

*These notes relate to the Senior Judiciary (Vacancies and Incapacity)
(Scotland) Act 2006 (asp 9) which received Royal Assent on 27 June 2006*

SENIOR JUDICIARY (VACANCIES AND INCAPACITY) (SCOTLAND) ACT 2006

EXPLANATORY NOTES

THE ACT

3. The provisions of this Act ensure that there is no disruption to the orderly conduct of business in the courts and in those areas of public administration in which the two most senior judges in Scotland have functions, during such time as those judges are incapacitated owing to ill health or either of the offices is vacant.
4. The two most senior judges are the Lord President of the Court of Session and the Lord Justice Clerk. The Lord President is the head of the Court of Session (Scotland's superior civil court). The Lord Justice Clerk is the next senior judge. There are another 32 judges in the Court of Session. Eight of these judges, together with the Lord President and the Lord Justice Clerk, form the Inner House of the Court. This is essentially, although not exclusively, the appellate branch of the Court.
5. The judges of the Court of Session are also the judges of the High Court of Justiciary, the superior criminal court. The head of the High Court is the Lord Justice General. This office is held by the Lord President. The Lord Justice Clerk is the next senior judge in the High Court.
6. As the law stands there are some actions that can be taken, and decisions that can be made, by the holders of the offices of Lord President, Lord Justice General and Lord Justice Clerk alone. The office of Lord President, in particular, has a wide range of functions conferred on it by statute. Some of these concern matters of court administration, others broader areas of public administration which they hold by virtue of their position as the senior judges in Scotland.

Section 1

7. Subsections (1), (3)(a) and (4) of this section set out the events that trigger the provisions of the Act in relation to the office of the Lord President. 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 at least five of their number must sign a written declaration to this effect, which must be supplied to the First Minister. The Lord Justice Clerk, unless he or she is also incapacitated, or his or her post is vacant, must be one of the five judges. The requirement for five judges means that a majority of the Inner House judges must be satisfied as to the Lord President's incapacity. Once the written declaration is received by the First Minister, the provisions of the Act for incapacity take effect.
8. There is no procedure required in the case of a vacancy. 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), the provisions of section 1 will take effect.
9. Once the procedure is triggered, subsection (2) does a number of things. It provides that the functions of Lord President will be carried out instead by the Lord Justice Clerk,

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and that the functions of the office of Lord Justice Clerk will, in turn, be carried out by the senior Inner House judge.

10. The subsection also makes clear that both active and passive functions of the Lord President and the Lord Justice Clerk are covered. 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. He also has various rule-making powers. There are also 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. The Lord President's approval is required for rules made by the Law Society of Scotland to govern such matters as professional practice and rights of audience.
11. The powers under the Act will cease to have effect on one of two 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 at least five 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 five judges sign both declarations.
12. Subsection (5) requires the First Minister to send a copy of either declaration concerning incapacity received from the judges - whether triggering or ending the process in the Act - to the Presiding Officer of the Scottish Parliament.

Section 2

13. This section deals with the incapacity of the Lord Justice Clerk, or a vacancy in that office. The provisions are almost identical with those in section 1. However, there are some important differences.
14. One difference is that it is made clear in subsections (2)(a) and (b) that among the functions of the Lord Justice Clerk that are covered by the provision are those which the Lord Justice Clerk might be carrying on for the time during the incapacity of the Lord President, or because that office is vacant, because section 1 of the Act has been invoked. Sections 1 and 2 of the Act therefore provide a comprehensive arrangement to ensure there is no disruption to administration were both the Lord President and the Lord Justice Clerk to be incapacitated at the same time, or in the event that both posts were vacant. This is achieved by providing for the functions of the two most senior judicial offices to be carried out by the most senior Inner House judges respectively. The Lord Justice Clerk is accordingly replaced with the senior judge of the Inner House. In the case where the Lord President and the Lord Justice Clerk are both incapacitated or their office vacant, the senior judge takes the Lord President's functions and the next most senior such judge (called "the second senior judge" in the Act) takes the Lord Justice Clerk's functions (see subsection (2)(c) and (d)). The next paragraph illustrates how this would work in practice.
15. The Inner House comprises the Lord President, the Lord Justice Clerk, and, in order of seniority, Judges 1, 2, 3, 4, 5, 6, 7 and 8. 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 section 2, 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 3

16. This section deals with the possibility that at the point when it becomes necessary to invoke the provisions of sections 1 or 2, the judge of the Inner House who would have taken on functions is unavailable. The provision provides that in such circumstances, the

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next most senior judge who is available should take the place of his or her more senior colleague. So using the illustration in paragraph 16, 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.

Section 4

17. This section gives certain words specific meanings for the purposes of the Act. Subsection (1)(a) makes clear that incapacity arises only on the grounds of ill health. Subsection (1)(d) 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 procedure in the Act. Subsection (1)(e) 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 Act.
18. Subsection (2) 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. Section 4(2) makes clear that the existence of the procedure in the Act, if it has not been triggered on vacancy or the First Minister receiving the written declaration of incapacity, does not give rise to doubts that the Lord Justice Clerk has such powers. In the event of a vacancy or the incapacity of the Lord Justice General, i.e. once the procedure in the Act has been triggered, 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 provisions of the Act.