

BAIL, JUDICIAL APPOINTMENTS ETC. (SCOTLAND) ACT 2000 (asp 9)

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Bail, Judicial Appointments etc. (Scotland) Act 2000 (asp 9). They do not form part of the Act and have not been endorsed by the Scottish Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. 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 ACT

3. The Act is in three Parts:

Part 1 amends the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") in relation to bail. It places a duty on the sheriff, or judge of the district court, on the first appearance of every accused person, to consider automatically whether bail should be granted; it extends those provisions and the existing bail provisions to someone who is already in custody; it removes restrictions on the range of offences for which bail may be granted by a sheriff; and it amends the right of the accused to appeal against the refusal of bail.

Part 2 has three Chapters.

Chapter 1 amends the Court of Session Act 1988 in relation to the composition of the Inner House of the Court of Session. It enables the Scottish Ministers to alter, by Order, the number of senior judges in either, or both, Divisions of the Inner House of the Court of Session.

Chapter 2 amends the Sheriff Courts (Scotland) Act 1971 (the "1971 Act") in relation to temporary and part-time sheriffs. It abolishes the office of temporary sheriff and introduces a new office of part-time sheriff.

Chapter 3 amends the District Courts (Scotland) Act 1975 (the "1975 Act") in relation to justices of the peace. It requires a justice to be appointed as a full justice, who can exercise judicial functions, or as a signing justice, who can undertake only a limited range of signing tasks; it allows for delegated legislation to set out requirements in relation to pre-appointment procedures and consultation; it provides new removal procedures for full justices and suspension of full justices, pending an investigation into their fitness for office; it restricts the functions of justices who are also councillors to those of a signing justice.

Part 3 removes from local authorities the right to prosecute in district courts.

4. The schedule to the Act makes minor and consequential amendments. Paragraph 3 of the schedule amends the Education (Scotland) Act 1980 in relation to the prosecution of certain education offences.

PART 1 – BAIL

5. This Part of the Act consists of four sections.

Section 1 (Consideration of bail on first appearance)

6. Section 1 inserts a new section 22A into the 1995 Act.

7. Section 22A(1) imposes a duty on the sheriff or judge of the district court, on an accused person's first appearance, to consider automatically the question of whether the accused should be given bail. At first appearance, the accused person or their legal representative will no longer require to make a bail application before the issue will be considered. This provision applies whether the person has been arrested by virtue of a "petition", i.e. the offence is serious enough to merit solemn proceedings and trial on indictment before a jury, or charged on "complaint", i.e. for a lesser offence which can be tried by a sheriff or judge of the district court alone.

8. Section 22A(2) gives the sheriff or judge the power to defer taking a bail decision on first appearance for up to 24 hours. A deferral may be necessary if insufficient evidence is available to allow an immediate decision to be taken. This is in line with the existing provisions in section 23 of the 1995 Act which allow a 24-hour continuation where a person is charged on complaint or where a person arrested on petition has already been committed. Prior to the committal of a person arrested on petition, the sheriff is not bound by any limit of time on his bail decision but, in practice, a 24-hour limit is usually applied. The existing provisions will apply to bail applications made after first appearance.

9. Section 22A(3) provides that if the bail decision is not taken within the period of 24 hours, the accused person must be liberated. This is in line with the existing position in section 23 of the 1995 Act in relation to bail applications.

10. Section 22A(4) requires the court to consider bail whether or not the accused is already in custody when he is brought before the sheriff or judge.

Section 2 (Bail and liberation where person already in custody)

11. Section 2 inserts a new section 23A into the 1995 Act.

12. Section 23A ensures that the fact that an accused person is already in custody for another matter cannot in itself be a reason for a refusal to consider bail. The court will be required to consider, in the usual way, whether it is appropriate to grant bail for the new offence. Section 23A(1) provides that the court's duty applies to an accused person who is already in prison, either serving a sentence of imprisonment or having been refused bail for another crime or offence. Section 23A(2) makes it clear that an accused person in custody, who is admitted to bail for the new offence, is not liberated from his existing custody, i.e. the accused person will not be released, until the reason for the existing custody expires.

13. Section 23A(3) makes it clear that where a person is already in custody on another matter, any requirement to liberate that person under section 22A(3) or section 23(7) as a consequence of the court failing to make a bail decision within the 24-hour period, does not release him from that existing custody.

14. Section 23A(4) defines the expression “another crime or offence” in section 23A to mean a matter other than the crime or offence which is the subject of the current bail proceedings.

Section 3 (Removal of restrictions on bail)

15. Section 3 removes the existing statutory restrictions in sections 24 and 26 of the 1995 Act which prevented a sheriff from considering bail for certain serious offences. Although the High Court or the Lord Advocate had (and still have) power to grant bail for any crime or offence, the sheriff had no power to grant bail for any person charged with murder or treason or for any person charged with attempted murder, culpable homicide, rape or attempted rape who had a previous conviction for any of those offences, murder or manslaughter. Subsection (1) removes the exclusion in section 24 of the 1995 Act applying to the crimes of murder and treason. Subsection (2) repeals section 26 of the 1995 Act so as to remove the exclusions which apply to other serious offences.

Section 4 (Removal of restriction on appeals against refusal of bail)

16. Section 4 amends section 32 of the 1995 Act. This section makes provision for appeals against bail decisions but prevented an accused arrested on petition, who had been refused bail, appealing to the High Court against any refusal which resulted from an application made before committal. An appeal could be made only against the refusal of any subsequent application made after committal. The amended provision will allow all accused persons to appeal a refusal of bail by the sheriff under the new section 22A and the refusal of any subsequent bail application.

PART 2 - JUDICIAL APPOINTMENTS

CHAPTER 1 - VARIATION OF NUMBER OF INNER HOUSE JUDGES AND FILLING OF VACANCIES

17. This Chapter of the Act consists of one section.

Section 5 (Variation of number of Inner House judges and filling of vacancies)

18. Section 5 amends section 2 of the Court of Session Act 1988 to allow the Scottish Ministers, by Order, to vary the number of senior judges in the Inner House of the Court of Session. Previously the number of judges in each Division of the Inner House was fixed by statute in primary legislation. The power to vary the number of judges allows Ministers to respond to circumstances in which it is thought desirable to increase, or reduce, the number of senior judges in the Inner House to reflect the volume of business at that level. Any Order must be made under the affirmative procedure of the Scottish Parliament. In addition, section 5 adds a provision to section 2 (new subsection (8)) which provides that the Scottish Ministers may consent to the filling of a vacancy that is created in either Division of the Inner House only if they are satisfied that the state of business in the Inner House justifies that vacancy being filled.

CHAPTER 2 - TEMPORARY AND PART-TIME SHERIFFS

Section 6 (Abolition of temporary sheriffs)

19. Section 6(1) repeals section 11(2) of the 1971 Act and accordingly abolishes the office of temporary sheriff. Section 6(2) makes provision allowing temporary sheriffs to complete cases which had begun before them (in practice, before 11 November 1999, when the Scottish Ministers announced the suspension of the use of temporary sheriffs) but which

were not concluded at the date of the office being abolished. The abolition follows a High Court judgement that a temporary sheriff was not an independent and impartial tribunal for the purposes of Article 6 of the European Convention on Human Rights.

Section 7 (Creation of part-time sheriffs)

20. Section 7 amends the 1971 Act by inserting new sections 11A to 11D, containing detailed provisions on arrangements for the appointment of part-time sheriffs, their conditions of service and their removal from office.

21. Section 11A(1) gives power to the Scottish Ministers to appoint part-time sheriffs. Section 11A(2) requires Ministers to comply with any relevant requirements as to the procedure which should govern appointments and the need for consultation with other parties, which should take place before appointments are made. Any such requirements will be detailed in regulations (made by statutory instrument) requiring the approval of the Scottish Parliament (see references in new section 11D(1) and (2)). Section 11A(3) requires a part-time sheriff to have the same qualifications for office as are required of a permanent sheriff and section 11A(4) gives the part-time sheriff authority to act in any of Scotland's six sheriffdoms.

22. Section 11A(5) stipulates that the maximum number of persons holding appointment as part-time sheriffs at any one time must not exceed 60, unless the Scottish Ministers secure the agreement of the Scottish Parliament to an order which changes this number (see section 11D(1) and (2)). Section 11A(6) provides that it is the sheriff principal, and not Ministers, who directs the work of the part-time sheriff when he or she is sitting in that sheriff principal's sheriffdom. Section 11A(7) imposes on the sheriffs principal collectively the duty of having regard to the desirability of securing that each part-time sheriff has the opportunity of sitting for at least 20 days in each 12 month period and sits for no more than 100 days in each such period.

23. Section 11A(8) gives the Scottish Ministers the authority to pay part-time sheriffs at a rate decided by Ministers.

24. Section 11B deals with terms of appointment of part-time sheriffs. Section 11B(1) sets the initial term as 5 years and section 11B(2) enables part-time sheriffs to resign from office. Section 11B(3) fixes a retirement age of 70, the same as that for all permanent sheriffs appointed since 1995. Section 11B(4) makes provision for the termination of a part-time sheriff's appointment where he or she is removed from office by virtue of section 11C. Section 11B(5) allows for re-appointment at the end of any 5-year term and clarifies that re-appointment will be automatic unless any of the circumstances described in section 11B(6) applies. Section 11B(7) permits an individual who may have resigned at any time to be re-appointed at some future date. Section 11B(8) makes clear that conditions governing the appointment of a part-time sheriff apply equally to a re-appointment. Section 11B(9) prevents any solicitor from sitting as a part-time sheriff in the sheriff court district where he or she has his or her main place of business as a solicitor.

25. Section 11C details the procedure for removal of a part-time sheriff from office. Section 11C(1) places the responsibility for deciding on removal from office on a tribunal to be constituted for this purpose. Section 11C(2) sets out the criteria for removal to which the tribunal must have regard as part of their investigations into fitness for office. Section 11C(3) provides that the tribunal shall consist of three persons, to be appointed by the Lord President of the Court of Session. The tribunal is to be presided over by a Court of Session judge or sheriff principal and the other members are to be a solicitor or advocate of at least 10 years'

standing and one other person. Section 11C(4) allows regulations made by the Scottish Ministers to specify that the tribunal may suspend a part-time sheriff and gives authority to Ministers to include such further provisions in the regulations as they consider necessary or expedient.

26. Section 11D governs the making by the Scottish Ministers of regulations and orders under sections 11A and 11C and provides that they be made by way of statutory instrument made under the affirmative procedure of the Scottish Parliament.

CHAPTER 3 - JUSTICES OF THE PEACE

27. This Chapter of the Act consists of three sections.

Section 8 (Appointment of justices)

28. Section 8 amends section 9 of the 1975 Act. Paragraph (a) inserts new subsections (2A) and (2B). Subsection (2A) requires that, at the time of appointment of a justice, the instrument of appointment shall specify whether the appointment is as a full justice or as a signing justice. Subsection (2B) enables a signing justice to subsequently be appointed as a full justice. Paragraph (b) inserts new subsections (8A) to (8C) which require the Scottish Ministers to comply with such pre-appointment procedures and consultation as may be prescribed in Regulations made by statutory instrument. The Regulations must be made under the affirmative procedure of the Scottish Parliament. Paragraph (c) inserts a new subsection (12) which defines the terms “full justice” and “signing justice”. A full justice is a justice of the peace who is qualified as a justice to do any act including any function of a judicial nature or to be a member of any committee or other body. A signing justice is qualified only to undertake a limited number of signing tasks as set out in section 15(9) of the 1975 Act.

Section 9 (Removal, restriction of functions and suspension of justices)

29. Section 9 of the Act has three subsections. Section 9(1) inserts a new section 9A into the 1975 Act.

30. Section 9A(1) places, on a tribunal to be constituted for the purpose, the responsibility for deciding whether a justice should be removed from office or be restricted to having the functions of a signing justice. This is subject to certain other provisions in the 1975 Act which affect a justice’s tenure. Section 9(4) of the 1975 Act, as read with subsections (6) and (7) of that section, has the effect of removing from office a justice who, as a result of the Scottish Ministers rescinding a direction made under subsection (4), no longer meets the residential requirements in subsection (3). In addition, where a full justice becomes a councillor, his or her functions are automatically restricted to those of a signing justice by virtue of section 12(2) of the 1975 Act (as inserted by section 10 of this Act). Finally, a full justice who reaches the age of 70 will become a signing justice by virtue of his or her name being entered in the supplemental list under section 15(1) of the 1975 Act.

31. Section 9A(2) sets out the criteria to which the tribunal must have regard as part of their investigations into the fitness of a justice for the office of justice or for performing a justice’s judicial functions. It also specifies that the tribunal may make an order only following an investigation carried out at the request of Scottish Ministers.

32. Section 9A(3) provides that the tribunal shall consist of three persons, to be appointed by the Lord President of the Court of Session. The tribunal is to be presided over by a sheriff principal and the other members are to be a solicitor or advocate of at least 10 years’ standing and one other person. Section 9A(4) provides that the sheriff principal should be the sheriff principal of the sheriffdom which includes the commission area for which the justice of the

peace was appointed unless section 9A(5) applies. Section 9A(5) provides for the circumstances in which the local sheriff principal shall not preside over the tribunal, namely where it appears to the Lord President to be inappropriate. This might be the unavailability of the local sheriff or such other links as would make his or her involvement undesirable. Section 9A(6) prohibits a temporary sheriff principal from presiding over the tribunal.

33. Section 9A(7) allows regulations made by the Scottish Ministers to specify that the tribunal may suspend a full justice from office or from performing functions of a judicial nature and gives authority to Ministers to include such further provisions in the regulations as they consider necessary or expedient, including provision as to the procedure to be followed by and before the tribunal.

34. Subsection (8) and (9) of section 9A provide that the tribunal regulations are to be made by statutory instrument subject to affirmative resolution procedure of the Scottish Parliament. Section 9A(10) provides that a justice removed from office shall be ineligible for re-appointment. It also prevents a justice, whose functions have been restricted to those of a signing justice, from being re-appointed as a full justice

35. Section 9A(11) provides that a justice whose functions have been restricted to those of a signing justice shall have his or her name entered in the supplemental list which is kept in accordance with section 15 of the 1975 Act. Section 9A(12) requires the Scottish Ministers to send a copy of any order made by the tribunal under section 9A(1) to the clerk of the peace for the relevant commission area.

36. Section 9(2) inserts a new subsection (2C) into section 9 of the 1975 Act to allow for the removal of signing justices by an instrument of removal in the name of Her Majesty under the hand of the Scottish Ministers.

37. Subsection (3) provides that the new provisions apply to justices appointed before the new powers of removal and suspension come into force as well as those justices appointed after the new provisions come into force.

Section 10 (Restriction of functions of justices who are councillors etc.)

38. Section 10 replaces section 12 of the 1975 Act with a new provision.

39. New section 12 restricts the functions of justices who are councillors. Section 12(1) provides that a member of a local authority cannot be appointed as a full justice but may be appointed as a signing justice. Section 12(2) provides that any existing councillor justices will become signing justices on the coming into force of the new appointment provisions. It also provides for full justices automatically to become signing justices if they are appointed as councillors after being appointed as a full justice. Section 12(3) requires the names of justices who are signing justices by virtue of this section to be entered into the supplemental list.

PART 3 - MISCELLANEOUS AND GENERAL PROVISIONS

40. This Part of the Act consists of three sections.

Section 11 (Abolition of prosecutions on behalf of or by local authorities)

41. Section 11 provides that it is no longer competent for local authorities to instruct or bring prosecutions in the district courts. Any such proceedings at the time of the coming into force of the Act will end on that date unless taken over on or before that date by the procurator fiscal.

Section 12 (Minor and consequential amendments)

42. Section 12 makes provision for the schedule to the Act to have effect.

SCHEDULE (MINOR AND CONSEQUENTIAL AMENDMENTS)

43. Paragraph 1 makes necessary changes to the 1971 Act in consequence of the abolition of the office of temporary sheriff and the creation of the office of part-time sheriff.

44. Paragraph 2 makes minor amendments to the 1975 Act in consequence of the creation of full and signing justices and the new appointment and removal provisions. In particular, paragraph 2(2) inserts a new subsection (2A) into section 11 of the 1975 Act to require ex officio justices to have their names entered in the supplemental list in recognition of the fact that ex officios will become signing justices and will no longer be entitled to undertake court duties. In addition, paragraph 2(4) amends section 16 of the 1975 Act to ensure that justices who are signing justices by virtue of being councillors may sit on the justices committees which assist and advise the local authorities on the administration of the district courts.

45. Paragraph 3 makes amendments to sections 36 and 43 of the Education (Scotland) Act 1980 which are in line with the restrictions to local authority prosecutions set out in Part 3. The local authority is prevented from bringing a prosecution under this Act in the district court but may choose to prosecute in the sheriff court or report the case to the procurator fiscal.

46. Paragraphs 4, 5, 6 and 7(4) and (5) make amendments to other connected pieces of legislation in consequence of the abolition of temporary sheriffs and the creation of the office of part-time sheriff.

47. The remainder of paragraph 7 makes consequential amendments to the 1995 Act in relation to bail.

48. Paragraph 7(1) amends section 23 of the 1995 Act to remove consequential references to the existing bail exclusions. Paragraph 7(1) also makes consequential amendments to section 23 to take account of the fact that an application for bail will no longer be required when the accused is brought before the court for the first time.

49. Paragraph 7(2)(a), (b) and (c) makes consequential amendments to section 32 which change all existing references to an “applicant” or “application” to ensure that the section applies consistently to the automatic consideration of bail on first appearance and subsequent applications for bail.

50. Paragraph 7(3) makes additional consequential amendments to section 33 of the 1995 Act to reflect the automatic consideration of bail on first appearance. The amendments preserve the existing position whereby no fees or expenses can be awarded against the accused for the first hearing on bail.

PARLIAMENTARY HISTORY

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place; the references to the Official Report of those proceedings; and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports

Reference

Introduction

25 May 2000

SP Bill 17 (Session 1)

Stage 1

Justice and Home Affairs Committee

18th Meeting, 2000

15 May 2000, cols 1252 – 1261

19th Meeting, 2000

22 May 2000, cols 1273 – 1309

20th Meeting, 2000

30 May 2000, cols 1313 – 1353

6th Report 2000

16 June 2000, SP Paper 147

Subordinate Legislation Committee

19th Meeting, 2000

6 June 2000, cols 214–232; 236 - 241

Meeting of the Parliament

22 June 2000

cols 726 - 766

Stage 2

Justice and Home Affairs Committee

23rd Meeting, 2000

21 June, col 1450

24th Meeting, 2000

27 June, cols 1504 - 1542

Between Stage 2 and Stage 3

Subordinate Legislation Committee

23rd Meeting, 2000

4 July 2000, cols 267 – 268

29th Report, 2000

5 July 2000

Stage 3

Meeting of the Parliament

5 July 2000

cols 1009 - 1060

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