

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

Part V: Miscellaneous and General

SECTION 95: Appointment and removal of judges

Purpose and Effect

This section sets out the roles of the Prime Minister and the First Minister in the appointment and removal of members of the Scottish Judiciary. It provides that the Prime Minister will continue to exercise the role of recommending the appointment by Her Majesty of the Lord President of the Court of Session and the Lord Justice Clerk but on the basis of nominations from the First Minister following consultation with the Lord President and the Lord Justice Clerk. Other judges of the Court of Session, sheriffs and sheriffs principal are appointed by Her Majesty on the recommendation of the First Minister, after consultation with the Lord President.

This section also sets out a statutory framework for the removal of judges. It provides that a judge of the Court of Session and the Chairman of the Scottish Land Court may be removed from office only by Her Majesty on the recommendation of the First Minister. The First Minister may make such a recommendation only if a tribunal constituted for these purposes resolves that a judge is unfit for office by reason of inability, neglect of duty or misbehaviour and if the Parliament resolves, on a motion made by the First Minister, that a recommendation should be made.

General

This section is one of a number of provisions which implement the White Paper proposals in relation to the judiciary and provide safeguards for their independence. Section 23(7) exempts judges from the Scottish Parliament's power to call witnesses or require the production of documents. Under Section L1 of Schedule 5 the determination of senior judicial salaries and pensions are reserved matters. This will allow pay awards to continue to be based on recommendations of the Senior Salaries Review Body.

The provisions in the present section for the removal of a judge of the Court of Session rectified the anomaly that, unlike in the rest of the UK, there were no powers to remove such a judge from office. Powers already exist for the removal from office of sheriffs principal and sheriffs (section 12 of the Sheriff Courts (Scotland) Act 1971) and the relevant functions in the 1971 Act transferred to the Scottish Ministers and Scottish Parliament. The arrangements for the removal of judges are based on the model already used for sheriffs.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1150
CC	4-Mar-98	1151
CR	19-May-98	775
LC	6-Oct-98	398
LC	6-Oct-98	399
LC	6-Oct-98	400
LC	6-Oct-98	409
LC	6-Oct-98	415
LC	6-Oct-98	416
LR	2-Nov-98	17
Stage	Date	Column
LR	2-Nov-98	41
L3	9-Nov-98	586
L3	9-Nov-98	590
LCCLA	17-Nov-98	1176

Details of Provisions

Subsection (1) provides that it will continue to be for the Prime Minister to recommend to Her Majesty the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk.

Subsection (2) provides that the candidates for these two senior judicial posts put forward by the Prime Minister require to have been nominated by the First Minister.

Subsection (3) provides that, before making such a nomination, the First Minister shall consult the Lord President and the Lord Justice Clerk (unless, in either case, the office is vacant).

Subsection (4) provides that it is for the First Minister, after consulting the Lord President, to recommend candidates to Her Majesty for appointment as judges of the Court of Session (other than the Lord President or the Lord Justice Clerk) or as sheriffs or sheriffs principal.

Subsection (5) provides that the First Minister shall comply with any requirement imposed by virtue of any enactment in relation to a nomination for the appointment of a person as Lord President or Lord Justice Clerk, or a recommendation for the appointment of a person as a judge of the Court of Session, sheriff principal or sheriff. This will allow the Parliament to impose further requirements on the First Minister in relation to nominations and recommendations.

Subsection (6) provides that a judge of the Court of Session and the Chairman of the Scottish Land Court can only be removed from office by Her Majesty on the recommendation of the First Minister. Paragraph 29 of Schedule 8 amends the Scottish Land Court Act 1993 in connection with the appointment of members of the Scottish Land Court.

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Subsection (7) requires that the First Minister shall make a recommendation for the removal of such a judge if (and only if) the Parliament, on a motion made by the First Minister passes a resolution that the judge should be removed. The Standing Orders of the Parliament make further provision in this regard.

Subsection (8) requires provision to be made for a tribunal constituted by the First Minister to investigate and report on whether a judge of the Court of Session or the Chairman of the Scottish Land Court is unfit for office by reason of inability, neglect of duty or misbehaviour and the report to be laid before the Parliament. This provision is to be made by or under an Act of the Scottish Parliament.

Subsection (9) requires the provision made for the tribunal to include provision for the constitution of the tribunal by the First Minister when requested by the Lord President as well as in such other circumstances as the First Minister thinks fit. It also provides that the tribunal should be chaired by a member of the Judicial Committee of the Privy Council (limited to the same composition of the Committee as provided for in section 103(2) in relation to devolution cases). Provision may be made for a judge to be suspended from office.

Subsection (10) provides the circumstances in which the First Minister can make a motion recommending the removal of a judge. Such a motion can only be made if the First Minister has received a written report from the tribunal concluding that the judge is unfit for office by reason of inability, neglect of duty or misbehaviour. If the motion concerns the Lord President or the Lord Justice Clerk, the First Minister must consult the Prime Minister. The subsection also provides that the First Minister should comply with any other requirement imposed by virtue of any enactment (including an Act of the Scottish Parliament).

Subsection (11) defines provision for the purposes of section 95 as meaning a provision by or under an Act of the Scottish Parliament. It defines tribunal for the purposes of this section as a tribunal of at least three persons.

Until the Parliament made its own provision for a tribunal, transitional arrangements were put in place by the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 ([S.I. 1999/1017](#)).