

JUDICIARY AND COURTS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Judiciary and Courts (Scotland) Bill introduced in the Scottish Parliament on 30 January 2008:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 6–PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill makes substantive provision in relation to 4 main policy areas (judicial independence, the judiciary including the provision of a statutory basis for the Judicial Appointments Board, the courts and new arrangements for the governance of the Scottish Court Service (“the SCS”). However the overarching objective for the Bill is to modernise and improve the court system through strengthening the role of Scotland’s judiciary.

5. Part 1 provides a statutory guarantee of the continued independence of the judiciary in Scotland.

6. Part 2 provides for the Lord President of the Court of Session to be the head of the Scottish judiciary; sets out procedures in relation to the vacancy, incapacity and suspension of the senior judiciary; provides a statutory basis for the Judicial Appointments Board and the criteria for the appointment of the Lord President and the Lord Chief Justice; sets out the eligibility criteria for appointment as a judge of the Court of Session and arrangements for retired and temporary judicial office holders; and makes provision for a scheme for judicial conduct and the removal of judges and sheriffs.

7. Part 3 provides for matters relating to the judiciary and the Court of Session; responsibilities and powers in relation to sheriff courts; and responsibilities in relation to justice of the peace courts.

8. Part 4 sets out the new governance arrangements for the SCS establishing it as a body corporate and detailing its functions, membership, powers and responsibilities.

9. Part 5 contains a range of general provisions including an interpretation section and provision about subordinate legislation making powers.

PART 1 – JUDICIAL INDEPENDENCE

Section 1 – Guarantee of continued judicial independence

10. Section 1 places a duty on the First Minister, the Lord Advocate, the Scottish Ministers and any other persons who have responsibility for matters relating to the judiciary or the

administration of justice in Scotland to uphold the continued independence of the judiciary. In doing so it also sets out two specific duties for the purpose of upholding that independence.

11. The first is a duty on the First Minister, the Lord Advocate and the Scottish Ministers not to seek to influence judicial decisions through any special access to the judiciary. “Special access” is intended to refer to any access which they may have which a member of the general public may not. However this duty would not limit what may be said on their behalf in court in the course of presenting any case in which they are a party.

12. The second is a duty on the First Minister, the Lord Advocate and the Scottish Ministers to have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions.

PART 2 – THE JUDICIARY

Chapter 1 – Head of the Scottish Judiciary

Section 2 – Head of the Scottish Judiciary

13. This section unifies the judiciary under the Lord President by establishing the Lord President as the head of the Scottish judiciary and placing a number of responsibilities on the Lord President. These responsibilities are: the efficient disposal of business in the Scottish courts; representation of the views of the Scottish judiciary to the Scottish Parliament and to the Scottish Ministers; the laying of written representations before Parliament on matters of importance relating to the Scottish judiciary or to the administration of justice in Scotland; the welfare, training, guidance of judicial office holders; and establishment and operation of a conduct scheme for the judiciary.

14. In order to facilitate the efficient disposal of business in the courts, subsection (3) gives the Lord President a power to give directions to sheriffs principal and places a duty on sheriffs principal to comply with such directions. These directions relate to administrative matters, so that the business of the courts may run efficiently. This power would not, for example, enable the Lord President to give a direction concerning a judicial decision. This power is mirrored in sections 44 and 55 which amend the Sheriff Courts (Scotland) Act 1971 (c.58) (“the 1971 Act”) and the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) (“the 2007 Act”) respectively to give the same power to sheriffs principal in relation to sheriffs, justices of the peace, stipendiary magistrates and staff of the SCS. This power of the sheriffs principal is subject to the Lord President’s overarching power of direction.

Section 3 – Delegation of functions

15. This section enables the Lord President to delegate his or her functions as set out in section 2(2) to other judges (referred to as “judicial office holders” in the Bill and defined in section 39). Subsection (2) places restrictions on this delegation, namely that the following functions cannot be delegated: the Lord President’s function of making and maintaining arrangements to secure the efficient disposal of business in sheriff courts and justice of the peace courts (“JP courts”); and the Lord President’s function of making rules for the judicial conduct scheme under section 26(1).

Chapter 2 – Senior judiciary: vacancy, incapacity and suspension

Section 4 – Lord President

16. This section makes various provisions for when the office of the Lord President of the Court of Session – the most senior judge in Scotland – is vacant, or when the Lord President is either incapacitated or suspended. This section together with sections 5, 6, 7 and 8 re-enact, with minor modifications, the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 (asp 9) which is repealed by paragraph 6 of schedule 5.

17. In any of these circumstances, subsection (2) provides that the functions of Lord President will be carried out instead by the Lord Justice Clerk, and that the functions of the office of Lord Justice Clerk will, in turn, be carried out by the senior Inner House judge. Subsection (2) also makes clear that all of the functions of the Lord President and the Lord Justice Clerk are covered. For example, the Lord President has statutory functions in relation to a wide range of tribunals, he has responsibility for making appointments to, for example, the Lands Tribunal for Scotland and he also has various rule-making powers. There are a number of provisions that require others to consult with the Lord President, or seek his approval, in the course of their activities. For example Ministers must consult with the Lord President before they appoint persons as temporary judges. All of these functions are covered in addition to his judicial functions.

18. Subsections (3)(a) and (4) provide for a decision that the Lord President is incapacitated. It is for the judges of the Inner House to decide this, and a majority of their number must sign a written declaration to this effect, which must be supplied to the First Minister. A majority of judges is calculated in accordance with section 7(3). The Lord Justice Clerk must be one of those judges except where subsection (5) applies, that is, where the Lord Justice Clerk is incapacitated, suspended or there is a vacancy in the office in terms of section 5, or where the judges making the declaration are satisfied that the Lord Justice Clerk is incapacitated in terms of section 7(4). Once the written declaration is received by the First Minister, the provisions of the Bill for incapacity take effect.

19. No procedure is required in the case of a vacancy or suspension. As soon as the office of Lord President becomes vacant for any reason (for instance on the death, resignation, removal or retirement of the office holder) or when the Lord President is suspended, subsection (2) will take effect.

20. The powers under the Bill will cease to have effect on one of three events occurring. The first would be the assumption of office of a new Lord President where there has been a vacancy. The second is when the First Minister receives a written declaration signed by a majority of Inner House judges that they are satisfied the Lord President is no longer incapacitated. This is provided for in subsection (3)(b). There is no requirement that the same judges sign both declarations. The third is if the Lord President's period of suspension ceases and he or she resumes office.

21. Subsection (6) requires the First Minister to send a copy of either declaration concerning incapacity received from the judges to the Presiding Officer of the Scottish Parliament.

22. Subsection (7) prevents the Lord Justice Clerk, whilst he or she is undertaking the functions of the Lord President during a period of vacancy, incapacity or suspension, from deputising for the Lord President on a panel constituted under section 17(2) to recommend appointment to the office of Lord Justice Clerk.

Section 5 – Lord Justice Clerk

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

Section 6 – Periods when both sections 4 and 5 apply

24. Section 6 makes provision for what would happen were both the Lord President and the Lord Justice Clerk to be incapacitated or suspended at the same time or in the event of both posts being vacant. It provides that in such a situation their functions would be carried out by the two most senior judges of the Inner House. In particular the most senior would carry out the Lord President's functions and the other (i.e. "the second senior judge") would carry out the Lord Justice Clerk's functions.

25. By way of illustration - the Inner House comprises the Lord President, the Lord Justice Clerk, and, in order of seniority, Judges 1, 2, 3, 4, 5, 6, 7, 8 and 9. The Lord President is incapacitated. The Lord Justice Clerk is carrying out the functions of that office, with Judge 1 carrying out the functions of the Lord Justice Clerk. The Lord Justice Clerk becomes incapacitated before the Lord President returns to duty. Following the scheme of this section, Judge 1 then "steps up" and exercises the functions of the Lord President; Judge 2 assumes powers to carry on the functions of the Lord Justice Clerk.

Section 7 – Supplementary

26. Subsections (1) and (2) deal with the possibility that at the point when it becomes necessary to invoke the provisions of sections 4, 5 or 6, the judge of the Inner House who would have taken on the functions, is unavailable. The provisions provide that, in such circumstances, the next most senior judge who is available should take the place of his or her more senior colleague. So using the illustration in paragraph 25, if Judge 2 had been unavailable when the Lord Justice Clerk became incapacitated, Judge 3 would have stepped up to carry out the functions of the Lord Justice Clerk. This will only last during the currency of any such unavailability. This provision may assist in situations where the next most senior judge has judicial or other commitments which would prevent him or her from taking on the additional functions.

27. Subsection (3) sets out which judges will count towards the total number of judges for the purposes of calculating the majority of judges required to sign the declaration in sections 4(3) and 5(3).

28. Subsection (4) makes provision for circumstances when both the Lord President and the Lord Justice Clerk are incapacitated, to address a potential difficulty with the arrangements for

declaring incapacity: if the Lord Justice Clerk were to become incapacitated at the same time as or shortly after the Lord President, the declaration of the Lord President's incapacity under section 4(3)(a) could not proceed because the Lord Justice Clerk would be unable to participate as required by section 4(4) and would not yet have been declared incapacitated under section 5(3)(a) such that section 4(5)(a) would apply. In these circumstances, subsection (3) enables the declaration to proceed without the participation of the Lord Justice Clerk. The provision works in a similar way as regards declarations of incapacity under section 5.

29. Subsection (5) makes it clear that during periods when a judge is carrying out the functions of the Lord President or the Lord Justice Clerk under sections 4 and 5, that judge will continue to receive his or her usual remuneration and will not receive any remuneration due to the Lord President or the Lord Justice Clerk.

Section 8 – Interpretation of Chapter 2

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

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

Chapter 3 – Judicial appointments

Judicial Appointments Board for Scotland

Section 9 – The Judicial Appointments Board for Scotland

32. Subsection (1) establishes the Judicial Appointments Board for Scotland (“the Board”) as a statutory body. The Board is an advisory non-departmental public body which is not a body corporate.

33. Subsection (2) provides that the functions of the Board are to recommend individuals for appointment to the judicial offices within the Board's remit, listed at section 10(1), and to provide advice on those appointments. The Board makes recommendations and provides advice to “members of the Scottish Executive”. This expression is used because some judicial appointment functions are exercised by the First Minister individually (e.g. appointment of judges of the Court of Session, sheriffs principal and sheriffs) and some by the Scottish Ministers

collectively (e.g. appointment of temporary judges and part-time sheriffs). It would therefore be misleading to simply refer here to “the Scottish Ministers” as that would fail to catch appointments functions exercised by the First Minister alone. “Members of the Scottish Executive” also addresses the fact that functions placed on the Scottish Ministers collectively may in practice be exercised by a particular Minister (section 52(3) of the Scotland Act 1998 (c.46) (“the Scotland Act 1998”) provides that “Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Executive”).

34. Subsection (3) makes it clear that the work of the Board is not subject to either the direction or the control of any member of the Scottish Executive or any other person. This ensures that the Board may not be directed or controlled by anyone outside the Board, including the First Minister when he or she exercises appointment powers alone, the Scottish Ministers when they act collectively, junior Scottish Ministers (who are not members of the Scottish Executive by virtue of section 44 of the Scotland Act 1998) and the Lord President.

35. Subsection (4) refers to schedule 1 which sets out matters relating to the Board such as membership, fees and expenses, administrative support and procedures. Schedule 1 is further explained below.

Section 10 – Judicial offices within the Board’s remit

36. The judicial offices within the Board’s remit are listed at subsection (1). Two of the offices listed (“office of temporary judge” and “office of part-time sheriff”) are defined by reference to statutory provision in section 68. The Board’s remit does not extend to the offices of Lord President and the Lord Justice Clerk for which separate provision is made at sections 18 and 19. Subsection (1)(c) provides that the office of temporary judge falls within the Board’s remit except where a candidate already holds certain judicial offices. This means that a person who is already a sheriff, a sheriff principal or the Chairman of the Scottish Land Court may be appointed as a temporary judge without having to be interviewed or selected by the Board.

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

Section 11 – Recommendations of the Board

38. Subsection (1) ensures that only individuals who have been recommended by the Board for appointment to judicial office may be nominated or recommended by the First Minister or Scottish Ministers as applicable.

39. Subsections (2) to (5) set out a formal process to be followed if the relevant Minister decides not to accept a recommendation of the Board. The Minister must explain his or her decision in a notice to the Board and the Board must reconsider the matter and make a further

recommendation. These provisions are intended to enable the Minister to seek clarification or further information in respect of the Board's recommendations.

40. Subsection (6) recognises that both the First Minister and the Scottish Ministers have, in different circumstances, the function of making appointments or nominating or recommending individuals for appointment to judicial office.

Section 12 – Selection criteria

41. Subsection (2) makes it clear that selection must be solely on merit. This is intended to prevent selection on other grounds (e.g. seniority). Merit has not been defined but would encompass the applicants' abilities and competencies in respect of the criteria for the particular judicial office. It is wider than professional knowledge and would extend to attributes such as strong interpersonal skills.

42. In addition, subsection (3) requires that an individual may only be selected if he or she is of good character. This is a test that all candidates must meet after which merit is the sole criterion.

Section 13 – Assessment of legal knowledge, skills and competence

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

Section 14 – Encouragement of diversity

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

Section 15 – Guidance

45. Subsections (1) and (2) confer powers on both the Scottish Ministers and the Lord President to issue guidance to the Board. The power is conferred on both because both have an interest in the work of the Board.

46. Subsection (3) provides a non-exhaustive list of examples of the sorts of issues which may be included in the guidance.

47. Under subsection (4) the Board is required to have regard to any guidance issued under this section. This means that the Board is required to consider the guidance, but the Board is not obliged to follow the guidance provided that the decision not to follow it is not unreasonable.

48. As a safeguard against duplicate or conflicting guidance being issued, subsections (5) and (6) require that the Scottish Ministers consult the Lord President in advance of issuing any guidance and agree any guidance issued by the Lord President. Both the Lord President and the Scottish Ministers must also consult the Board.

49. To ensure transparency, subsections (7), (8) and (9) require that guidance issued under this section must be published and laid before the Scottish Parliament.

Section 16 – Confidentiality of information

50. This section recognises that the Board will be dealing with sensitive and personal information. Subsection (1) prohibits unauthorised disclosures by the Board, its staff or indeed anyone who has been privy to confidential information relating to the appointment to judicial office process. For example, a candidate's referee, who has provided information to the Board, is prohibited from disclosing that information unless the disclosure is authorised, that is, unless subsections (3) applies.

51. Subsection (2) clarifies that in this context, confidential information is information that relates to an identified or identifiable individual. Subsection (4) makes it clear that information given by one person about another person (for example, a reference) is confidential information about both persons.

52. Subsection (3) sets out the limited circumstances in which disclosure of information is authorised, which includes when the subject of the information is content for the information to be disclosed. In the case of a reference, the effect of subsection (4) is that both the candidate and the referee would have to agree to the disclosure. Disclosure is also authorised where either the Board or the Scottish Ministers need to disclose certain information in order to carry out their functions in connection with a judicial appointment (for example, when inviting references or arranging criminal records checks).

53. Under subsection (5), disclosure of confidential information that has already been in the public domain would not breach the subsection (1) duty against unauthorised disclosure.

54. Subsection (6) provides that a disclosure of confidential information which is not authorised under subsection (3), or which discloses information not already in the public domain in terms of subsection (5), is actionable in the civil courts by the subject of the information where he or she can establish that loss or damage has resulted from the disclosure. For example, the situation might arise that Queens Counsel X was a candidate for judicial office and this was disclosed to solicitor Y who would otherwise have appointed X to a complex and lengthy case but decides not to on the basis that X, if successful, would be unable to commit to the case. If X was not successful in obtaining a judicial appointment and later discovered that he or she had been Y's initial choice and had effectively lost out on a significant case, X would be likely to be able to establish loss and would therefore have a right of action.

55. To the extent that information is prohibited from disclosure by this section it is exempt from disclosure under a freedom of information request, by virtue of section 26(a) of the

Freedom of Information (Scotland) Act 2002 (asp 13). That Act applies to the Board by virtue of paragraph 21 of schedule 1 to the Bill.

Section 17 – Annual report

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

Lord President and Lord Justice Clerk

Section 18 – Appointment

57. The arrangements for selecting a Lord President and a Lord Justice Clerk when these respective offices are vacant are set out in section 18 and schedule 2 which require the First Minister to establish a selection panel with the function of making a recommendation to the First Minister about those individuals deemed suitable for appointment.

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

Section 19 – Selection criteria

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

Other Court of Session judges

Section 20 – Eligibility of solicitors for appointment as judges

60. At present those who are eligible for appointment as a judge of the Court of Session are: in terms of article xix of the Union with England Act 1707 advocates of 5 years standing and Writers to the Signet of 10 years standing who have passed the civil law exam two years before appointment; and by paragraph 1 of Schedule 4 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) ("the 1990 Act") sheriffs principal and sheriffs who have served 5 years and solicitors with rights of audience in *both* the Court of Session and High Court of Justiciary for 5 years.

61. This section amends Schedule 4 to the 1990 Act to further extend eligibility to include solicitors with rights of audience for 5 years in *either* the Court of Session or the High Court of

Justiciary. Recommendation for appointment to judicial office is the function of the Judicial Appointments Board for Scotland.

Section 21 – Temporary judges: tenure

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

Section 22 - Re-employment of retired judges

63. Provision in relation to the re-employment of retired judges is made at section 22(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73) (“the 1985 Act”) which enables the Lord President of the Court of Session, with the consent of the Scottish Ministers, to appoint retired judges so that they can give assistance to the Court of Session and the High Court of Justiciary. This section amends section 22(1) of the 1985 Act to remove the requirement on the Lord President to obtain the consent of the Scottish Ministers and to prevent a judge of the Court of Session who has been removed from office under section 95(6) of the Scotland Act 1998, from being re-employed under this section. Such re-employment does not fall within the remit of the Judicial Appointments Board. Similar provision is made in section 24 for the re-employment of retired sheriffs principal and sheriffs.

Sheriffs principal, sheriffs and part-time sheriffs

Section 23 – Appointment of temporary sheriffs principal

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

Section 24 – Re-employment of retired sheriffs principal and sheriffs

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

Section 25 – Appointment of part-time sheriffs

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

Chapter 4 – Judicial conduct

Judicial conduct

Sections 26 and 27 – Rules about investigations etc. and powers of the Lord President

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

68. Section 26(1) provides that the Lord President may make rules for the investigation and determination of issues of judicial conduct and for reviews of any such determinations. Subsection (2) contains a non-exhaustive list of the matters that may be covered by the rules. Subsection (3)(a) would enable the Lord President to, for example, make provision in the rules in terms of subsection (2)(f) for different people to conduct investigations dependent on whether a judge or sheriff was the subject of the investigation. Subsection (3)(b) provides for the publication of these rules.

69. Section 27 enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out at subsection (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and subsection (3) makes it clear that this does not restrict what the Lord President may do informally.

Judicial Complaints Reviewer

Sections 28, 29, 30 and 31 – Judicial Complaints Reviewer, tenure, guidance and the Lord President's powers on referral

70. Section 28 provides for the appointment by the Scottish Ministers (with the consent of the Lord President) of a Judicial Complaints Reviewer ("the Reviewer"). Under subsection (5), certain categories of persons are disqualified from appointment as the Reviewer. This is to ensure the independence of the person appointed from political, ministerial or judicial influence. The functions of the Reviewer are: on request of the complainant or of the judicial office holder who has been the subject of the investigation, to review the handling of an investigation in terms of procedure; where the procedure has not been followed to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures. The Reviewer role is only procedural. The Reviewer is not given the function of reviewing the merits.

71. Section 29 sets out the details of the Reviewer's appointment. Subsection (1) gives the Scottish Ministers the power to determine, with the consent of the Lord President, the period of

tenure and the terms and conditions of appointment of the Reviewer. The circumstances in which the Reviewer may be removed from office are set out at subsection (5). Provision is made at subsection (4) for the Scottish Ministers to effect such a removal and for the consent of the Lord President to be obtained before a removal can take place. Whilst the Reviewer may be re-appointed (subsection (7)) a limit of 5 years is placed on their total, consecutive or otherwise, period of office by subsection (8).

72. Section 30 provides that the Reviewer must comply with any guidance that the Scottish Ministers may issue about the carrying out of the Reviewer's functions. Subsection (2) places a duty on the Scottish Ministers to consult the Lord President before issuing any such guidance.

73. Section 31 provides for the end of the process. It provides that where the Reviewer refers a case to the Lord President under section 28(2)(b) the Lord President may vary or revoke the determination (or part thereof); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers appropriate.

Suspension

Section 32 – Suspension

74. This section makes provision for suspension of judicial office holders where the Lord President considers it necessary for the purpose of maintaining public confidence in the judiciary. Subsection (4) provides that the suspension would be done by the Lord Justice Clerk if the Lord President is unavailable, or where both are unavailable by the senior judge of the Inner House. Such suspension does not affect a judicial office holder's salary. An example of the type of situation in which this might be used is where an alleged incident of a serious nature involving a judicial office holder is reported widely in the press.

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

Chapter 5 – Removal of judges and sheriffs

Judges

Section 33 – Tribunal to consider fitness for judicial office

76. This section provides that the First Minister must set up a tribunal to investigate and report on whether a person is unfit to hold judicial office by reason of inability, neglect of duty or misbehaviour where requested to do so by the Lord President or in other such circumstances as he thinks fit.

77. Section 95 of the Scotland Act 1998 provides for the removal of a judge of the Court of Session and the Chairman of the Scottish Land Court. Subsection (8) of that section provides that the Scottish Parliament may make provision by Act for a tribunal to investigate and report on whether such a judge is unfit for office by reason of inability, neglect of duty or misbehaviour and for the report to be laid before the Parliament. Subsection (9) of that section states what

must be covered by such provision and subsection (11) provides that the tribunal must comprise of at least three persons. A temporary order was made in 1999, namely the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 (SI 1999/1017), pending the coming into force of an Act of the Scottish Parliament dealing with those matters. The provisions in this part of the Bill are to replace those transitory provisions.

78. Subsections (4) to (7) of this section provide that the tribunal is to consist of two judge members (including one member of the Judicial Committee of the Privy Council and one judge or former judge of the Court of Session), one advocate or solicitor with at least 10 years experience and one lay person.

Section 34 – Suspension during investigation

79. This section provides for the suspension of a judge who is being or is to be investigated by a tribunal at the instigation of the Lord President or the First Minister. Suspension is by the former where the Lord President has initiated the investigation and by the latter where the tribunal has recommended it. As with suspension under section 32, suspension under this section does not affect the payment of salary of those judges. Section 95(9) of the Scotland Act 1998 provides that provision may be made for suspension.

Section 35 – Further provision about tribunals

80. This section provides that a tribunal may require any person to attend its proceedings to give evidence or may require any person to produce documents; that the Court of Session may, by act of sederunt, set out the procedures which will apply to these tribunals; and that the Scottish Ministers may pay such remuneration and expenses as are reasonably required. The rules of procedure may cover, for example, notification of the constitution of a tribunal to the judge who is to be investigated; time limits for responding to requests for information; any set form for responding to such requests; and how and by whom the matter is to be investigated.

Section 36 – Report of tribunal

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

Section 37 – Temporary judges: removal from office

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

Sheriffs

Section 38 – Consideration of fitness for, and removal from, shrieval office

83. This section substitutes sections 12A to 12F in place of the existing section 12 of the 1971 Act bringing the provisions into line with that proposed for judges in Part 2 Chapter 5. Section 12 of the 1971 Act provided for the removal of sheriffs from office. No provision is made in the Scotland Act 1998 for removal of sheriffs unlike the position with judges. Section 11C of the 1971 Act (removal of part-time sheriffs from office) is repealed by paragraph 4(3) of schedule 5 to the Bill as these new sections also cover part-time sheriffs.

84. New section 12A provides that the First Minister must set up a tribunal to investigate and report on whether a person is unfit to hold judicial office by reason of inability, neglect of duty or misbehaviour where requested to do so by the Lord President or in other such circumstances as he thinks fit. Subsection (2) of the new section 12A provides that sheriffs principal, sheriffs and part-time sheriffs are all subject to the jurisdiction of such tribunals. Subsection (3) of the new section 12A provides that a tribunal may only be constituted if the Lord President has been consulted. Subsections (4) to (8) provide that the tribunal is to consist of 1 judge who must be a member of the Judicial Committee of the Privy Council, 1 sheriff principal or sheriff, 1 advocate or solicitor of 10 years experience and 1 lay member; that the selection of members is to be made by the First Minister with the agreement of the Lord President and that the member of the JCPC is to chair the tribunal.

85. New section 12B provides for the suspension by the Lord President or the First Minister of the sheriff principal, sheriff or part-time sheriff who is being or is to be investigated. The Lord President has the power to suspend where he or she has requested the First Minister to set up a tribunal. The First Minister has the power to suspend where the tribunal recommends to him or her that the person should be suspended.

86. New section 12C makes the same provision to that for judges in section 35.

87. New section 12D makes the same provision to that for judges in section 36.

88. New section 12E provides that the First Minister may remove a sheriff principal, sheriff or part-time sheriff from office by making an order subject to the negative resolution procedure of the Scottish Parliament. However the tribunal must have reported to the First Minister that the person is unfit and that report must have been laid before Parliament.

PART 3 – THE COURTS

The Court of Session

Section 40 – Maximum number of judges

89. This section amends section 1 of the Court of Session Act 1988 (“the 1988 Act”) by inserting a new subsection (3A) which places a requirement on the Scottish Ministers to consult the Lord President before making an order increasing the number of judges in the Court of

Session. Subsection (3) retains the affirmative resolution procedure and updates the terminology to refer to the Scottish Parliament.

Section 41 – Number of judges of the First and Second Division of the Inner House

90. This section amends section 2 of the 1988 Act to require the Scottish Ministers to consult the Lord President before making an order under subsection (2A) altering the number of senior judges in the two Divisions.

Section 42 – Divisions of the Inner House

91. This section provides for the quorum of a Division of the Inner House to be set by act of sederunt. It does so by repealing section 2(4) of the 1988 Act (which provides for the quorum to be three judges) and inserting a new act of sederunt making power regarding quorum in section 5(ba) of the 1988 Act. This is intended to provide the Court of Session with a flexible power to adjust the quorum of judges to fit the demands of court business. For example the quorum may be reduced to 1 judge to deal with procedural matters whilst the substance of a competent appeal may be dealt with by 3 or more judges, as happens at present. There is a consequential amendment to section 2(3) of the 1988 Act to remove a reference to an extra Division being composed of 3 judges. In addition, provision regarding which judge should preside over an extra Division, and sign its judgments and interlocutors, has been shifted from section 2(3) to the new section 5(ba) power.

The Lands Valuation Appeal Court

Section 43 – Lands Valuation Appeal Court

92. Section 43 amends section 7 of, and inserts a new section 7A into, the Valuation of Lands (Scotland) Amendment Act 1879 (c.42) (“the 1879 Act”). The effect of these amendments is to formally name the court which hears appeals under section 7 of the 1879 Act the “Lands Valuation Appeal Court”, a name used for many years informally and in acts of sederunt. In addition, the amendments introduce new rules regarding the number of judges who sit on that Court by providing for the quorum of the Court to be set by act of sederunt. This is intended to operate in the same way and provide the same flexibility as section 42 will in relation to the quorum of the Inner House of the Court of Session.

Sheriff courts

Section 44 – Sheriff principal’s responsibility

93. Section 15(1) of the 1971 Act confers on sheriffs principal the responsibility for ensuring the speedy and efficient disposal of business in the sheriff courts in their sheriffdoms. Subsection (2) of section 44 replaces section 15 of the 1971 Act. The new section 15(1) re-states this responsibility, bringing the wording in line with the wording of the Lord President’s responsibility in section 2(2)(a). The new subsections (2) and (3) of section 15 re-state the existing section 15(2) of the 1971 Act. The new section 15(4) makes it clear how this responsibility of sheriffs principal and their direction making power relates to the Lord President’s overarching responsibility in section 2(2)(a) and the Lord President’s direction making power in section 2(3).

94. Section 16 of the 1971 Act sets out sheriffs principals' powers in respect of the duties and leave of absence of sheriffs, to support them in their responsibilities for the speedy and efficient disposal of business in the sheriff courts. These powers are subject to the direction of the Scottish Ministers. Subsection (3) of section 44 amends section 16 of the 1971 Act to remove the direction making power of the Scottish Ministers and to make this function subject to the Lord President's overarching responsibility in section 2(2)(a) and the Lord President's direction making power in section 2(3).

95. Section 17 of the 1971 Act provides that a sheriff principal may fix sittings and business of sheriff courts in his or her sheriffdom and sessions for civil business. Subsection (4) of section 44 amends section 17 to make this function subject to the Lord President's overarching responsibility in section 2(2)(a) and the Lord President's direction making power in section 2(3).

96. Section 20 of the 1971 Act provides that the Lord Advocate may issue instructions to procurators fiscal under section 8(1) of the Sheriff Courts and Legal Officers (Scotland) Act 1927 (c.35) for the purpose of ensuring the speedy and efficient disposal of business in the sheriff courts. Subsection (5) of section 44 amends the wording of section 20 of the 1971 Act to bring it into line with the responsibilities imposed on the Lord President in section 2(2)(a) of the Bill and on sheriffs principal in the amended section 15 of the 1971 Act. There is no change in substance.

Section 45 – Repeal of certain responsibilities of Scottish Ministers

97. Section 56 establishes a body corporate to be known as the SCS. Section 57 gives the SCS the function of providing the property, services, officers and other staff required by the Scottish Courts (including the sheriff courts) and the judiciary of those courts. Scottish Ministers role in section 1 of the 1971 Act is therefore redundant and is repealed in this section. This section also repeals the Scottish Ministers' power to give administrative directions in section 9 of the 1971 Act as this role now rests with the Lord President under section 2(3).

Section 46 – Sections 15 to 17 of the 1971 Act: Lord President's default power

98. In recognition of the Scottish Ministers duties and powers in relation to sheriff courts, section 18 of the 1971 Act provided them with a default power which enabled them to step in and take over the functions of a sheriff principal where they considered that he or she was exercising his or her functions in such a way as to prejudice the efficient disposal of business in, or organisation or administration of, the sheriff courts within their sheriffdom or that their actions were not in the interests of the public. The power was intended for use in the case of significant malfunction, for example a sheriff principal issuing an arbitrary instruction excluding certain types of cases from being heard within the courts of their sheriffdom. This section repeals section 18 of the 1971 Act and inserts a new section 17A in that Act which provides the Lord President with an equivalent default power.

Section 47 – Alteration of boundaries of sheriffdoms

99. There are at present 6 sheriffdoms in Scotland, each headed by a sheriff principal. Scottish Ministers have powers under section 2 of the 1971 Act to alter the boundaries of these sheriffdoms, to form new sheriffdoms and to provide for the abolition of sheriffdoms. These

powers are exercisable by order. The Bill shifts responsibility for the deployment of the judiciary to the Lord President in his capacity as head of the Scottish judiciary and the SCS becomes responsible for the provision and resourcing of courts in Scotland. Section 47 therefore makes the necessary consequential changes to section 2 of the 1971 Act to support these changes in responsibility by providing the Lord President with power, exercisable by order, to alter the boundaries of sheriffdoms, to form new sheriffdoms and to provide for the abolition of sheriffdoms. Whilst the Lord President may exercise this power at his or her own volition, subsection (4) makes the exercise of the power subject to the consent of the SCS if as a consequence, any office requires to be abolished. This is because subsection (5) places a duty on the SCS to pay such compensation to anyone who loses his or her office. Subsection (4) also provides that orders, which involve consequential alterations to the sheriff court district boundaries, a requirement to open a new sheriff court or the closure of an existing sheriff court, may only be made on the recommendation of the SCS. Subsection (7) provides that such an order shall be subject to the negative resolution procedure of the Scottish Parliament.

Section 48 – Sheriff court districts and places where sheriff courts are to be held

100. Section 3 of the 1971 Act provides that it is for the Scottish Ministers to decide the arrangement of sheriff court districts and where sheriff courts should be held. These powers were commensurate with their duty to make provision for sheriff courts in Scotland and were exercisable by order. The Bill shifts this responsibility to the SCS and as a consequence this section amends section 3 of the 1971 Act to provide that such changes, which may include the closure of an existing court or the opening of a new court or the alteration of sheriff court districts, will be for the SCS to recommend to the Lord President and for the Lord President to make by order. Subsection (6) provides that such an order shall be subject to the negative resolution procedure of the Scottish Parliament.

Section 49 – Repeal of power to appoint sheriff to assist Scottish Ministers

101. This section repeals section 8 of the 1971 Act as the Scottish Ministers will no longer have a role in respect of the administration of sheriff courts by virtue of the repeal of sections 1 and 9 of the 1971 Act in section 45 of the Bill and therefore their power under section 8 to appoint a sheriff to assist them in relation to the organisation and administration of sheriff courts is no longer appropriate.

Section 50 – Sheriffs principal and sheriffs acting in other sheriffdoms

102. This section replaces references to the Scottish Ministers in section 10 of the 1971 Act with references to the Lord President. It moves the power and responsibility for the movement of sheriffs principal and sheriffs across sheriffdoms from the Scottish Ministers to the Lord President. This is in line with the Lord President's role of securing the efficient disposal of business in all of the Scottish courts, including the sheriff courts, in section 2(2)(a).

Section 51 – Residence and leave of absence of sheriffs principal

103. Section 13 of the 1971 Act gives the Scottish Ministers functions in relation to residence and leave of absence of sheriffs principal. In line with the Lord President's responsibilities in section 2(2)(a), this sections amends section 13 of the 1971 Act to give that role to the Lord

President. Subsection (3) of section 51 amends section 13(2) to clarify that the reference to seven weeks leave in that section is intended to be holiday leave. Subsection (4) adds a new subsection (3) to section 13 to clarify that any other leave should be approved by the Lord President. This would cover, for example, study leave and attendance at conferences.

Section 52 – Number, residence and deployment of sheriffs

104. Section 14 of the 1971 Act provides that the Scottish Ministers may by order prescribe the number of sheriffs to be appointed for each sheriffdom, that they may direct sheriffs as to their residence and as to their sheriff court district. This section amends section 14 by repealing the power to prescribe the number of sheriffs to be appointed for each sheriffdom and transferring the role of the Scottish Ministers to the Lord President.

Section 53 – Leave of absence of sheriffs

105. Section 16 of the 1971 Act gives the Scottish Ministers functions in relation to duties and leave of absence of sheriffs. In line with the Lord President's responsibilities in section 2(2)(a), this section amends section 16 of the 1971 Act to give that role to the Lord President. Paragraph (a) also clarifies that the reference to seven weeks leave in section 16(2) is to holiday leave. Subsection (3) adds a new subsection (2A) to section 16 to clarify that it is for the sheriff principal of the sheriffdom to approve the leave of absence of a sheriff for any other purpose. This would cover for example study leave and attendance at conferences.

Justice of the peace courts

Section 54 – Establishment, constitution etc.

106. Section 59 of the 2007 Act provides the Scottish Ministers with a power to establish Justice of the Peace courts ("JP courts") by order, with reference to particular sheriff court districts. Before making an order establishing JP courts, the Scottish Ministers must consult the sheriff principal for the relevant sheriffdom. Subsection (5) requires the Scottish Ministers, in deciding whether a JP court is necessary, to take account of the amount of summary criminal business and the capacity of other JP or sheriff courts in the sheriffdom. Subsection (6) provides that, where JP courts have been established, the Scottish Ministers may subsequently, by order, provide for the relocation or disestablishment of a JP court. Subsection (7) provides that, before making such an order, the Scottish Ministers must consult the sheriff principal for the relevant sheriffdom. Section 54(2) transfers these responsibilities to the Lord President. This reflects the Lord President's responsibility for securing the efficient disposal of business in the Scottish courts in section 2(2)(a).

107. Section 63(2) of the 2007 Act provides that the Scottish Ministers may amend section 6 (2) of the Criminal Procedure (Scotland) Act 1995 (c.46) so that it provides that a JP court (where not constituted by a stipendiary magistrate) is to be constituted by one JP only. Section 54(3) transfers this power to the Lord President. Section 54(4) amends the procedural requirements in the 2007 Act to provide that the Lord President can make such an order and to make such an order subject to negative, rather than affirmative, resolution procedure.

Section 55 – Sheriff principal’s responsibility

108. Section 61 of the 2007 Act places the responsibility for the efficient administration of justice of the peace courts in the sheriffdom on the sheriff principal. In exercising this responsibility, the sheriff principal may issue administrative directions to those involved in the administration of JP courts (other than the Scottish Ministers). The Scottish Ministers may also issue administrative directions for the purpose of ensuring the efficient administration of JP courts, subject to prior consultation with the sheriff principal.

109. Section 55 substitutes a new section 61 in the 2007 Act. This mirrors the provisions made at section 44 in respect of the responsibilities of sheriff principals for sheriff courts, as described at paragraph 93 above. New subsections (2) and (3) give sheriffs principal the power to give administrative directions to any justice of the peace, including part-time justices of the peace, within their sheriffdom and also the staff of the SCS within their sheriffdom - such directions must be complied with. Administrative directions by their nature must be in pursuance of the sheriff principal’s duty to ensure the efficient disposal of business.

110. Subsection (4) recognises the over arching role of the Lord President in respect of the efficient disposal of business across all courts in Scotland and makes the duties and responsibilities of sheriffs principal subject to that role and to the direction giving power of the Lord President at section 2(3).

PART 4 – THE SCOTTISH COURT SERVICE

111. Part 4 of the Bill establishes a body corporate known as the Scottish Court Service (“the SCS”) whose functions are to provide the administrative support for the Scottish courts, the judiciary of those of courts and certain other specified persons. The existing Executive Agency of the Scottish Government, also known as the SCS, will be replaced by this new body. The new SCS will be part of the Scottish Administration but not part of the Scottish Government (see paragraph below as to the mechanism for achieving this). This is in contrast to the existing SCS which, as an Executive Agency, is part of the Scottish Government and therefore under Ministerial control. The new SCS will consist of 7 judicial members and 6 non-judicial members and will have its own staff of civil servants. It will not be under Ministerial control but it will have to agree a corporate plan with the Scottish Ministers. There is also a default power for the Scottish Ministers to take over the functions of the SCS.

112. Paragraph 1 of schedule 3 to the Bill (which makes further provision about the SCS) provides that the SCS is to be the holder of an office. That paragraph also provides that the SCS is to be the name of both the office-holder and the office itself. The intention is that an order will be made at Westminster under section 104 of the Scotland Act 1998 (power to make provision consequential on legislation of, or scrutinised by, the Parliament) to include the office known as the SCS within the Scottish Administration.

Functions

Section 57 – Administrative support for the Scottish courts and judiciary

113. This section provides for the SCS's principal function of running the court service in Scotland. In doing so the section also provides that they must take into account, in particular, the needs of members of the public and those involved in proceedings in courts and that they must co-operate with others involved in the administration of justice. This latter requirement would cover, for example, cooperation with the Crown Office and Procurator Fiscal Service over the scheduling of criminal cases. The courts covered by this function are the Court of Session, the High Court of Justiciary, the Registration Appeals Court, the Election Court, the Lands Valuation Appeal Court, the sheriff courts, JP courts and such other courts as may be specified by the Scottish Ministers by order.

Section 58 – Administrative support for other persons

114. This section provides that the SCS also has the function of providing administrative support for various other persons. In particular subsection (1)(a) provides that the SCS has the function of providing administrative support for the functions conferred on the Lord President as head of the Scottish judiciary under section 2 of the Bill and support for the Lord President's other non-judicial functions. The latter covers the functions carried out by the Lord President's Private Office in providing support to the Lord President in carrying out a range of statutory and other functions such as powers of appointment, removal and rule-making or rule approval in relation to tribunals and in respect of the Law Society of Scotland, the Scottish Legal Complaints Commission and university ordinances. Subsection (1)(b) provides that the SCS has the function of providing administrative support to the delegate where the Lord President has delegated one or more of his or her functions as head of the Scottish judiciary in section 2 under section 3. Subsection (1)(c) provides that the SCS has the function of providing administrative support to sheriffs principal in carrying out their functions of ensuring the efficient disposal of business in sheriff courts and of the timetabling of business in the sheriff courts in their sheriffdoms.

Section 59 – Appointment etc. of office holders

115. This section transfers the function of appointing various statutory office holders from the Scottish Ministers to the new SCS. Schedule 4 makes the necessary consequential modifications. These office holders are employed by the existing Executive Agency and will transfer to the new body corporate by virtue of paragraph 18 of schedule 3 to the Bill.

Section 60 – Payment of remuneration etc. of certain judicial office holders

116. This section amends the 1971 Act, the 1985 Act and the 1990 Act to provide that the SCS will pay remuneration and allowances to temporary sheriffs principal, part-time sheriffs, re-employed retired judges and temporary judges, with the responsibility for determining the level of that remuneration and those allowances remaining with the Scottish Ministers. This is because budgetary responsibility for the use of temporary judges and sheriffs will rest with the SCS.

Provision of advice etc. to the Scottish Ministers

Section 60 – Provision of advice etc. to the Scottish Ministers

117. This section makes more specific provision to that more general provision in paragraph 15(2)(c) of schedule 3. That paragraph provides that the SCS may do anything it considers necessary or expedient for the purposes of or in connection with its functions including, in particular, providing information and advice. This section provides that the SCS may give information or advice, or make proposals, to the Scottish Ministers on matters relating to its functions or the administration of justice in Scotland. Furthermore this section provides that the Scottish Ministers must have regard to such information, advice or proposals.

Plans and reports

Section 62 – Corporate plans

118. This section places various requirements on the SCS in relation to business planning and gives a role to Scottish Ministers in relation to the form and approval of such plans. The first plan will cover the period from the date the new SCS comes into being until a date to be specified by order. Thereafter plans will be for three year periods, or for such other period as the Scottish Ministers determine by order. Subsection (4)(b) provides for publication of the approved plan (such publication could be on the SCS website).

Ministerial powers

Section 65 – Guidance

119. An example of the type of guidance that might be issued under this section is guidance on high level policies and priorities.

Section 66 – Default power

120. This section provides for the Scottish Ministers to take over the functions of the SCS in the event of serious failure. In that event all of the functions of the SCS would be taken over by the Scottish Ministers. Such action could be taken immediately by the Scottish Ministers and subsection (2) provides for this to be achieved by order. Under section 67(5) the order would be laid in Parliament after coming into effect. If not approved by Parliament it would cease to have effect.

PART 5 – GENERAL

Section 67 – Orders and regulations

121. This section sets out the procedure under which the Scottish Ministers can exercise powers which the Bill gives them to make subordinate legislation. All orders and regulations are to be made by statutory instrument (and will be published as such). Most will be subject to the Scottish Parliament's negative resolution procedure. Orders under section 66(2) (default power) are to be made as described in paragraph 120 above. Commencement orders made under section 72(1) are not subject to parliamentary procedure. Orders modifying the membership of the SCS

under paragraph 2(4) of schedule 3 and orders which are made under section 70(1) which amend primary legislation are subject to the Scottish Parliament's affirmative resolution procedure.

122. The Lord President is also given power to make orders in sections 47 and 48 and the procedure for those orders is set out in those sections.

SCHEDULE 1 – THE JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

Status of the Board

123. Paragraph 1 makes it clear that the Board will not be a servant of the crown, which is appropriate given that the Board is set up as an independent entity, not subject to the direction or control of the Scottish Ministers.

Membership

124. Paragraph 2 makes provision for 3 categories of members: judicial, legal and lay. Whilst the Scottish Ministers are to appoint the legal and lay members it is for the Lord President to appoint the judicial members.

The judicial and legal members

125. Paragraph 3(1) and (2) set out who qualifies as a judicial member and who qualifies as a legal member. The Lord President and Lord Justice Clerk are excluded from judicial membership. There are three judicial members and two legal members. Sub-paragraph (4) provides the Scottish Ministers with an order-making power to modify the judicial or legal membership categories. This power could be used to alter the membership of the Board on a permanent or temporary basis, for example, to add a new category of judicial office or increase the number of members from a particular category. This may be necessary when the Board is asked to deal with a large number of appointments in a short period of time; the Board may require an increased membership to deal with the increased workload. The effect of paragraph 3(5) is that the Scottish Ministers may add judicial and legal members to the Board by order, but may only remove those members already added by order; they may not remove the membership categories set out in sub-paragraphs (1) and (2).

The lay members

126. Paragraph 4 provides that the number of lay members should at all times be the same as the combined total of judicial and legal members. This is to preserve the balance of membership on the Board. At commencement of this Act there would be five judicial and legal members on the Board, therefore five lay members. If the numbers of judicial or legal members were increased by order under paragraph 3(4) the number of lay members would increase by equivalent number. Sub-paragraph (2) sets out 3 criteria which must be fulfilled in order to qualify as a lay member.

Persons disqualified from membership

127. Under paragraph 5, certain categories of persons are disqualified from membership of the Board. This is to ensure the independence of the Board from political or ministerial influence.

Term of office

128. Under paragraph 6(1), members will be appointed initially for a period of no more than 4 years. The actual period of appointment is to be determined by the person making the appointment, which would be the Lord President for judicial members and the Scottish Ministers for legal and lay members.

129. Paragraph 6(2) and (3) enable a member to be re-appointed, but a member's total term of office cannot exceed 8 years. By virtue of paragraph 18, the *Code of Practice for Ministerial Appointments to Public Bodies in Scotland* ("the Code"), issued by the Commissioner for Public Appointments in Scotland under section 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), applies to legal and lay appointments to the Board. The Code may be revised from time to time, therefore the following explanation of the interaction between paragraph 6 and the Code applies only to the edition of the Code dated April 2006, which is the current Code at the date of introduction of this Bill. The Code provides that only one further period of re-appointment to public office is permissible without an open competition to fill the office. Under the Code, read with paragraph 6, a legal or lay member of the Board could be appointed initially for a period of 4 years and then re-appointed for a further 4 years without an open competition being held. The member would then have served the maximum term of office under paragraph 6(3) and could not be re-appointed, even after an open competition. To use a different example, if an individual was initially appointed for 3 years, and perhaps re-appointed without open competition for 2 years, the Code would require the member to re-apply in open competition for any further re-appointment up to their maximum term of office of 8 years under paragraph 6(3).

130. Judicial members' appointments and re-appointment are subject to paragraph 6(1) to (3); however, the Code does not apply to these appointments because they are made by the Lord President, not by the Scottish Ministers.

131. Paragraph 6(4) sets out the various circumstances in which membership of the Board would cease. These include reasons relating to a change in the status of the member, for example, if any category of member becomes a civil servant or member of the Scottish Parliament they are disqualified from membership by virtue of paragraph 5. Another circumstance in which membership of the Board would cease is if the person no longer has the status which qualified them for the appointment in the first place (for example, a lay member becoming a practising solicitor, or a judge retiring from the Bench or being appointed as a Law Lord).

132. To avoid disruption to the work of the Board, paragraph 6(5) provides that should a member's tenure come to an end, the Scottish Ministers in the case of legal and lay members and the Lord President in the case of judicial members may direct that a member's appointment be extended by up to 6 months. This may be helpful in managing the succession of Board members and ensuring continuity of experience.

133. Paragraph 6(7) brings in additional flexibility for membership to be extended (or further extended following a paragraph 6(5) extension) without a direction by the Scottish Ministers or the Lord President, but only where necessary in order for a member to complete consideration of a particular judicial appointment which the Board is dealing with at the time when the member's appointment ceases. For example, if a shrieval member of the Board was due to retire from the Board during an appointments process, the shrieval member could continue in office until he or she has concluded work on that appointments process.

Resignation and removal of members

134. Paragraph 7 sets out the procedure a member wishing to resign should follow. This involves giving notice in writing to whoever appointed them – that is, the Lord President or the Scottish Ministers – and providing a copy of the notice to the other appointing office-holder. For example, a resigning lay member would send their notice to the Scottish Ministers, copied to the Lord President. Sub-paragraph (3) provides that the period of notice is 6 months unless agreed otherwise by office-holder who has appointed the member.

135. Paragraph 8 sets out the procedure for removing a member and the circumstances in which a member may be removed. Responsibility for the removal of judicial members lies with the Lord President. Sub-paragraph (1) provides that removal must be in writing and that the Lord President must consult the Chairing Member of the Board and the Scottish Ministers before satisfying himself that grounds for removal exist. Equivalent procedures are set out at sub-paragraph (2) for the Scottish Ministers in respect of the removal of legal and lay members. However there is no duty to consult the Chairing Member if that member is the subject of the removal. The grounds for removal are listed at sub-paragraph (3).

136. In the event that one of the grounds for removal is satisfied, removal from office is not mandatory. Paragraph 8(1) and (2) leave the Lord President and the Scottish Ministers with discretion in the matter. For example, if a Board member was convicted of a very minor offence that did not give rise to doubt about their fitness to continue in office, the Lord President or the Scottish Ministers may consider that they need not be removed.

137. The conduct of members of the Board is to fall within the remit of the Standards Commission for Scotland. For that reason paragraph 19 applies the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7) to the Board. As a devolved public body the Board must produce a code of conduct for its members.

Chairing Member: appointment and tenure, resignation, removal, vacancy etc.

138. Paragraph 9 places a duty on the Scottish Ministers to appoint one of the lay members as chair to the Board. The Chairing Member's appointment is determined by the Scottish Ministers and is for no longer than 4 years. There is nothing to prevent a member being re-appointed as the Chairing Member, subject to the overall limit of 8 years on their term of office as an ordinary member of the Board under paragraph 6(3).

139. Paragraph 10(1) and (2) make provision for the resignation or removal of the Chairing Member as chair, but not as a member of the board. Paragraph 10(3) to (6) enable the Chairing

Member's role to be filled temporarily from within the Board in the event of a vacancy, or where the Chairing Member is unable to act for any reason.

Temporary members

140. Paragraph 11 makes provision for appointing temporary members to cover periods of absence of Board members, so long as the period of absence does not exceed 6 months. There may be a number of reasons (for example, personal reasons, ill health, other work commitments) why a member is unable to discharge their functions on the Board for a period of time. Under paragraph 11(1) if the Chairing Member is satisfied that the member will be unable to discharge their functions for up to 6 months they may request that the Lord President or the Scottish Ministers appoint a temporary member. Under paragraph 11(3) and (4) the temporary member must fall into the same category as those members they are replacing. For example, if an advocate member is unable to sit on the Board for a period, the temporary member appointed in their place must also be an advocate. Paragraph 11(4)(b) requires temporary lay members to satisfy the general qualification requirements to be a lay member (see paragraph 4(2)).

141. To maintain the legal and lay balance of the Board, paragraph 11(6) makes it clear that during the period of temporary cover, the absent member is not to be counted as a member. The effect of this is that the total number of members of the Board will remain the same. There will be no need to appoint an extra lay member upon the appointment of a temporary legal or judicial member, as might otherwise be required under paragraph 4(1). Under paragraph 11(7) a temporary appointment ceases when the absent member returns or after 6 months, whichever comes first. To ensure that the work of the Board is not unduly disrupted, paragraph 11(8) enables a temporary member to continue acting as a member beyond the 6 month period to conclude any ongoing judicial appointment process with which they are involved, to be concluded. Paragraph 11(9) provides that a temporary member will be otherwise subject to all of the same provisions as apply to an ordinary member of the Board.

Conflicts of interest

142. Paragraph 12 makes very similar provision for substitute members to be appointed where a member of the Board has a conflict of interest that would make it improper for them to be involved in a particular appointment process. It is envisaged that this provision would be used where a member has a close personal relationship with one of the candidates in a particular appointment round.

143. In contrast with paragraph 11, paragraph 12(6) provides that a substitute member does not entirely replace the member who has a conflict of interest; that member may continue to sit on the Board and deal with other matters where no conflict arises. If, for example, the member with the conflict of interest is a judge of the Court of Session, the Board will seek a substitute judge member for that appointment process. There would be nothing to prevent the judge with the conflict of interest from taking part in another appointment process where there is no such conflict, or in any other business of the Board.

144. Paragraph 12(7) provides that a substitute member does not count as a member for the purposes of paragraph 4(1) so there is no need to make any extra lay appointment in the event

that a substitute legal or judicial member is appointed, or to make an extra legal or judicial appointment if a substitute lay member is appointed.

Miscellaneous provisions relating to the Board

145. Under paragraph 13, it is for the Scottish Ministers to determine and pay fees and expenses to Board members. Different fees and expenses may be paid to different categories of member. For example, the Chairing Member may receive a higher rate to reflect the level of responsibility attached to that office. In contrast, judicial members may receive no fees or expenses because they are members of the Board by virtue of the judicial office they hold, for which they already receive a salary.

146. To support the Board in its work, paragraph 14(1) places the Scottish Ministers under a duty to ensure that the Board has sufficient staff, property and services to enable it to carry out its functions. Paragraph 14(2) gives a non-exhaustive list of examples of the services that may be provided to the Board. Appointment of an independent observer could be beneficial where, for example, a person being interviewed for judicial office is a former member of the Board. The presence of an independent observer may reassure other candidates as to the propriety of the Board's selection procedures in these circumstances. Specialist advice may be sought by the Board in relation to certain judicial appointments. For example, the Chairman of the Land Court is a specialist judicial role, and the Board may wish to seek the advice of a person with expertise in land law for the purposes of that appointment. Paragraph 14(3) obliges the Scottish Ministers to consult the Board about the level of support it needs.

147. Paragraph 15 provides that the Board may determine its own procedure and its own quorum. In order to maintain the legal and lay balance of membership, however, the Chairing Member does not have a casting vote. To assist the Board in the exercise of its functions, paragraph 16 allows the Board to establish committees and to delegate its functions to those committees; however, responsibility for those functions remains with the Board as a whole.

148. Paragraph 17 provides that the validity of the Board's proceedings cannot be challenged on the grounds of a vacancy in the membership of the Board, a deficiency in the appointment of a member or the disqualification of a member. This ensures that decisions of the Board cannot be challenged on the grounds of such procedural irregularity alone.

149. Paragraph 18 brings the appointment of legal and lay members to the Board within the remit of the Commissioner for Public Appointments in Scotland ("the Commissioner"). Under section 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), the Commissioner must publish a code of practice ("the Code") for ministerial appointments. The current Code (dated April 2006) includes, amongst other matters, guidelines about the composition of selection panels to select people for appointment to public office. It also provides that a selection panel will normally include a civil servant from the Scottish Government department sponsoring the public body. The Code is silent on whether Ministers or other politicians may sit on a selection panel. The Bill goes further than the Code to ensure that appointments to the Board are as free as possible from political and ministerial influence; paragraph 18(2) and (3) provide that, regardless of what the Code as revised from time to time may say, a selection panel for appointment as a member of the Board should not include any of

the persons disqualified from membership of the Board under paragraph 5 (that is, MPs, MSPs, MEPs, UK Ministers, Scottish Ministers and civil servants). The Code otherwise applies in full to legal and lay appointments to the Board.

150. Paragraph 19 makes the Board a devolved public body to which the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7) (“the 2000 Act”) applies. This means that the Board is under a duty to promote high standards of conduct on the part of its members; that the Board must prepare a code of conduct for members based on a model code prepared by the Scottish Ministers under the 2000 Act; and that the conduct of members is subject to the scrutiny of the Standard Commission for Scotland.

151. Paragraph 20 adds the Board to Part 2 of schedule 2 to the Scottish Public Services Ombudsman Act 2002 (asp 11), so that the Scottish Public Services Ombudsman is able to investigate complaints it receives about the actions of the Board. Paragraph 20(2) and (3) require the Board to put in place appropriate arrangements for investigating any complaints made to the Board about maladministration, and to publicise those arrangements.

152. Paragraph 21 makes the Board subject to the provisions of the Freedom of Information (Scotland) Act 2002 (asp 13) (“the 2002 Act”); however, confidential information that is prohibited from disclosure under section 16 of the Bill would be exempt from disclosure by virtue of section 26(a) of the 2002 Act.

153. Paragraph 22 achieves the transition from the existing non-statutory Board to the statutory Board set up under the Bill by providing that the existing Board will become the first statutory Board on the coming into force of schedule 1.

SCHEDULE 2 – PANELS ESTABLISHED UNDER SECTION 18(2)

154. This schedule sets out the procedures in relation to a panel established under section 18(2) to deal with a vacancy in either the office of the Lord President or the Lord Justice Clerk.

155. Paragraph 1(1) deals with the composition of the panel for a vacancy in the office of the Lord President, which is to include 2 qualifying judges nominated by the First Minister, as further explained in paragraph 3(1). Similar provision is made at paragraph 1(2) in connection with a panel for a vacancy in the office of the Lord Justice Clerk, except that one of the 2 judges nominated by the First Minister is replaced by the Lord President.

156. Paragraph 2(1) makes provision for when the Chairing Member of the Board is unable to take part in either panel. In these circumstances they must nominate another lay member of the Board to take their place. Under paragraph 2(2), if the office of Chairing Member is vacant, or that member is not able to make a nomination, then the Board must nominate another lay member of the Board as a substitute.

157. When the Lord President is unable to take part in a panel dealing with a vacancy in the office of Lord Justice Clerk, he or she may nominate another qualifying judge to sit in his or her place under paragraph 2(3). Paragraph 2(4) provides that where section 4(2) applies, that is,

where the Lord President is incapacitated, suspended, or there is a vacancy in the office, the First Minister is to nominate another qualifying judge to take the Lord President's place.

158. Paragraph 3(2) provides that the Lord Justice Clerk may not sit on a panel to fill a vacancy in that office. Thus a retiring Lord Justice Clerk has no role in the appointment of his or her successor. Paragraph 3(3) provides that in order to qualify to sit on a panel judges must first confirm to the First Minister that they do not wish to be appointed to the office in question. The effect of this is that any judges wishing to be considered for the vacant office will not be considered for appointment to the panel formed in connection with that vacancy.

SCHEDULE 3 – THE SCOTTISH COURT SERVICE

Status of SCS

159. As mentioned in paragraph 112 above paragraph 1 of this schedule establishes the SCS as the holder of an office, which office shall also be known as the SCS, for the purposes of the order to be made under section 104 of the Scotland Act 1998 which will provide that the office known as the SCS is included within the Scottish Administration.

Membership

160. Paragraph 2(3)(d) provides that there shall be three lay members of the SCS.

161. Paragraph 2(5) enables the Scottish Ministers to modify the membership of the SCS by order but only with the consent of the Lord President and only in so far as it does not affect the judicial majority.

Procedure for appointment of members

162. Paragraph 3(1) provides that the Lord President is to appoint the members of the SCS other than the Lord Justice Clerk and the Chief Executive. This is because the Lord Justice Clerk is an *ex officio* member and the Chief Executive is appointed by the SCS as a whole in terms of paragraph 14(1) and not appointed by the Lord President alone. Sub-paragraphs (2) to (4) make provision for regulations to be made prescribing the procedure to be followed for nominations or selection. For example regulations made under this paragraph might provide that the Senators of the College of Justice would nominate the judicial member listed at paragraph 2(2)(c) and that the six sheriffs principal would nominate the judicial member listed at paragraph 2(2)(d).

Term of office

163. Paragraph 5(3)(b) covers the scenario of a person failing to be qualified as a member of the SCS in terms of which they were appointed under paragraph 2(2) and (3). If they failed to remain qualified they would cease to hold office as a member of the SCS. For example, if the solicitor member of the SCS (appointed under paragraph 2(3)(b)) lost his or her practising certificate they would automatically cease to hold office as a member of the SCS under this paragraph.

Suspension of judicial members

164. Paragraph 8 provides that if a judicial member of the SCS is suspended from his or her position as judge, sheriff principal, sheriff or JP, he or she will also be suspended from acting as a member of SCS during that period.

Committees

165. Paragraph 10 enables the SCS to establish committees. For example it may establish an estates committee or an audit committee. A person who is not a member of the SCS, such as an external consultant, may be appointed to be a member of such a committee.

Chief Executive and other staff

166. Paragraph 14 provides that the SCS must appoint a Chief Executive and may appoint such other staff as it considers appropriate. Such staff will be civil servants as they will be within the Scottish Administration as provided for in the section 104 order mentioned at paragraph 159 above.

Power to use local authority premises

167. Paragraph 16 provides for the SCS to require a local authority to let or sub-let premises to the SCS or make such premises available for use by the SCS. Where the SCS requires a local authority to do the former this is subject to agreement on the terms of the lease (including the rent payable) and to the agreement of any third party who has an interest in the premises. Where the SCS requires a local authority to do the latter the SCS must reimburse the authority for any reasonable expenses in respect of heating, lighting and cleaning and must allow the premises to continue to be used for any business normally conducted there. This re-enacts the provisions made in Part 2 of the 1971 Act in relation to sheriff courts and in section 60 of the 2007 Act in relation to JP courts and extends it to all courts for which the SCS is responsible. (Part 2 of the 1971 Act and section 60 of the 2007 Act are repealed by paragraphs 4(5) and 7(a) respectively of schedule 5 to the Bill.) Sub-paragraph (4) provides that the SCS may in turn allow any premises let or used by them under this paragraph to be used by other persons on the condition that it does not adversely interfere with the business normally conducted there. An example might be where the SCS allows part of such premises to be used by the Crown Office and Procurator Fiscal Service.

Transfer of staff

168. Paragraph 18 provides for the statutory office holders listed in section 59(2) of the Bill (who are also currently employed by the Scottish Ministers and therefore meet the requirements in both sub-paragraphs (1)(a) and (b)) and members of staff in the existing SCS to transfer to the new SCS on the date that this paragraph comes into force. Staff on secondment or loan to the existing SCS do not transfer and neither does the existing Chief Executive. Sub-paragraphs (4) and (5) transfer the contracts of employment for those staff from the Scottish Ministers to the SCS. It also provides that the contract of employment of staff is not terminated by the transfer and has effect as though originally made between the person and SCS.

Transfer of property and liabilities

169. Paragraph 19 enables the Scottish Ministers to transfer the property held or used by them for or in connection with the purposes of the Scottish courts or the judiciary of those courts and any property used for the purposes listed in section 57(1) (administrative support for other persons) to the new SCS. It also enables the Scottish Ministers to transfer the corresponding liabilities to the new SCS. In terms of section 66 such an order would be made by negative resolution procedure. Sub-paragraphs (3) to (12) make supplementary provision for such an order (and are similar to the provision made in section 116 of the Scotland Act 1998). Sub-paragraph (3) provides that the order may provide for the creation of rights or interests, etc. and provide for the property etc. to be determined (rather than specified in the legislation itself). Sub-paragraph (4) ensures that the order overrides “any provision (of whatever nature)” that may otherwise prevent, penalise or restrict the transfer. Sub-paragraphs (5) to (10) and (12) make further provision to ensure that rights of pre-emption, etc. do not operate as a result of the transfer; that compensation may be payable to any person who may be prevented from exercising such a right and for the determination of any disputes. Sub-paragraph (10) extends the scope of sub-paragraphs (4) to (9) to cover the creation of rights or interests, or the doing of anything else, in relation to property. Sub-paragraph (11) makes provision for a certificate issued by the Scottish Ministers to be conclusive evidence of a transfer.

SCHEDULE 4 – APPOINTMENT ETC. OF OFFICE HOLDERS: CONSEQUENTIAL AMENDMENTS

170. This schedule makes the necessary modifications to enactments required by section 59.

171. Paragraph 1(1) to (4) amends the Administration of Justice (Scotland) Act 1933 (“the 1933 Act”) to transfer from the Scottish Ministers to the SCS the power to appoint clerks in the Court of Justiciary (section 23(1)); officers of the Court of Session (section 24(1) and (7)); and the Principal Clerk of Justiciary (section 25).

172. Paragraph 1(5) amends section 27 the 1933 Act in respect of the remuneration of officers of the High Court of Justiciary and the Court of Session to insert a provision that the remuneration shall be of such amounts as the SCS may determine. It removes the exemption of the office of the Auditor of the Court of Session from this determination, meaning that the remuneration of that office will continue to be paid by the Scottish Ministers.

173. Paragraph 2 amends the Sheriff Courts and Legal Officers (Scotland) Act 1927 (“the 1927 Act”).

174. Paragraphs 2(2) to (3) amend the 1927 Act to transfer from the Scottish Ministers to the SCS the power to appoint, remove from office and transfer sheriff clerks (section 1); and to appoint sheriff clerk deposes (section 2).

175. Paragraph 2(4) amends section 3 of the 1927 Act to transfer from the Scottish Ministers to the SCS the power to determine that the office of sheriff clerk shall be a full time office and no person appointed to the office may engage directly or indirectly in practice as a law agent or

other employment which will in the opinion of the SCS interfere with the discharge of the duties of the office.

176. Paragraph 2(5) amends section 4 of the 1927 Act to transfer from Scottish Minister to the SCS the power to give directions for the discharge during a period of vacancy or incapacity of the duties of a sheriff clerk or sheriff clerk depute to another officer.

177. Paragraph 2(6) amends section 5 of the 1927 Act to transfer from the Scottish Ministers to the SCS the power to appoint whole time clerks or assistants to a sheriff clerk.

178. Paragraph 2(7) amends section 8 of the 1927 Act to transfer from the Scottish Ministers to the SCS the power to issue instructions as regards sheriff clerks.

179. Paragraph 2(8) amends section 9 of the 1927 Act to transfer from the Scottish Ministers to the SCS the requirement to consent to a deputation to a fit person to act as a depute sheriff clerk.

SCHEDULE 5 – CONSEQUENTIAL AMENDMENTS AND REPEALS

180. Paragraph 1 amends section 2(1)(a) of the Courts of Law Fees (Scotland) Act 1895 to reflect the new budgetary arrangements for the SCS which will not receive its funding from the Scottish Ministers but by virtue of a separate vote in the annual Budget Act.

181. Paragraph 2 makes amendments to the Valuation of Lands (Scotland) Amendment Act 1879 (“the 1879 Act”), consequential to the amendments to the 1879 Act in section 43.

182. Paragraph 3 makes an amendment to the Lands Tribunals Act 1949 (c.42), also consequential to the amendments to the 1879 Act in section 43.

183. Paragraph 4 makes amendments to and repeals parts of the 1971 Act. Sub-paragraph (2) repeals section 11A(2) and is consequential on section 10(1)(f). Sub-paragraph (3) repeals section 11C and is consequential on section 38. Sub-paragraph (4) amends section 11D(1) and is also consequential on sub-paragraph (3). Reference is made to paragraph 167 above for the explanation of sub-paragraph (5). Sub-paragraph (6) amends section 33(4) to remove the role of the Scottish Ministers in appointing a secretary to the Sheriff Court Rules Council.

184. Paragraph 6 repeals the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006. The provisions of that Act are re-enacted with minor modification in Chapter 2 of Part 2 of the Bill.

185. Reference is made to paragraph 167 above for the explanation of paragraph 7(a). Paragraph 7(b) is a consequential amendment on section 57. It repeals subsection 63(6) of the 2007 Act as the new SCS will have the responsibility for the administration of JP courts.

FINANCIAL MEMORANDUM

INTRODUCTION

186. This document relates to the Judiciary and Courts (Scotland) Bill introduced in the Scottish Parliament on 30 January 2008. It has been prepared by Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

187. The overarching aim of the Judiciary and Courts (Scotland) Bill is to improve the justice system by modernising the arrangements for the judiciary, and strengthening their role through greater authority over the Scottish Court Service. The Bill makes substantive provision in relation to judicial independence; the creation of a unified judiciary; the provision of a statutory basis for the Judicial Appointments Board; the introduction of a scheme of conduct for the judiciary and associated appointment issues and new arrangements for the governance of the Scottish Court Service.

Methodology

188. Since the costs arising from the reforms in the Bill all fall on the Scottish Administration, it has not been necessary to produce a Regulatory Impact Assessment. We have, however, considered widely the impact of the policy reforms and have consulted with those likely to be affected, in particular the Scottish Court Service and the Lord President's office. This allows an informed estimate to be made of the impact of the Bill's reforms. Using information from relevant sources, it has been possible to provide a best estimate of the financial consequences of the provisions of the Bill. The provisions in the Bill in the main involve the repositioning of existing resources (for example the costs incurred by the Scottish Court Service; in constituting selection panels under section 18 or tribunals under section 33). Only the direct costs associated with the provisions in the Bill are examined in this document. For the purposes of this Memorandum costs will incur only in the 4 areas identified below:

- Placing the existing Judicial Appointments Board on a statutory footing (Part 2, Chapter 3 of the Bill);
- The office of the Judicial Complaints Reviewer (Part 2, Chapter 4 sections 26 to 31 of the Bill) and
- Establishing the Scottish Court Service (Part 4 of the Bill).
- The conferring of new responsibilities on the Lord President of the Court of Session

COSTS ON THE SCOTTISH ADMINISTRATION

Judicial Appointments Board

189. The Judicial Appointments Board is a non-statutory public body established in 2002 by administrative action. The Board was set up in order to maintain and strengthen judicial independence, to take responsibility for selecting candidates for judicial office out of the hands of the ministers and to make the appointments process more open and transparent.

190. At the time that the Board was established in 2002 it was the intention that after some experience of the new arrangements the Board would be placed on a statutory footing. The provisions in the Bill will not change the functions of the Board or the level of staffing required to support the core work of the Board. Its status will be that of an Advisory Non Departmental Public Body (NDPB) and the staffing and other running costs will continue to be met by the Scottish Government. The annual cost of running the Board is currently around **£440,000**.

191. Whilst there are no significant costs associated directly with placing the Board on a statutory footing, allowance has been made for 1.5 additional staff to provide the new Board with greater capacity for development work. The increased costs associated with this come to **£62,000 per annum**.

Judicial Complaints Reviewer

192. The Bill makes provision for the Lord President to establish a scheme for dealing with issues of judicial conduct. Statute will provide a framework of powers, leaving the Lord President to determine the detail. Currently, statute makes no provision for dealing with issues of judicial conduct short of a question of continuing fitness for office. No sanctions exist for any less serious, but significant, conduct of a nature that would attract disciplinary action, short of dismissal. Paragraphs 207 to 211 below describes the impact of the provisions on the office of the Lord President.

193. The Bill also makes provision for the appointment of a Judicial Complaints Reviewer. This provides both the complainer and the subject of the complaint with right to have an independent person review the administration of the case to ensure the set procedures have been followed. It is not the Scottish Government's intention to create an overly bureaucratic system which requires extensive support. Rather the post will be relatively light touch, receiving what support (administrative and other) it requires from the Scottish Court Service

194. Currently, in the region of 180 complaints per year are made about the Scottish judiciary either directly to the judiciary or to the Courts Directorate of the Scottish Government. The vast majority of these relate to sheriffs whilst a smaller number concern judges. A significant proportion of complaints received relate to sentencing and other judicial decisions. This is despite the fact that decisions made by the judiciary in exercise of their duties are only subject to review by the Appeal Courts and neither the Scottish Ministers nor the Scottish Government may intervene in individual cases. There are also a proportion of vexatious complaints and complaints without substance.

195. The current number of complaints amounts to 0.5% of the total sitting days across the Court of Session, High Court of Justiciary and the 49 Sheriff Courts for 2005-06¹. The number of total sitting days is projected to rise to 36,500 in 2008-09² which, if the rate of complaints remained constant at 0.5% would mean an annual complaint figure, in the region of 182. However, experience in England and Wales has shown that the very existence of a formal process appears to have resulted in a significant increase in the number of complaints received.

¹ The Scottish Court Service Annual Report and Account 2005-06 (total sitting days c.34,700)

² The Scottish Court Service Corporate Plan 2005-2008 – workload projections for 2008-09.

196. In England, in the year prior to the establishment of the Office for Judicial Complaints (OJC) the Department for Constitutional Affairs had investigated 250 complaints of misconduct. However since its creation the OJC had looked into 1,674³ cases. Whilst these figures are not directly comparable because the latter includes all complaints, not just those relating to judicial conduct, it is nonetheless likely that an increase in the number of complaints - at least initially - may be anticipated.

197. Conversely, the Bill also provides clear responsibility for the welfare, training and deployment of the judiciary. This should over time make a positive contribution to identifying and dealing with inappropriate behaviour at an early stage thus helping to prevent conduct which members of the public may previously have had cause to complain about.

198. On balance, and for the purposes of establishing the likely workload of the Judicial Complaints Reviewer, our best estimate that in the region of 400⁴ complaints, per annum, may be received and that over half may be sifted out at an early stage because they relate to a sentence or judgement rather than conduct, or have no substance. (The OJC reported that 51% of the complaints received in 2006-07 related to a judicial decision.) The equivalent body to the Judicial Complaints Reviewer in England Wales – the Judicial Appointments and Conduct Ombudsman - for the year 2006-07 received 222⁵ conduct related cases, or 27% of the cases dealt with by the OJC. If we apply a similar percentage to the estimate for Scotland this would mean that the Judicial Complaints Reviewer may deal with around 50 cases per year.

199. Taking account of the other responsibilities the Judicial Complaints Reviewer will have, we anticipate that this would involve on average, 8 days per month, receiving appropriate administrative and other support from within the Scottish Court Service.

200. The Judicial Complaints Reviewer will have to be a person who is able to command the respect of the most senior judiciary and for that reason we consider that a daily fee rate equivalent to the chair of an Executive Non Departmental Public Body (NDPB) is appropriate⁶. The costs of the Judicial Complaints Reviewer are therefore estimated to be 96 days at £250 per day (£24,000).

Scottish Court Service

201. The Bill changes the status of the Scottish Court Service (“the SCS”) to that of a statutory body which will be part of the Scottish Administration but independent of the Scottish Government. The SCS will no longer come under the direct authority of the Cabinet Secretary for Justice but will operate within a set of priorities agreed with Scottish Ministers. The cost of running the SCS will be covered by a separate vote in the annual Budget Act.

202. The functions of running the court service will be transferred from the Scottish Ministers to the SCS which will be chaired by the Lord President and have a judicial majority. Members

³ The Office for Judicial Complaints Annual Report 2006-07

⁴ This estimated figure may be over stated but for the purposes of building up costs this was seen as preferable to underestimating.

⁵ Judicial Appointments and Conduct Ombudsman Annual Report 2006-007

⁶ Public Sector Pay Policy: Policy for Senior Public Appointments 2007-008

of the SCS will be appointed by the Chairman. The SCS will determine policy in relation to the Scottish Court Service and oversee implementation of that policy. The SCS will appoint a Chief Executive and staff of the Scottish Court Service who would be civil servants.

203. Changes to the SCS governance arrangements will not achieve any savings. There will be additional costs arising from the processes required to appoint members and the payment of attendance allowances and the expenses of members. An estimate of the cost of these items would be **£15,000 per annum**.

204. SCS already have their own finance, procurement, HR and payroll services. There may be additional costs associated with the purchase of some services from the Scottish Government which are currently provided at no charge e.g. legal services, SEAS, procurement advice etc. By convention however if the Scottish Government did decide to charge for these services a transfer of resources would be made to the SCS.

205. It is not anticipated that there will be additional administrative costs associated with the arrangement of meetings of SCS members. The SCS as it is currently constituted already operates with a strategic board. Similarly costs related to the development of the corporate plan and annual report will remain the same as at present. Existing contracts to which SCS is a joint signatory with the Scottish Government would not be affected.

206. Allowance has also been made for temporary judicial cover so that whilst judges and sheriffs are engaged on duties associated with the SCS, provision may be made for temporary judges or part-time sheriffs to sit in their stead so that the business of the courts is not unduly delayed or affected. Currently 2 members of the judiciary sit on the strategic board of the existing SCS but as there are more judicial office holders on the new board there will be a commensurate increase in judicial time that may require to be covered. Based on an average daily rate for judicial time and an estimated 60 days per year for which judicial cover is required additional costs are estimated as **£40,000 per annum**. Total funding **£55,000 per annum**.

Lord President

207. The Bill provides that the Lord President will be the head of the Scottish judiciary and consequently places a number of new functions on that role. As head of the Scottish judiciary the Lord President will have statutory responsibility to represent the views of the judiciary to Parliament and to Ministers; lay before the Scottish Parliament written representations on matters that appear to him/her to be matters of importance relating to the judiciary or otherwise to the administration of justice; maintain arrangements to secure the efficient disposal of business in the courts of Scotland; maintain appropriate arrangements for the deployment of the judiciary; maintain appropriate arrangements for the welfare, training and guidance of the judiciary; and introduce a scheme of conduct for members of the judiciary.

208. It is anticipated that the Lord President may, in developing processes and procedures and in discharging certain of these duties, wish to involve other judicial officers to assist him. Allowance has therefore been made for temporary judicial cover so that whilst judges and sheriffs are engaged on duties supporting the Lord President with his new responsibilities provision may be made for temporary judges or part-time sheriffs to sit in their stead so that the

business of the courts is not unduly delayed or affected. While precise figures are difficult to reach at this stage, for these purposes we have estimated this annual cost to be, at most, the equivalent of 200 sitting days per year (**£160,000**).

209. The Lord President currently has his own Private Office which comprises of a legal secretary and two deputies (one part-time), a private secretary and a judicial secretary. It is recognised that in order to fully support the Lord President in the exercise of his new functions that increased support will be required. The costs⁷ included are based on an estimate of five additional staff of varying grades plus an allowance for additional running costs. The existing posts within the private office would remain.

210. It is envisaged that these additional staff would offer direct support to the Lord President. They would be responsible for establishing the necessary systems and thereafter the operation and maintenance of those systems, relating to the Lord President functions i.e. a scheme of conduct, manage the increased functions of the office. Additional staff costs are estimated to be in the region of **£250,000** per annum.

211. The proposed increase in staff to support the Lord President will also result in an increased requirement for accommodation and operational support services i.e. property, running costs, human resources etc. In addition the revised governance arrangements will involve an increased workload related to financial procedures. The estimated costs for accommodation are a one-off capital cost of **£200,000** and recurring costs of **£24,000** per annum. Additional operational support services are estimated to cost **£25,000** per annum.

Courts Directorate, Scottish Government

212. The Courts Directorate of the Scottish Government carry out a number of functions in relation to the judiciary. These include the statutory arrangements relating to the appointment of the judiciary, judicial salaries and pensions, handling of complaints about the judiciary as well as the arrangements for minor courts and tribunals. As a result of the provisions in the Bill relating to the governance of the Scottish Court Service and the head of the Scottish judiciary, there will no longer be a requirement for certain functions to be carried out by the Courts Directorate. In the main, only those relating to judicial appointments, salaries and pensions, and the arrangements for minor courts and tribunals will remain.

213. Currently the Courts Directorate comprises 7 full time staff. The annual staff and running costs are around £389,000 (this excludes the Judiciary and Courts (Scotland) Bill Team). An element of the Directorate would still require to be retained to deal with the residual responsibilities falling to the Scottish Ministers and it is anticipated that following commencement of the Bill, Courts Directorate costs will be around £146,000. The balance of work would move to the Lord President and we estimate a saving of **£243,000** which would offset some of the new costs that have been identified.

⁷ Staff costs have been based on the average staff costs for Scottish Government core staff 2006-07. The figures used are gross and include superannuation and national insurance costs.

214. The financial impact of this package have been summarised in the table below. In making a calculation of the financial impact of the Bill, the approach taken has been to err towards a higher rather than a lower figure. Nevertheless, the identified need for new funding is relatively modest at around £0.4m per annum with a one off capital cost of £200,000. All figures are given in £000's and references to the relevant paragraphs of this Memorandum, where more information on particular aspect can be found, are provided in the first column.

Provision (paragraph reference)	2008-09 one-off Capital cost	2008-09 and 2009 -10 Recurrent Costs⁸	Net additional recurrent costs
Judicial Appointments Board (paragraphs 189 - 191)		502 (440)	62
Judicial Complaints Reviewer (paragraphs 192 to 200)		24	24
Scottish Court Service (paragraphs 201 to 206)		55	55
Lord President (paragraphs 207 to 211)			
Judicial cover		160	160
Support staff		250 (243)	7
Support services		25	25
Accommodation	200	24	24
TOTAL	200	1040(683)	357

COSTS ON LOCAL AUTHORITIES

215. The Scottish Government does not expect local authorities to incur any additional costs as result of the changes provided for in this bill.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

216. The Scottish Government does not expect other bodies, individuals or businesses to incur any additional costs as a result of the changes provided for in this bill.

⁸ Costs already incurred in the Justice baseline as shown in brackets

These documents relate to the Judiciary and Courts (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 30 January 2008

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

217. On 30 January 2008, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Judiciary and Courts (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

218. On 29 January 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Judiciary and Courts (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

These documents relate to the Judiciary and Courts (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 30 January 2008

JUDICIARY AND COURTS (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

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