should any judge or sheriff be suspended pending an investigation this would be done by the Lord President. The First Minister may suspend only on the written recommendation of a tribunal.

7.5 We are not persuaded that membership of the tribunal should be restricted to members of the judiciary. Lay membership of tribunals established to consider the fitness of professional persons is not uncommon. The public expect a certain standard of conduct from the judiciary, and we believe having a lay member on a tribunal would give the public greater confidence in the judicial system. Membership of the tribunal is to be agreed by the Lord President, or in certain circumstances the Lord Justice Clerk.

⁷ SI 1999/1017

7.6 We have given careful attention to the opposition of the Sheriffs' Association to the amendment of section 12 of the 1971 Act. We understand their concerns, but we do not consider that our proposals undermine the guarantee of independence that presently rests in the need for a joint investigation by the two most senior judges before a sheriff may be removed from office. We believe that what is important is ensuring that removal can only follow a finding of unfitness on the grounds of inability, neglect of duty or misbehaviour; that the process is free from Executive influence, and follows the basic principles of natural justice, respecting the rights of the individual members of the judiciary. The procedure we are proposing respects all these considerations. A tribunal would be chaired by a judge who would have a casting vote, if that were ever necessary; membership would be agreed by the Lord President; and the Lord President would have power to regulate the procedure to be followed by tribunals. If a finding of unfitness were made, removal would require a statutory instrument which would be subject to annulment by the Scottish Parliament.

CHAPTER 8

CONDUCT

What was proposed?

8.1 In Chapter 8 of the consultation paper we proposed a comprehensive scheme for dealing with issues of judicial conduct that fall short of grounds that would warrant an investigation into fitness for office. We proposed that the Lord President, in his new role as Head of the Judiciary, should have responsibility for such issues of judicial conduct. We invited comments on various aspects of the proposed scheme.

What views were expressed in the consultation?

8.2 Our proposal for a comprehensive scheme to deal with complaints about judicial conduct was not universally welcomed. There was concern that our consultation had created an impression that there was a serious problem with such complaints. This was not the case. Some considered the present arrangements to be satisfactory. Taken broadly, however, there was support for devising a more formal approach.

8.3 There was general agreement that no attempt should be made to define what might constitute inappropriate conduct, and many respondents were critical of our reference to failing to produce work. It was considered unhelpful to single out one matter, especially when in that case the failure might be caused by circumstances other than wilful misconduct.

8.4 The Lord President was seen as the ultimate discipline authority. There was support for giving the Lord President power to delegate functions, but there were mixed views on the involvement of sheriffs principal. Some doubted whether a sheriff principal investigating one of his or her sheriffs would constitute an independent tribunal. There was also concern that giving sheriffs principal such a role would undermine the relationship of trust and mutual confidence that should exist between a sheriff principal and the sheriffs. The Lord President was seen as the appropriate authority to make rules to govern the conduct scheme, although there was a body of opinion that any regulation should allow flexibility in the handling of complaints.

8.5 While the need for some process to consider a grievance about the handling of a complaint was generally accepted, views on who should conduct that review varied. There was a strong body of opinion that the reviewing function should remain within the judiciary, but this was balanced by those who favoured the involvement of an independent person.

8.6 There was almost unanimous support for providing a means for reviewing the merits of a complaint and the penalty and for giving the Lord President a power to suspend a judicial office holder, although some wished to see the circumstances when suspension could occur being limited.

How do we intend to proceed?

8.7 The proposals in the consultation paper were based on there being a single authority in conduct issues. That authority would be the Lord President in his role as Head of the Judiciary. Until a view can be taken on the proposals for unification of the judiciary, which

in turn depends upon the current discussions on the governance of the Scottish Court Service, it would be premature to develop our proposals into draft legislation. However, we have refined our proposals in light of the comments received and set these out in this section. We may need to make changes to these in light of the discussions with the judiciary and any further comment in response to this paper.

8.8 We agree with the view expressed in the consultation that there is no current problem with complaints about judicial conduct. The current arrangements for dealing with such complaints that are received are, however, rather unstructured and do not always command public confidence. There is a balance to be struck. We wish to put in place a more structured process for dealing with complaints while not creating an unnecessary bureaucracy. The draft framework for a scheme which we set out below attempts to do this.

8.9 We have reflected on the opposition to our proposal that an independent person feature in the scheme to fulfil essentially an ombudsman role: that is to examine process, not to review merits. The opposition was not universal, and there was support for the involvement of an independent person, and not only from those who might be considered as representing the public users of the court system. We do not consider that the involvement of an independent person in the role we envisage would undermine the independence of the judiciary. On the contrary, we feel it would enhance public confidence in the arrangements we are proposing by removing any perception, however false that would be in fact, that a review by a judicial figure would not be independent.

8.10 Responsibility for dealing with issues of conduct for the judiciary would be conferred on the Lord President, as Head of the Judiciary. We would provide in statute only a framework of powers, leaving the Lord President to determine the detail.

8.11 No definition of what amounts to conduct falling below the standard expected of a member of the judiciary would be made. We anticipate that the required standards would be determined by the judiciary and set down in a code of conduct or judicial ethics under the authority of the Lord President or, perhaps, the Judicial Council.

8.12 The framework in the primary legislation would provide for the following.

- a) The Lord President, as Head of the Judiciary, would have power to give any member of the judiciary formal advice, a formal warning or a reprimand.
- b) The Lord President would be given a general power to delegate functions of the conduct scheme to other members of the judiciary as he considered appropriate.
- c) The Lord President would have a general power to suspend from office any judicial office holder in circumstances where the Lord President was satisfied that such suspension was necessary to maintain public confidence in the judiciary. Suspension would continue until recalled by the Lord President. Salary would continue to be paid throughout the period of suspension.

- d) The Lord President would have a general rule making power allowing him to determine the procedure to be followed in dealing with issues of judicial conduct, including:
- i) declining to investigate complaints which were directed at the merits of a judicial decision, vexatious, trivial or lacking any supporting evidence;
 - ii) appointing other members of the judiciary to investigate any complaint and make a recommendation to him or her as to the appropriate course of action;
 - iii) advising the judge of the complaint and obtaining his or her response;
 - iv) obtaining information to determine the matter.
- e) The right of the judge complained about to have the merits of a decision and the recommendation reviewed by two other judges, but only when the recommendation was that a formal warning or reprimand should be given.
- f) Where the recommendation of an investigation by a single judge was that continuing fitness for office should be referred to a statutory tribunal, it would at the Lord President's discretion whether to agree to a request by the judge complained of that the matter be reviewed by two judges.
- g) The right of the complainer to have an independent person review the administration of the case to ensure the set procedures had been followed. This independent person would have power to refer any case to the Lord President where there had been a failure to follow procedures. The independent reviewer would have no power to review the decision reached, or any penalty imposed.
- h) Investigation of complaints would be confidential, and the outcome, while made known to the complainer, would not be the subject of any publicity except where the Lord President considered that it would be in the interests of the administration of justice for the outcome to be given some publicity.

CHAPTER 9

RE-EMPLOYMENT OF RETIRED JUDGES AND SHERIFFS

What was proposed?

9. In Chapter 9 of the consultation paper we proposed an arrangement that would allow a sheriff principal to engage a retired sheriff in the same way that the Lord President is presently able to invite a retired judge to sit. We also proposed that the consent of Ministers would not be required in either case.

What views were expressed in the consultation?

9.2 This proposal was almost unanimously welcomed.

How do we intend to proceed?

9.3 We have prepared draft sections to implement this proposal. These are sections 13 and 14 in the draft Bill.

CHAPTER 10

THE OFFICE OF TEMPORARY JUDGE

What was proposed?

10.1 In Chapter 11 of the consultation paper we set out proposals to place the tenure of temporary judges on a similar basis to that enjoyed by part-time sheriffs. We also sought views on whether appointment as a temporary judge should fall within the remit of the judicial appointments board.

What views were expressed in the consultation?

10.2 There was a body of opinion that favoured the board's having a role in the appointment of temporary judges, although this was balanced by strong contrary views that favoured the present arrangements.

How do we intend to proceed?

10.3 We explained in Chapter 6 of this paper why we have decided to include the office of temporary judge in the remit of the judicial appointments board. We also explained why we were distinguishing appointments of serving and former sheriffs principal and sheriffs.

10.4 Our proposals for strengthening the tenure of the office of temporary judge are set out in paragraphs 11.7 and 11.8 of the consultation paper. We have not yet developed these into draft sections as the arrangements for providing temporary judicial assistance in the Court of Session and High Court are closely related to the view that is taken on the proposals for unification of the judiciary, which in turn depends upon the current discussions with the judiciary on the governance of the Scottish Court Service.

CHAPTER 11

ELIGIBILITY FOR APPOINTMENT AS A JUDGE OF THE COURT OF SESSION

What was proposed?

11.1 In Chapter 12 of the consultation paper we asked for views on whether eligibility for appointment as a judge of the Court of Session should be extended to all practising solicitors.

What views were expressed in the consultation?

11.2 There was no consensus in the responses to this question. Extending eligibility was supported by the solicitor branch of the profession. There was also support from outside the profession where extending eligibility was seen as an important step to increasing greater diversity among the judiciary. On the contrary was a strongly held view that experience of pleading before the superior courts, or service as a sheriff, was an essential qualification for appointment as a judge of the Court of Session. The Lord President, the judges, the Sheriffs Principal and the Faculty of Advocates all considered experience of pleading before the superior courts as an essential qualification. Some from outside the legal profession and the judiciary questioned how a lawyer with no experience of appearing before the superior courts could be qualified to be a judge in those courts. However there was some acceptance that there was an argument for extending eligibility to solicitors who have extended rights of audience in either the Court of Session or the High Court.

How do we intend to proceed?

11.3 We have taken careful note of what has been said in the consultation, and the weight of opinion on both sides. Having balanced the arguments, we do not think that it would be right to extend eligibility for appointment to the Court of Session bench to all solicitors at this time. To do so would fail to take account of the arrangements that were made in 1990 when eligibility was extended to a broader group of solicitors. Under those arrangements, solicitors who had held rights of audience before both the Court of Session and High Court for a continuous period of five years became eligible to seek appointment as a judge. As so few solicitors have sought rights in both courts, this reform has not had an opportunity to bring forward candidates. We consider that the next logical step in extending eligibility would be to give the 1990 reforms that opportunity by adjusting the qualification to take account of the fact that solicitors are choosing to specialise in Court of Session work or High Court work. What we propose to do therefore is amend the 1990 Act to extend eligibility for appointment as a judge of the Court of Session to solicitors who, for a continuous period of not less than five years, have held rights of audience in either the Court of Session or the High Court of Justiciary.

11.4 It was suggested to us that the qualifying period should be ten years. This view was not universally held and we do not propose to make any change. A solicitor who has five years rights of audience may also have many years prior legal experience. All candidates for appointment would of course have to satisfy the judicial appointments board that they were appointable on merit.

CHAPTER 12

THE SCOTTISH COURT SERVICE

12.1 The issue of judicial involvement in the governance of the Scottish Court Service is not new. Most recently, the agency review⁸ led by Douglas Osler in 2005 concluded that the Court Service should remain an agency but proposed that the judiciary should have a role on its Board. The report was written before the publication of the consultation paper, but the questions it raised were familiar at the time of the review. In its conclusions, the report of the agency review anticipated the possible unification of the judiciary and recommended that agency status be revisited:

“further consideration of the relationship between a, by then, unified judiciary ... and the SCS should be undertaken in three years time.”

12.2 There were some strong views in the consultation on the link between the unification of the judiciary and the governance of the Court Service. Put simply, the view was that the Lord President should not take an overall responsibility for the efficient disposal of business in all courts without having authority over the administrative support for those courts. We understand the force of that argument, and have therefore entered into more detailed discussion about how more judicial authority over the Court Service would work in practice, taking into account the continuing strategic role of Scottish Ministers, accountability to Parliament and the need for strong working relationships with other bodies in the justice system.

12.3 We recognise that we did not consult specifically on proposals to change the way the Court Service is governed, and we would not wish to make any change without hearing the views of all those with an interest in this matter. Discussion on the details is continuing, but the following features have emerged as likely to have a place in a revised governance model. We would especially welcome thoughts on these.

- (i) The Court Service should be overseen by a non-executive board, chaired by the Lord President.
- (ii) Other directors on the board should have a range of different backgrounds and interests, including representatives of the different levels of the judiciary and a nominee from the Scottish Executive Justice Department.
- (iii) The chief executive would report to the Court Service Board, which would set overall policy for, and monitor the performance of, the Court Service, taking account of strategic priorities agreed between the board and Ministers. Within the framework set by the board, the chief executive would have delegated authority to take operational decisions.
- (iv) Resources would be allocated to the Court Service by Ministers in line with the agreed strategic priorities, and subject to approval by Parliament.

⁸ http://www.scotcourts.gov.uk/library/Agency_Review.pdf

- (v) The chief executive would be the accountable officer, in line with sections 14 and 15 of the Public Finance and Accountability (Scotland) Act 2000, and would be required to report as appropriate to the Parliament and to Ministers on the performance of the Court Service and its use of public funds.
- (vi) From time to time the Lord President, as Chair of the Court Service Board, might also provide an account of policy set by the Board to Parliament.

12.4 Including these features would move us away from the concept of the judiciary as customers of the Scottish Court Service. Rather, it would put the Lord President in the position as head of the courts, where he or she would have the necessary authority and the resources at his or her disposal to ensure that court business was managed in the interests of justice. A reformed Court Service under the chairmanship of the Lord President would continue to work with other bodies to improve the overall effectiveness of the justice system.

12.5 As we have said earlier in this paper, the greater involvement of the judiciary in the work of the Scottish Court Service offers the potential to make real changes for the benefit of all who use, or rely upon, the services of the courts. The ongoing discussions with the judiciary, and the comments that we receive to this paper, will help us decide what is the right provision to make.

DRAFT JUDICIARY (SCOTLAND) BILL

This section of the paper contains a draft Judiciary (Scotland) Bill. We would expect to add to this once the discussions with the judiciary on the governance of the Court Service have been concluded and, as we anticipate, further discussion on the detailed provisions to unify the judiciary under the Lord President has taken place.

Part 4 of the Bill contains provisions based on those passed by the Scottish Parliament in June 2006 under the emergency bill procedure. We said at that time that we would bring these provisions before the Parliament again for more reflective consideration than was possible under the emergency procedure. There was limited opportunity to consult on the provisions in the 2006 Act. We would therefore invite further comment on these provisions.

The explanatory notes that accompanied the 2006 Act are available on the website of the Office of Public Sector Information.⁹

⁹ http://www.opsi.gov.uk/legislation/scotland/en2006/aspn_20060009_en.pdf

Judiciary (Scotland) Bill

DRAFT

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DRAFT

Judiciary (Scotland) Bill

An Act of the Scottish Parliament to make provision about the judiciary (including provision for the purposes of section 95(8) and (9) of the Scotland Act 1998 (c.46)).

PART 1

JUDICIAL INDEPENDENCE

1 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, and
 - (d) all with responsibility for matters relating to the judiciary or otherwise to the administration of justice, where that responsibility is to be discharged only in or as regards Scotland.
- (2) The First Minister, the Lord Advocate and the Scottish Ministers must, in particular, under subsection (1), not seek to influence particular judicial decisions through any special access to the judiciary.
- (3) In this section “the judiciary” means the judiciary of—
 - (a) the Supreme Court, or
 - (b) any other court established under the law of Scotland.

PART 2

JUDICIAL APPOINTMENTS

Judicial Appointments Board for Scotland

2 The Judicial Appointments Board for Scotland

- (1) There is established a body to be known as the Judicial Appointments Board for Scotland, and referred to in this Act as “the Board”.
- (2) Schedule 1 makes further provision about the Board, including provision about its membership.

3 Functions of the Board

- (1) The functions of the Board are—
 - (a) to recommend to members of the Scottish Executive individuals for judicial appointments, and
 - (b) generally to provide advice to members of the Scottish Executive in connection with judicial appointments.
- (2) A member of the Scottish Executive—
 - (a) must not exercise a judicial appointment function in relation to any judicial appointment until the Board has made a recommendation in relation to the appointment under subsection (1)(a), and
 - (b) in deciding whom to appoint (or, as the case may be, to nominate or recommend for appointment), must have regard to the Board's recommendation.
- (3) In this section—

“judicial appointment” means an appointment to any judicial office within the Board's remit (on which see section 4);

“judicial appointment function” means a function of the First Minister or the Scottish Ministers under any enactment of making a judicial appointment, or nominating or recommending an individual for such an appointment.

4 Judicial offices within the Board's remit

- (1) The judicial offices within the Board's remit are—
 - (a) the office of judge of the Court of Session,
 - (b) the office of Chairman of the Scottish Land Court,
 - (c) the office of temporary judge (except in any case where the individual to be appointed to the office is or has been a sheriff principal or a sheriff),
 - (d) the office of sheriff principal,
 - (e) the office of sheriff,
 - (f) the office of part-time sheriff, and
 - (g) such other judicial offices as the Scottish Ministers may by order made by statutory instrument specify.
- (2) The Scottish Ministers may specify a judicial office under subsection (1)(g) only if the First Minister or the Scottish Ministers have the function of making appointments to the office, or of nominating or recommending individuals for such appointments.
- (3) A statutory instrument containing an order under subsection (1)(g) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) In subsections (1)(g) and (2) and this subsection, “judicial office” means—
 - (a) judge of any court,
 - (b) member of any tribunal,
 - (c) any other office or appointment exercising functions of a judicial nature,and includes any part-time or temporary judicial office.

5 Independence of the Board

- (1) The Board, in the exercise of its functions, is not to be subject to the direction or control of any member of the Scottish Executive.
- (2) Subsection (1) is subject to section 10(2) (Scottish Ministers' power to direct form and content of Board's annual report).

6 Selection to be on merit and good character

- (1) This section applies where the Board is, for the purpose of exercising its function under section 3(1)(a) in relation to any judicial appointment, selecting an individual or individuals to be recommended by it for appointment.
- (2) Selection must be solely on merit.
- (3) The Board may select an individual only if it is satisfied that the individual is of good character.

7 Encouragement of diversity

- (1) The Board must, in exercising its functions, have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for judicial appointments.
- (2) Subsection (1) is subject to section 6.

8 Guidance

- (1) The Scottish Ministers may issue guidance to the Board as to the procedures to be followed by it in the exercise of its functions.
- (2) Such guidance may, in particular, relate to the manner in which the Board is to publicise vacancies and identify candidates for any appointment.
- (3) The Board must, in exercising its functions, have regard to any guidance issued by the Scottish Ministers under this section.
- (4) Before issuing any guidance under this section, the Scottish Ministers must—
 - (a) consult the Lord President and the Board, and
 - (b) after doing so, lay a draft of the proposed guidance before the Scottish Parliament.
- (5) The Scottish Ministers must publish any guidance issued by them under this section.

9 Confidentiality of information

- (1) Any person (whether or not a member of the Board or its staff) who has provided or obtained confidential information in connection with the exercise of the Board's functions must not disclose the information unless the disclosure is authorised.
- (2) Information is confidential for the purposes of subsection (1) if it relates to an identified or identifiable individual.
- (3) Disclosure of information is authorised for the purposes of subsection (1) only so far as it is—
 - (a) made with the consent of the individual to whom the information relates,

- (b) necessary for the purposes of the exercise by the Board of its functions,
 - (c) required for the purposes of any legal proceedings, whether criminal or civil, (including for the purposes of the investigation of any offence or suspected offence), or
 - (d) authorised or required by any other enactment.
- (4) This section does not prevent the disclosure of information which is already, or has previously been, in the public domain.
- (5) Any disclosure of information in breach of the duty imposed by subsection (1) which causes loss or damage to the individual to whom the information relates is actionable at the instance of that individual.

10 Annual report

- (1) The Board must submit to the Scottish Ministers annually a general report on the exercise of the Board's functions during the year to which the report relates.
- (2) In preparing the report, the Board must comply with any directions given by the Scottish Ministers as to the form and content of the report.
- (3) The Scottish Ministers must lay before the Scottish Parliament a copy of each report submitted to them by the Board under subsection (1).
- (4) The Board must publish each report submitted by it to the Scottish Ministers under subsection (1).

Appointment of Lord President and Lord Justice Clerk

11 Appointment of Lord President and Lord Justice Clerk

- (1) This section applies where a vacancy arises, or is expected to arise, in the office of Lord President or the office of Lord Justice Clerk.
- (2) The First Minister must establish a panel in accordance with schedule 2.
- (3) The function of the panel is to recommend to the First Minister individuals who are suitable for appointment to fill the vacancy.
- (4) The First Minister—
- (a) must not, for the purposes of section 95(2) of the Scotland Act 1998 (c.46), nominate any individual for appointment to fill the vacancy until the panel has made its recommendation under subsection (3), and
 - (b) in deciding whom to nominate for the purposes of that section, must have regard to the panel's recommendation.

12 Selection to be on merit and good character

- (1) This section applies where a panel established under section 11(2) is selecting an individual or individuals to be recommended by it as suitable for appointment.
- (2) Selection must be solely on merit.
- (3) The panel may select an individual only if it is satisfied that the individual is of good character.

*Re-employment of retired judges and sheriffs***13 Re-employment of retired judges**

In section 22(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73) (re-employment of retired judges)—

- (a) the words “with the consent of the Scottish Ministers” are omitted, and
- (b) in paragraph (a), after “Session” there is inserted “(and did not cease to hold that office by virtue of section 95(6) of the Scotland Act 1998 (c.46))”.

14 Re-employment of retired sheriffs principal and sheriffs

After section 14 of the 1971 Act there is inserted—

“14A Re-employment of retired sheriffs principal and sheriffs

- (1) A sheriff principal may, if it appears to him to be expedient as a temporary measure in order to facilitate the disposal of business in the sheriff courts of the sheriffdom, appoint a qualifying former sheriff principal or sheriff to act as a sheriff of that sheriffdom during such period or on such occasions as the sheriff principal thinks fit.
- (2) A qualifying former sheriff principal is someone who—
 - (a) ceased to hold that office other than by virtue of an order under section 12E of this Act, and
 - (b) has not reached the age of 75 years.
- (3) A qualifying former sheriff is someone who—
 - (a) last held that office for the sheriffdom for which the appointment is to be made,
 - (b) ceased to hold that office other than by virtue of an order under section 12E of this Act or by being appointed as a sheriff principal, and
 - (c) has not reached the age of 75 years.
- (4) A person appointed under subsection (1) above is not to be treated as a sheriff for the purposes of any statutory provision or rule of law relating to—
 - (a) the appointment, retirement, removal or disqualification of sheriffs,
 - (b) the tenure of office and oaths to be taken by sheriffs, or
 - (c) the remuneration, allowances or pensions of sheriffs.
- (5) But, otherwise, such a person is to be treated for all purposes as a sheriff of the sheriffdom for which the person is appointed (and so may perform any of the functions of a sheriff of that sheriffdom).
- (6) The Scottish Ministers may pay to, or in respect of, a person appointed under subsection (1) above such remuneration or allowances as they may determine.
- (7) Despite subsection (1), the period during which or an occasion on which a person appointed under that subsection may act under that appointment does not extend beyond or is not to be after the person reaches the age of 75 years.
- (8) Despite the expiry (whether by virtue of subsection (7) above or otherwise) of any period for which a person is appointed under subsection (1) above—

- (a) the person may attend at a sheriff court for the purpose of continuing to deal with, giving judgment in, or dealing with any matter relating to, any case begun before the person while acting under that appointment, and
 - (b) for that purpose, and for the purpose of any proceedings arising out of any such case or matter, the person is to be treated as acting, or as the case may be, having acted, under that appointment.
- (9) In this section—
- (a) “sheriff principal” includes “temporary sheriff principal” only in the first reference in subsection (1), and
 - (b) “sheriff” does not include “part-time sheriff” or “honorary sheriff”.

PART 3

REMOVAL OF JUDGES AND SHERIFFS

Judges

15 Tribunal to consider fitness for judicial office

- (1) The First Minister—
- (a) must, when requested to do so by the Lord President, and
 - (b) may, in such other circumstances as the First Minister thinks fit,
- constitute a tribunal to investigate and report on whether a person holding a judicial office to which this section applies is unfit to hold the office by reason of inability, neglect of duty or misbehaviour.
- (2) The judicial offices to which this section applies are—
- (a) the office of Lord President,
 - (b) the office of Lord Justice Clerk,
 - (c) the office of judge of the Court of Session,
 - (d) the office of Chairman of the Scottish Land Court, and
 - (e) the office of temporary judge.
- (3) The First Minister may constitute a tribunal under subsection (1)(b) only if—
- (a) the Lord President has been consulted (unless the tribunal is to consider the Lord President’s fitness for office),
 - (b) the Lord Justice Clerk has been consulted (if the tribunal is to consider the Lord President’s fitness for office).
- (4) A tribunal constituted under this section is to consist of—
- (a) two individuals who hold, or have held, high judicial office (“judge members”),
 - (b) one individual who is, and has been for at least 10 years, an advocate or solicitor, and
 - (c) one individual who does not hold (and has never held) high judicial office and is not (and never has been) an advocate or solicitor.
- (5) “High judicial office” has the meaning given by section 60 of the Constitutional Reform Act 2005 (c.4).

- (6) At least one of the judge members must be a member of the JCPC.
- (7) At least one of the judge members must hold, or have held, office as a judge of the Court of Session.
- (8) The selection of persons to be members of a tribunal under this section is to be made by the First Minister, with the agreement of—
 - (a) the Lord President (unless the tribunal is to consider the Lord President's fitness for office),
 - (b) the Lord Justice Clerk (if the tribunal is to consider the Lord President's fitness for office).
- (9) If only one of the judge members is a member of the JCPC, that person shall chair the tribunal.
- (10) If both of the judge members are members of the JCPC, the First Minister must appoint one of them to chair the tribunal.
- (11) The member who chairs the tribunal has a casting vote if necessary.
- (12) "JCPC" means Judicial Committee of the Privy Council.

16 Suspension during investigation

- (1) Where the Lord President has requested that the First Minister constitutes a tribunal under section 15, the Lord President may, at any time before the tribunal reports to the First Minister, suspend the person who is to be, or is, the subject of the investigation, from office.
- (2) Such a suspension lasts until the Lord President orders otherwise.
- (3) A tribunal constituted under section 15 may, at any time before the tribunal reports to the First Minister, recommend to the First Minister that the person who is the subject of the tribunal's investigation is suspended from office.
- (4) Such a recommendation must be in writing.
- (5) Where the First Minister receives such a recommendation, the First Minister may suspend the person from office.
- (6) Such a suspension lasts until the First Minister orders otherwise.
- (7) Suspension under this section from the office of Lord President, Lord Justice Clerk, judge of the Court of Session or Chairman of the Scottish Land Court does not affect payment of salary for the office in respect of the period of suspension.

17 Further provision about tribunals

- (1) A tribunal constituted under section 15 may require any person—
 - (a) to attend its proceedings for the purpose of giving evidence, or
 - (b) to produce documents in the person's custody or under the person's control.
- (2) But a person on whom such a requirement is imposed is not obliged to answer any question or produce any document which he or she would be entitled to refuse to answer or produce in a court in Scotland.
- (3) The Lord President may by regulations made by statutory instrument make provision as to the procedure to be followed by and before tribunals constituted under section 15.

- (4) The Scottish Ministers may pay such remuneration to, and expenses of, members of tribunals constituted under section 15 as they think fit.
- (5) The Scottish Ministers must pay such expenses as they consider are reasonably required to be incurred to enable a tribunal constituted under section 15 to carry out its functions.

18 Report of tribunal

- (1) The report of a tribunal constituted under section 15 must—
 - (a) be in writing,
 - (b) contain reasons for its conclusion, and
 - (c) be submitted to the First Minister.
- (2) The First Minister must lay the report before the Scottish Parliament.

19 Temporary judges: removal from office

- (1) A person may be removed from office as a temporary judge by the First Minister.
- (2) But he or she may be removed only if—
 - (a) a tribunal constituted under section 15 has reported to the First Minister that he or she is unfit to hold that office by reason of inability, neglect of duty or misbehaviour, and
 - (b) the First Minister has laid the report before the Scottish Parliament.

Sheriffs

20 Consideration of fitness for, and removal from, shrieval office

For section 12 of the 1971 Act there is substituted—

“Consideration of fitness for, and removal from, shrieval office

12A Tribunal to consider fitness for shrieval office

- (1) The Scottish Ministers—
 - (a) must, when requested to do so by the Lord President of the Court of Session, and
 - (b) may, in such other circumstances as they think fit,
constitute a tribunal to investigate and report on whether a person holding a shrieval office to which this section applies is unfit to hold the office by reason of inability, neglect of duty or misbehaviour.
- (2) The shrieval offices to which this section applies are—
 - (a) the office of sheriff principal,
 - (b) the office of sheriff, and
 - (c) the office of part-time sheriff.
- (3) The Scottish Ministers may constitute a tribunal under subsection (1)(b) above only if the Lord President has been consulted.
- (4) A tribunal constituted under this section is to consist of—

- (a) one individual who is a qualifying member of the Judicial Committee of the Privy Council (on which see subsection (5) below),
 - (b) one individual who holds the relevant shrieval office (on which see subsection (6) below),
 - (c) one individual who is, and has been for at least 10 years, an advocate or a solicitor, and
 - (d) one individual who is not (and never has been) a qualifying member of the Judicial Committee of the Privy Council, who does not hold (and never has held) an office to which this section applies and who is not (and never has been) an advocate or solicitor.
- (5) A qualifying member of the Judicial Committee of the Privy Council is someone who is a member of that Committee by virtue of section 1(2)(a) of the Judicial Committee Act 1833 (c.41) (that is, someone who is a member of the Privy Council who holds, or has held, high judicial office).
- (6) The relevant shrieval office is—
- (a) where the investigation is to be of a person’s fitness to hold the office of sheriff principal, that office,
 - (b) where the investigation is to be of a person’s fitness to hold the office of sheriff or part-time sheriff, the office of sheriff.
- (7) The selection of persons to be members of a tribunal under this section is to be made by the Scottish Ministers, with the agreement of the Lord President of the Court of Session.
- (8) The person mentioned in subsection (4)(a) is to chair the tribunal and has a casting vote if necessary.

12B Suspension during investigation

- (1) Where the Lord President of the Court of Session has requested that the Scottish Ministers constitute a tribunal under section 12A of this Act, the Lord President may, at any time before the tribunal reports to the Scottish Ministers, suspend the person who is to be, or is, the subject of the investigation, from office.
- (2) Such a suspension lasts until the Lord President orders otherwise,
- (3) A tribunal constituted under section 12A of this Act may, at any time before the tribunal reports to the Scottish Ministers, recommend to the Scottish Ministers that the person who is the subject of the tribunal’s investigation is suspended from office.
- (4) Such a recommendation must be in writing.
- (5) Where the Scottish Ministers receive such a recommendation, they may suspend the person from office.
- (6) Such a suspension lasts until the Scottish Ministers order otherwise.
- (7) Suspension under this section from the office of sheriff principal or sheriff does not affect payment of salary for the office in respect of the period of suspension.

12C Further provision about tribunals

- (1) A tribunal constituted under section 12A of this Act may require any person—
 - (a) to attend its proceedings for the purpose of giving evidence, or
 - (b) to produce documents in the person's custody or under the person's control.
- (2) But a person on whom such a requirement is imposed is not obliged to answer any question or produce any document which the person would be entitled to refuse to answer or produce in a court in Scotland.
- (3) The Lord President of the Court of Session may by regulations made by statutory instrument make provision as to the procedure to be followed by and before tribunals constituted under section 12A of this Act.
- (4) The Scottish Ministers may pay such remuneration to, and expenses of, members of tribunals constituted under section 12A of this Act as they think fit.
- (5) The Scottish Ministers must pay such expenses as they consider are reasonably required to be incurred to enable a tribunal constituted under section 12A of this Act to carry out its functions.

12D Report of tribunal

- (1) The report of a tribunal constituted under section 12A of this Act must—
 - (a) be in writing,
 - (b) contain reasons for its conclusion, and
 - (c) be submitted to the Scottish Ministers.
- (2) The Scottish Ministers must lay the report before the Scottish Parliament.

12E Removal from office

- (1) A person may be removed from the office of sheriff principal, sheriff or part-time sheriff by the Scottish Ministers.
- (2) But he or she may be removed only if—
 - (a) a tribunal constituted under section 12A of this Act has reported to the Scottish Ministers that he or she is unfit to hold that office by reason of inability, neglect of duty or misbehaviour, and
 - (b) the Scottish Ministers have laid the report before the Scottish Parliament.
- (3) Removal from the office of sheriff principal or sheriff is to be effected by the making by the Scottish Ministers of an order by statutory instrument.
- (4) Such a statutory instrument—
 - (a) is to be subject to annulment in pursuance of a resolution of the Scottish Parliament,
 - (b) is not to be made so as to come into effect before the expiry, in relation to the instrument, of the period of 40 days mentioned in article 11 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096).

12F Interpretation of sections 12A to 12E

In sections 12A to 12E of this Act—

- (a) “office of part-time sheriff” means an appointment (or re-appointment) as a part-time sheriff; and references to removal or suspension from that office are to be construed accordingly,
- (b) a reference to the office of sheriff principal does not include a reference to an appointment as a temporary sheriff principal,
- (c) a reference to the office of sheriff does not include a reference to the office of honorary sheriff.”

PART 4**SENIOR JUDICIARY: VACANCY, INCAPACITY AND SUSPENSION****21 Functions of the Lord President during vacancy, incapacity or suspension**

- (1) Subsection (2) applies during any period when—
 - (a) the office of Lord President is vacant,
 - (b) the Lord President is incapacitated, or
 - (c) the Lord President is suspended.
- (2) During such a period—
 - (a) any function of the Lord President is exercisable instead by the Lord Justice Clerk,
 - (b) anything that falls to be done in relation to the Lord President falls to be done instead in relation to the Lord Justice Clerk,
 - (c) any function of the Lord Justice Clerk is exercisable instead by the senior judge of the Inner House, and
 - (d) anything that falls to be done in relation to the Lord Justice Clerk falls to be done instead in relation to the senior judge of the Inner House.
- (3) For the purposes of this section—
 - (a) the Lord President is to be regarded as incapacitated only if the First Minister has received a declaration in writing signed by at least 5 judges of the Inner House declaring that they are satisfied that the Lord President is incapacitated,
 - (b) in such a case, the Lord President is to be regarded as incapacitated until the First Minister has received a declaration in writing signed by at least 5 judges of the Inner House declaring that they are satisfied that the Lord President is no longer incapacitated.
- (4) Except in any period during which section 22(2) applies, the judges of the Inner House mentioned in subsection (3)(a) and (b) must include the Lord Justice Clerk.
- (5) The First Minister must send a copy of a declaration received under subsection (3)(a) or (b) to the Presiding Officer of the Scottish Parliament.
- (6) The reference in subsection (2)(a) to functions of the Lord President does not include the function of participating in a panel established under section 11(2) in connection with a vacancy, or an expected vacancy, in the office of Lord Justice Clerk.

22 Functions of the Lord Justice Clerk during vacancy, incapacity or suspension

- (1) Subsection (2) applies during any period when—
 - (a) the office of Lord Justice Clerk is vacant,
 - (b) the Lord Justice Clerk is incapacitated, or
 - (c) the Lord Justice Clerk is suspended.
- (2) During such a period—
 - (a) any function of the Lord Justice Clerk (including any function exercisable by virtue of section 21) is exercisable instead by the senior judge of the Inner House,
 - (b) anything that falls to be done in relation to the Lord Justice Clerk (whether or not by virtue of that section) falls to be done instead in relation to the senior judge of the Inner House,
 - (c) any function exercisable by the senior judge of the Inner House by virtue of that section is exercisable instead by the second senior judge of the Inner House, and
 - (d) anything that falls to be done in relation to the senior judge of the Inner House by virtue of that section falls to be done instead in relation to the second senior judge of the Inner House.
- (3) For the purposes of this section—
 - (a) the Lord Justice Clerk is to be regarded as incapacitated only if the First Minister has received a declaration in writing signed by at least 5 judges of the Inner House declaring that they are satisfied that the Lord Justice Clerk is incapacitated,
 - (b) in such a case, the Lord Justice Clerk is to be regarded as incapacitated until the First Minister has received a declaration in writing signed by at least 5 judges of the Inner House declaring that they are satisfied that the Lord Justice Clerk is no longer incapacitated.
- (4) Except in any period during which section 21(2) applies, the judges of the Inner House mentioned in subsection (3)(a) and (b) must include the Lord President.
- (5) The First Minister must send a copy of a declaration received under subsection (3)(a) or (b) to the Presiding Officer of the Scottish Parliament.

23 Sections 21 and 22: supplementary

- (1) Where—
 - (a) any function is exercisable by, or anything falls to be done in relation to, the senior judge of the Inner House by virtue of section 21 or 22, and
 - (b) that judge is unavailable,the function is exercisable by, or the thing falls to be done in relation to, the second senior judge of the Inner House.
- (2) Where—
 - (a) any function is exercisable by, or anything falls to be done in relation to, the second senior judge of the Inner House by virtue of section 22(2)(c) or (d) or subsection (1) of this section, and
 - (b) that judge is unavailable,

the function is exercisable by, or the thing falls to be done in relation to, the next senior judge of the Inner House who is available.

24 Sections 21 to 23: interpretation

- (1) In sections 21 to 23—
 - (a) “incapacitated”, in relation to the Lord President or the Lord Justice Clerk, means unable by reason of ill health to exercise the functions of the office concerned,
 - (b) “suspended” means suspended from office under section 16,
 - (c) a reference to the senior judge, the second senior judge or the next senior judge of the Inner House is to be construed by reference to seniority of appointment to a Division of the Inner House,
 - (d) a reference to—
 - (i) any function of the Lord President includes any function of the Lord Justice General,
 - (ii) anything that falls to be done in relation to the Lord President includes anything that falls to be done in relation to the Lord Justice General,
 - (iii) the functions of the office of Lord President includes the functions of the office of Lord Justice General.
- (2) Where any other enactment makes provision for the exercise of any function of the Lord President by the Lord Justice Clerk, this Act does not affect the operation of that enactment except in relation to any period during which section 21(2) applies.

PART 5

GENERAL PROVISIONS

25 Consequential modifications

- (1) In section 11A of the 1971 Act, subsection (2) is repealed.
- (2) Section 11C of the 1971 Act is repealed.
- (3) In section 11D(1) of the 1971 Act, for “Regulations under section 11A or section 11C and orders” substitute “Orders”.
- (4) The Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 (SI 1999/1017) is revoked.
- (5) The Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 (asp 9) is repealed.

26 Interpretation

In this Act—

“the Lord President” means the Lord President of the Court of Session,

“the Inner House” means the Inner House of the Court of Session,

“judge of the Inner House” means judge of the First or Second Division of that House, other than the Lord President or the Lord Justice Clerk,

“office of temporary judge” means an appointment under section 35(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40); and references to removal or suspension from that office are to be construed accordingly,

“the 1971 Act” means the Sheriff Courts (Scotland) Act 1971 (c.58),

“office of part-time sheriff” means an appointment under section 11A, or a reappointment under section 11B(5) or (7), of the 1971 Act.

27 Commencement and short title

- (1) The preceding provisions of this Act come into force in accordance with provision made by order made by statutory instrument by the Scottish Ministers.
- (2) An order under this section may—
 - (a) make different provision for different purposes,
 - (b) include transitional or transitory provision or savings.
- (3) This Act may be cited as the Judiciary (Scotland) Act 2007.

SCHEDULE 1
(introduced by section 2(2))

THE JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

Membership

- 1 (1) The Board consists of—
 - (a) the legal members, and
 - (b) a number of lay members equal to the total number of legal members.
- (2) It is for the Scottish Ministers to appoint the members of the Board.

The legal members

- 2 (1) The legal members of the Board comprise—
 - (a) one judge of the Court of Session (other than the Lord President and the Lord Justice Clerk),
 - (b) one sheriff principal,
 - (c) one sheriff,
 - (d) one advocate practising as such in Scotland, and
 - (e) one solicitor practising as such in Scotland.
- (2) Each of those categories of membership is referred to in this schedule as a “legal membership category”.
- (3) The Scottish Ministers may by order made by statutory instrument modify sub-paragraph (1) so as to increase or decrease (but not to zero) the number for the time being specified in it of any legal membership category.
- (4) A statutory instrument containing an order under sub-paragraph (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (5) The Scottish Ministers may appoint a judge of the Court of Session to be a member of the Board only if the judge has been nominated for appointment by the Lord President.
- (6) The Scottish Ministers may appoint a sheriff principal to be a member of the Board only if the sheriff principal has been nominated for appointment by or on behalf of the sheriffs principal acting collectively.
- (7) In sub-paragraph (1)—
 - (a) the reference to a sheriff principal does not include a temporary sheriff principal, and
 - (b) the reference to a sheriff does not include a part-time sheriff or an honorary sheriff.

The lay members

- 3 (1) Each lay member is to be an individual who—
 - (a) is resident in Scotland,

- (b) does not fall within any legal membership category, and
 - (c) has not held any judicial office in any part of the United Kingdom.
- (2) In sub-paragraph (1)(c), “judicial office” has the meaning given by section 4(4).

Persons disqualified from membership

- 4 A person is disqualified from appointment, and from holding office, as a member of the Board 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, or
 - (f) a civil servant.

Term of office

- 5 (1) A member holds office for such period of not more than 3 years as the Scottish Ministers, at the time of appointment, may determine.
- (2) A person who is or has been a member may be re-appointed (whether in the same or a different capacity) for further periods.
- (3) However, a person may not hold office as a member for periods (whether or not consecutive) totalling more than 9 years.
- (4) A member’s appointment ceases—
- (a) on expiry of the member’s period of appointment,
 - (b) on the member becoming disqualified from holding office as a member,
 - (c) in the case of a legal member, on the member ceasing to fall within the legal membership category under which the member was appointed,
 - (d) in the case of a lay member, on the member ceasing to be qualified for appointment as a lay member.
- (5) However, the Scottish Ministers may direct that a member whose appointment would otherwise cease by virtue of sub-paragraph (4) is to continue to hold office despite that sub-paragraph.
- (6) Such a member continues to hold office for such period as the Scottish Ministers may specify in the direction.
- (7) A direction under sub-paragraph (5) may be given in relation to a member before or after the occurrence of an event specified in sub-paragraph (4).

Resignation and removal of members

- 6 (1) A member of the Board may at any time resign office by giving notice in writing to the Scottish Ministers.

- (2) The Scottish Ministers may, by notice in writing, remove a member from office if, after consulting as required by sub-paragraph (3), they are satisfied that the member—
 - (a) has failed without reasonable excuse to discharge the functions of a member for a continuous period of 6 months,
 - (b) has been convicted of any offence,
 - (c) has become insolvent,
 - (d) is otherwise unfit to be a member or unable for any reason to discharge the functions of a member.
- (3) Before deciding whether to remove a member (referred to as “the member concerned”) under sub-paragraph (2), the Scottish Ministers must consult—
 - (a) the Chairing Member (unless that is the member concerned), and
 - (b) the Lord President.
- (4) For the purposes of sub-paragraph (2)(c) a member becomes insolvent on—
 - (a) the approval of a voluntary arrangement proposed by the member,
 - (b) being adjudged bankrupt,
 - (c) the member’s estate being sequestrated,
 - (d) entering into a debt arrangement programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), or
 - (e) granting a trust deed for creditors.

Chair of the Board

- 7 (1) The Scottish Ministers must appoint one of the lay members to chair the Board.
- (2) That member is referred to in this Act as the “Chairing Member”.
- (3) The Chairing Member holds office as such for such period of not more than 3 years as the Scottish Ministers, at the time of appointment, may determine.
- (4) A member who is or has been the Chairing Member may be re-appointed for further periods.
- (5) The Chairing Member may at any time resign office by giving notice in writing to the Scottish Ministers.
- (6) The Scottish Ministers may, by notice in writing, remove the Chairing Member from office if, after consulting the Lord President, they are satisfied that the member—
 - (a) has failed without reasonable excuse to discharge the functions of the Chairing Member for a continuous period of 6 months, or
 - (b) is otherwise unfit to be the Chairing Member or unable for any reason to discharge the functions of the Chairing Member.
- (7) During any period when there is a vacancy in the office of the Chairing Member, the functions of the Chairing Member may be exercised by another lay member nominated by the Board.
- (8) During any period when the Chairing Member is for any reason unable to act, the functions of the Chairing Member may be exercised by another lay member nominated—

- (a) by the Chairing Member, or
 - (b) if the Chairing Member is unable to make such a nomination, by the Board.
- (9) A member exercising the Chairing Member's functions under sub-paragraph (7) or (8) is referred to in this Act as the "Acting Chairing Member".
- (10) Sub-paragraphs (7) and (8) apply to the Acting Chairing Member as they apply to the Chairing Member.

Temporary members

- 8 (1) The Scottish Ministers may, at the request of the Chairing Member, appoint an individual to be a temporary member of the Board if they are satisfied as to the matters specified in sub-paragraph (2).
- (2) Those matters are—
- (a) that a member of the Board (the "absent member") is likely to be unable to discharge the functions of a member for any period of time (the "period of absence") not exceeding 6 months, and
 - (b) that it is necessary for the proper exercise by the Board of its functions during that period that a temporary member be appointed to take the place of the absent member during the period of absence.
- (3) The Scottish Ministers may appoint an individual to be a temporary member only if—
- (a) in the case where the absent member is a legal member, the individual falls within the legal membership category under which the absent member was appointed,
 - (b) in the case where the absent member is a lay member, the individual is qualified for appointment as a lay member.
- (4) Before appointing a temporary member, the Scottish Ministers must consult—
- (a) the Chairing Member, and
 - (b) the Lord President.
- (5) A temporary member takes the place of the absent member and, accordingly, the absent member is not to be counted as a member while the temporary member holds office.
- (6) A temporary member's appointment ceases on—
- (a) the period of absence coming to an end, or
 - (b) the expiry of the period of 6 months from the date of appointment,
- (which ever occurs first).
- (7) A person whose appointment as a temporary member ceases may nonetheless continue to act as a member so far as that is necessary for the purpose of concluding consideration of a judicial appointment which the Board is in the course of considering at the time the person's appointment ceases.
- (8) Otherwise, the provisions of this schedule apply to a temporary member as they apply to any other member, and references in this schedule to a member of the Board are to be read accordingly.

Fees and expenses

- 9 (1) Each member of the Board is entitled to such fees and expenses as the Scottish Ministers may determine.
- (2) It is for the Scottish Ministers to pay those fees and expenses.
- (3) The Scottish Ministers may determine different fees and expenses for different members.

Administrative support

- 10 The Scottish Ministers must provide, or ensure the provision of, such staff, property and services as they consider the Board requires for the purposes of its functions.

Procedure

- 11 (1) The Board may determine its own procedure, including the quorum for its meetings.
- (2) However, the Chairing Member is not to have a casting vote.

Committees and delegation

- 12 (1) The Board may establish committees and may delegate the exercise of any of its functions to a committee.
- (2) Sub-paragraph (1) does not affect the Board's responsibility for the exercise of its functions.

Validity of proceedings

- 13 The constitution of the Board and the validity of its proceedings are not affected by any—
- (a) vacancy in the membership of the Board,
- (b) defect in the appointment of any member, or
- (c) disqualification of any person from holding office as a member of the Board.

Board to fall within remit of Commissioner for Public Appointments in Scotland

- 14 In the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), in schedule 2 (which lists the authorities appointments to which are subject to the remit of the Commissioner for Public Appointments in Scotland), under the heading “advisory bodies”, insert, at the appropriate place in alphabetical order—

“The Judicial Appointments Board for Scotland”.

Code of conduct for members

- 15 In the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7), in schedule 3 (which lists the devolved public bodies required to produce a code of conduct for their members under that Act), insert, at the appropriate place in alphabetical order—

“The Judicial Appointments Board for Scotland”.

Maladministration

16 (1) In the Scottish Public Services Ombudsman Act 2002 (asp 11), in schedule 2 (which lists the authorities subject to investigation under that Act), in Part 2 (entries amendable by Order in Council), after paragraph 25 insert—

“25A The Judicial Appointments Board for Scotland”.

- (2) The Board must make such arrangements as it considers appropriate for the investigation by it of any complaints of maladministration made to it by an individual concerning the manner in which the Board has exercised its functions in relation to the individual.
- (3) The Board must take reasonable steps to ensure that any individuals in relation to whom it exercises functions are made aware of the arrangements made under sub-paragraph (2).

Freedom of information

17 In the Freedom of Information (Scotland) Act 2002 (asp 13), in schedule 1 (which lists the Scottish public authorities subject to that Act), in Part 7 (other authorities), before paragraph 69 insert—

“68A The Judicial Appointments Board for Scotland”.

SCHEDULE 2
(introduced by section 11(2))

PANELS ESTABLISHED UNDER SECTION 11(2)

Constitution of panel

- 1 (1) A panel established under section 11(2) in connection with a vacancy, or an expected vacancy, in the office of Lord President is to comprise—
 - (a) the Chairing Member of the Judicial Appointments Board for Scotland (“the Board”),
 - (b) one of the other lay members of the Board nominated by the Chairing Member, and
 - (c) two qualifying judges (on which see paragraph 3) nominated by the First Minister.
- (2) A panel established under section 11(2) in connection with a vacancy, or an expected vacancy, in the office of Lord Justice Clerk is to comprise—
 - (a) the Chairing Member of the Board,
 - (b) one of the other lay members of the Board nominated by the Chairing Member,
 - (c) the Lord President, and
 - (d) one qualifying judge nominated by the First Minister.
- (3) This is subject to paragraph 2.

Vacancies etc.

- 2 (1) If the Chairing Member of the Board is unable for good reason to participate in a panel, that Member's place on the panel is to be taken by a lay member of the Board nominated by the Chairing Member.
- (2) If the office of the Chairing Member is vacant, or if that Member is unable for any reason to make a nomination for the purposes of sub-paragraph (1), that Member's place on the panel is to be taken by another lay member of the Board nominated by the Board.
- (3) If the Lord President is unable for good reason to participate in a panel, the Lord President's place is to be taken by a qualifying judge nominated by the Lord President.
- (4) During any period when section 21(2) applies, or if the Lord President is unable for any reason to make a nomination for the purposes of sub-paragraph (3), the Lord President's place on the panel is to be taken by a qualifying judge nominated by the First Minister.

Qualifying judges

- 3 (1) The qualifying judges are—
 - (a) those judges of the Supreme Court of the United Kingdom who have held office as judges of the Court of Session, and
 - (b) the judges of the Court of Session, except the Lord President.
- (2) But—
 - (a) the Lord Justice Clerk is not a qualifying judge in relation to a panel to be established in connection with an expected vacancy in that office, and
 - (b) a judge is a qualifying judge in relation to a panel only if the judge has given to the First Minister notice that the judge is not willing to be appointed to the vacancy in connection with which the panel is to be established.

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