

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 5 – Removal from office

Judges

Section 35 – Tribunal to consider fitness for judicial office

77. 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.
78. 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 \(Transitory and Transitional Provisions\) \(Removal of Judges\) 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 Act are to replace those transitory provisions.
79. 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 36 - Suspension during investigation

80. 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 34, 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 37 – Further provision about tribunals

81. 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 and for the enforcement of these requirements by providing that if a person fails to comply with either or both of these requirements the tribunal may make an application to the Court of Session. The Court of Session may in turn make an order enforcing compliance or deal with the matter as if it were contempt of court. This section also provides 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 38 – Report of tribunal

82. 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 39 – Temporary judges: removal from office

83. 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 40 – Consideration of fitness for, and removal from, shrieval office

84. 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 Act as these new sections also cover part-time sheriffs.
85. 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.
86. 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.

*These notes relate to the Judiciary and Courts (Scotland) Act
2008 (asp 6) which received Royal Assent on 29 October 2008*

87. New section 12C makes the same provision to that for judges in section 37.
88. New section 12D makes the same provision to that for judges in section 38.
89. New section 12E provides that the First Minister may remove a sheriff principal, sheriff or part-time sheriff from office following a report from a tribunal to the First Minister that the person is unfit by reason of inability, neglect of duty or misbehaviour. That report must be laid before the Scottish Parliament. In addition, the First Minister may only remove a sheriff principal or sheriff from office by order made by statutory instrument.

Justices of the Peace

Section 41 - Provision relating to tribunal considering fitness for office of justices of the peace

90. This section amends section 71 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (“the 2007 Act”) to provide that the provisions as respects the tribunal (including procedures for the tribunal and the tribunal’s ability to suspend a JP during an investigation) and authorising a specified body or class of persons to recommend that an investigation be carried out should be made by the Court of Session by act of sederunt instead of by Scottish Ministers.