

# **JUDICIARY AND COURTS (SCOTLAND) ACT 2008**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 3 – the Courts**

##### **The Court of Session**

###### ***Section 44 – Maximum number of judges***

92. 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 45 – Number of judges of the First and Second Division of the Inner House***

93. 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 46 – Divisions of the Inner House***

94. This section provides for the quorum of a Division of the Inner House considering solely procedural matters to be set by act of sederunt. It does so by 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 make provision for the quorum of judges where a Division is dealing only with procedural matters. For example, the quorum may be reduced to 1 judge when dealing with only procedural matters. 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.

##### **Sheriff Courts**

###### ***Section 47 – Sheriff principal’s responsibility***

95. 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 47 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).

96. 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 47 amends section 16 of the 1971 Act to remove the direction making power of the Scottish Ministers and to make this function subject to Lord President's overarching responsibility in section 2(2)(a) and the Lord President's direction making power in section 2(3).
97. 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 47 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).
98. 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 47 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 Act and on sheriffs principal in the amended section 15 of the 1971 Act. There is no change in substance.

#### ***Section 48 – Repeal of certain responsibilities of Scottish Ministers***

99. [Section 60](#) establishes a body corporate to be known as the SCS. Section 61 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 by 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 49 – Lord President's default power***

100. 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 50 – Alteration of boundaries of sheriffdoms***

101. 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 Act 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 50 therefore makes the exercise of this power subject to the consent of the Lord President for all alterations and subject to the consent of the SCS where an order includes provision for the abolition of any office, the alteration

of sheriff court districts, the formation of new districts, the abolition of districts or are that sheriff courts shall be held or shall cease to be held at any place. The SCS's role reflects the fact that such changes will have an impact on its budget. Subsection (3) provides that before giving such consent the SCS must consult such persons as it considers appropriate. Subsection (6) provides that such an order shall be subject to the negative resolution procedure of the Scottish Parliament.

### ***Section 51 - Sheriff court districts and places where sheriff courts are to be held***

102. 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 are exercisable by order. Section 51 amends section 3 to provide that the exercise of this power is to be subject to the consent of the Lord President and the SCS. As with the amendments in section 50 subsection (2) provides that before consenting to such an order the SCS must consult such persons as it considers appropriate. Subsection (4) provides that such an order shall be subject to the negative resolution procedure of the Scottish Parliament.

### ***Section 52 – Repeal of power to appoint sheriff to assist Scottish Ministers***

103. 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 48 of the Act 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 53 – Sheriffs principal and sheriffs acting in other sheriffdoms***

104. 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 54 – Residence and leave of absence of sheriffs principal***

105. 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 section amends section 13 of the 1971 Act to give that role to the Lord President. Subsection (3) of section 54 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 55 – Number, residence and deployment of sheriffs***

106. 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 56 – Leave of absence of sheriffs***

107. 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 57 – Establishment, constitution etc.***

108. 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 57(2) amends section 59 to make the exercise of this power subject to the consent of the Lord President and the SCS. Before consenting to such an order the Lord President must consult the sheriff principal and the SCS must consult such persons as it considers appropriate. This reflects the Lord President’s responsibility for securing the efficient disposal of business in the Scottish courts in section 2(2)(a) and the SCS’s responsibility for the provision and resourcing of courts in Scotland.
109. 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 57(3) amends section 63 to provide that this power may only be exercised on the recommendation of the Lord President.

### ***Section 58 - Sheriff principal’s responsibility***

110. 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.
111. [Section 58](#) substitutes a new section 61 in the 2007 Act. This mirrors the provisions made at section 47 in respect of the responsibilities of sheriff principals for sheriff courts, as described at paragraph 96 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.
112. 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 sub-section 2(3).

## **Court holidays**

### ***Section 59 – Court holidays in sheriff courts and justice of the peace courts***

113. This section enables sheriff principals to specify an additional day's holiday for court staff. The intention is that this would be used to give court staff a day's holiday on or around St Andrew's Day in line with the rest of the public sector.