

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### ***Schedule 1 – the Judicial Appointments Board for Scotland***

##### **Status of the Board**

125. [Paragraph 1](#) makes it clear that the Board will not be a servant of the crown, which is appropriate given that the Board is set up as an independent entity, not subject to the direction or control of the Scottish Ministers.

##### **Membership**

126. [Paragraph 2](#) makes provision for 3 categories of members: judicial, legal and lay. Whilst the Scottish Ministers are to appoint the legal and lay members it is for the Lord President to appoint the judicial members.

##### **The judicial and legal members**

127. [Paragraph 3\(1\)](#) and [\(2\)](#) sets out who qualifies as a judicial member and who qualifies as a legal member. The Lord President and Lord Justice Clerk are excluded from judicial membership. There are three judicial members and two legal members. [Subparagraph \(4\)](#) provides the Scottish Ministers with an order-making power to modify the judicial or legal membership categories. This power could be used to alter the membership of the Board on a permanent or temporary basis, for example, to add a new category of judicial office or increase the number of members from a particular category. This may be necessary when the Board is asked to deal with a large number of appointments in a short period of time; the Board may require an increased membership to deal with the increased workload. The effect of [paragraph 3\(5\)](#) is that the Scottish Ministers may add judicial and legal members to the Board by order, but may only remove those members already added by order; they may not remove the membership categories set out in [subparagraphs \(1\)](#) and [\(2\)](#).

##### **The lay members**

128. [Paragraph 4](#) provides that the number of lay members should at all times be the same as the combined total of judicial and legal members. This is to preserve the balance of membership on the Board. At commencement of this Act there would be five judicial and legal members on the Board, therefore five lay members. If the numbers of judicial or legal members were increased by order under [paragraph 3\(4\)](#) the number of lay members would increase by equivalent number. [Subparagraph \(2\)](#) sets out 3 criteria which must be fulfilled in order to qualify as a lay member.

## **Persons disqualified from membership**

129. Under paragraph 5, certain categories of persons are disqualified from membership of the Board. This is to ensure the independence of the Board from political or ministerial influence.

## **Term of office**

130. Under paragraph 6(1), members will be appointed initially for a period of no more than 4 years. The actual period of appointment is to be determined by the person making the appointment, which would be the Lord President for judicial members and the Scottish Ministers for legal and lay members.
131. [Paragraph 6\(2\)](#) and [\(3\)](#) enable a member to be re-appointed, but a member's total term of office cannot exceed 8 years. By virtue of paragraph 18, the *Code of Practice for Ministerial Appointments to Public Bodies in Scotland* ("the Code"), issued by the Commissioner for Public Appointments in Scotland under section 2 of the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 \(asp 4\)](#), applies to legal and lay appointments to the Board. The Code may be revised from time to time, therefore the following explanation of the interaction between paragraph 6 and the Code applies only to the edition of the Code dated April 2006, which is the current Code at the date of introduction of this Act. The Code provides that only one further period of re-appointment to public office is permissible without an open competition to fill the office. Under the Code, read with paragraph 6, a legal or lay member of the Board could be appointed initially for a period of 4 years and then re-appointed for a further 4 years without an open competition being held. The member would then have served the maximum term of office under paragraph 6(3) and could not be re-appointed, even after an open competition. To use a different example, if an individual was initially appointed for 3 years, and perhaps re-appointed without open competition for 2 years, the Code would require the member to re-apply in open competition for any further re-appointment up to their maximum term of office of 8 years under paragraph 6(3).
132. Judicial members' appointments and re-appointment are subject to paragraph 6(1) to (3); however, the Code does not apply to these appointments because they are made by the Lord President, not by the Scottish Ministers.
133. [Paragraph 6\(4\)](#) sets out the various circumstances in which membership of the Board would cease. These include reasons relating to a change in the status of the member, for example, if any category of member becomes a civil servant or member of the Scottish Parliament they are disqualified from membership by virtue of paragraph 5. Another circumstance in which membership of the Board would cease is if the person no longer has the status which qualified them for the appointment in the first place (for example, a lay member becoming a practising solicitor, or a judge retiring from the Bench or being appointed as a Law Lord).
134. To avoid disruption to the work of the Board, paragraph 6(5) provides that should a member's tenure come to an end, the Scottish Ministers in the case of legal and lay members and the Lord President in the case of judicial members may direct that a member's appointment be extended by up to 6 months. This may be helpful in managing the succession of Board members and ensuring continuity of experience.
135. [Paragraph 6\(7\)](#) brings in additional flexibility for membership to be extended (or further extended following a paragraph 6(5) extension) without a direction by the Scottish Ministers or the Lord President, but only where necessary in order for a member to complete consideration of a particular judicial appointment which the Board is dealing with at the time when the member's appointment ceases. For example, if a shrieval member of the Board was due to retire from the Board during an appointments process, the shrieval member could continue in office until he or she has concluded work on that appointments process.

## **Resignation and removal of members**

136. [Paragraph 7](#) sets out the procedure a member wishing to resign should follow. This involves giving notice in writing to whoever appointed them – that is, the Lord President or the Scottish Ministers – and providing a copy of the notice to the other appointing office-holder. For example, a resigning lay member would send their notice to the Scottish Ministers, copied to the Lord President. Sub-paragraph (3) provides that the period of notice is 6 months unless agreed otherwise by office-holder who has appointed the member.
137. [Paragraph 8](#) sets out the procedure for removing a member and the circumstances in which a member may be removed. Responsibility for the removal of judicial members lies with the Lord President. Sub-paragraph (1) provides that removal must be in writing and that the Lord President must consult the Chairing Member of the Board and the Scottish Ministers before satisfying himself that grounds for removal exist. Equivalent procedures are set out at sub-paragraph (2) for the Scottish Ministers in respect of the removal of legal and lay members. However there is no duty to consult the Chairing Member if that member is the subject of the removal. Sub-paragraph (3) provides that a member must be afforded an opportunity to be heard by the Lord President or as the case may be the Scottish Ministers before being removed from office. The grounds for removal are listed at sub-paragraph (4).
138. In the event that one of the grounds for removal is satisfied, removal from office is not mandatory. Paragraph 8(1) and (2) leave the Lord President and the Scottish Ministers with discretion in the matter. For example, if a Board member was convicted of a very minor offence that did not give rise to doubt about their fitness to continue in office, the Lord President or the Scottish Ministers may consider that they need not be removed.
139. The conduct of members of the Board is to fall within the remit of the Standards Commission for Scotland. For that reason paragraph 19 applies the provisions of the [Ethical Standards in Public Life etc. \(Scotland\) Act 2000 \(asp 7\)](#) to the Board. As a devolved public body the Board must produce a code of conduct for its members.

## **Chairing Member: appointment and tenure, resignation and removal, vacancy etc.**

140. [Paragraph 9](#) places a duty on the Scottish Ministers to appoint one of the lay members as chair to the Board. The Chairing Member's appointment is determined by the Scottish Ministers and is for no longer than 4 years. There is nothing to prevent a member being re-appointed as the Chairing Member, subject to the overall limit of 8 years on their term of office as an ordinary member of the Board under paragraph 6(3).
141. [Paragraph 10\(1\)](#) and (2) make provision for the resignation or removal of the Chairing Member as chair, but not as a member of the board. Paragraph 10(3) to (6) enable the Chairing Member's role to be filled temporarily from within the Board in the event of a vacancy, or where the Chairing Member is unable to act for any reason.

## **Temporary members**

142. [Paragraph 11](#) makes provision for appointing temporary members to cover periods of absence of Board members, so long as the period of absence does not exceed 6 months. There may be a number of reasons (for example, personal reasons, ill health, other work commitments) why a member is unable to discharge their functions on the Board for a period of time. Under paragraph 11(1) if the Chairing Member is satisfied that the member will be unable to discharge their functions for up to 6 months they may request that the Lord President or the Scottish Ministers appoint a temporary member. Under paragraph 11(3) and (4) the temporary member must fall into the same category as those members they are replacing. For example, if an advocate member is unable to sit on the Board for a period, the temporary member appointed in their place must also be

an advocate. Paragraph 11(4)(b) requires temporary lay members to satisfy the general qualification requirements to be a lay member (see paragraph 4(2)).

143. To maintain the legal and lay balance of the Board, paragraph 11(6) makes it clear that during the period of temporary cover, the absent member is not to be counted as a member. The effect of this is that the total number of members of the Board will remain the same. There will be no need to appoint an extra lay member upon the appointment of a temporary legal or judicial member, as might otherwise be required under paragraph 4(1). Under paragraph 11(7) a temporary appointment ceases when the absent member returns or after 6 months, whichever comes first. To ensure that the work of the Board is not unduly disrupted, paragraph 11(8) enables a temporary member to continue acting as a member beyond the 6 month period to conclude any ongoing judicial appointment process with which they are involved, to be concluded. Paragraph 11(9) provides that a temporary member will be otherwise subject to all of the same provisions as apply to an ordinary member of the Board.

### **Conflicts of interest**

144. Paragraph 12 makes very similar provision for substitute members to be appointed where a member of the Board has a conflict of interest that would make it improper for them to be involved in a particular appointment process. It is envisaged that this provision would be used where a member has a close personal relationship with one of the candidates in a particular appointment round.
145. In contrast with paragraph 11, paragraph 12(6) provides that a substitute member does not entirely replace the member who has a conflict of interest; that member may continue to sit on the Board and deal with other matters where no conflict arises. If, for example, the member with the conflict of interest is a judge of the Court of Session, the Board will seek a substitute judge member for that appointment process. There would be nothing to prevent the judge with the conflict of interest from taking part in another appointment process where there is no such conflict, or in any other business of the Board.
146. Paragraph 12(7) provides that a substitute member does not count as a member for the purposes of paragraph 4(1) so there is no need to make any extra lay appointment in the event that a substitute legal or judicial member is appointed, or to make an extra legal or judicial appointment if a substitute lay member is appointed.

### **Miscellaneous provisions relating to the Board**

147. Under paragraph 13, it is for the Scottish Ministers to determine and pay fees and expenses to Board members. Different fees and expenses may be paid to different categories of member. For example, the Chairing Member may receive a higher rate to reflect the level of responsibility attached to that office. In contrast, judicial members may receive no fees or expenses because they are members of the Board by virtue of the judicial office they hold, for which they already receive a salary.
148. To support the Board in its work, paragraph 14(1) places the Scottish Ministers under a duty to ensure that the Board has sufficient staff, property and services to enable it to carry out its functions. Paragraph 14(2) gives a non-exhaustive list of examples of the services that may be provided to the Board. Appointment of an independent observer could be beneficial where, for example, a person being interviewed for judicial office is a former member of the Board. The presence of an independent observer may reassure other candidates as to the propriety of the Board's selection procedures in these circumstances. Specialist advice may be sought by the Board in relation to certain judicial appointments. For example, the Chairman of the Land Court is a specialist judicial role, and the Board may wish to seek the advice of a person with expertise in land law for the purposes of that appointment. Paragraph 14(3) obliges the Scottish Ministers to consult the Board about the level of support it needs.

149. [Paragraph 15](#) provides that the Board may determine its own procedure and its own quorum. In order to maintain the legal and lay balance of membership, however, the Chairing Member does not have a casting vote. To assist the Board in the exercise of its functions, paragraph 16 allows the Board to establish committees and to delegate its functions to those committees; however, responsibility for those functions remains with the Board as a whole.
150. [Paragraph 17](#) provides that the validity of the Board's proceedings cannot be challenged on the grounds of a vacancy in the membership of the Board, a deficiency in the appointment of a member or the disqualification of a member. This ensures that decisions of the Board cannot be challenged on the grounds of such procedural irregularity alone.
151. [Paragraph 18](#) brings the appointment of legal and lay members to the Board within the remit of the Commissioner for Public Appointments in Scotland ("the Commissioner"). Under section 2 of the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 \(asp 4\)](#), the Commissioner must publish a code of practice ("the Code") for ministerial appointments. The current Code (dated April 2006) includes, amongst other matters, guidelines about the composition of selection panels to select people for appointment to public office. It also provides that a selection panel will normally include a civil servant from the Scottish Government department sponsoring the public body. The Code is silent on whether Ministers or other politicians may sit on a selection panel. The Act goes further than the Code to ensure that appointments to the Board are as free as possible from political and ministerial influence; paragraph 18(2) and (3) provide that, regardless of what the Code as revised from time to time may say, a selection panel for appointment as a member of the Board should not include any of the persons disqualified from membership of the Board under paragraph 5 (that is, MPs, MSPs, MEPs, UK Ministers, Scottish Ministers and civil servants). The Code otherwise applies in full to legal and lay appointments to the Board.
152. [Paragraph 19](#) makes the Board a devolved public body to which the [Standards in Public Life etc. \(Scotland\) Act 2000 \(asp 7\)](#) ("the 2000 Act") applies. This means that the Board is under a duty to promote high standards of conduct on the part of its members; that the Board must prepare a code of conduct for members based on a model code prepared by the Scottish Ministers under the 2000 Act; and that the conduct of members is subject to the scrutiny of the Standards Commission for Scotland.
153. [Paragraph 20](#) adds the Board to Part 2 of Schedule 2 to the [Scottish Public Services Ombudsman Act 2000 \(asp 11\)](#), so that the Scottish Public Services Ombudsman is able to investigate complaints it receives about the actions of the Board. Paragraph 20(2) and (3) require the Board to put in place appropriate arrangements for investigating any complaints made to the Board about maladministration, and to publicise those arrangements.
154. [Paragraph 21](#) makes the Board subject to the provisions of the [Freedom of Information \(Scotland\) Act 2002 \(asp 13\)](#); however, confidential information that is prohibited from disclosure under section 17 of the Act would be exempt from disclosure by virtue of section 26(a) of the 2002 Act.
155. [Paragraph 22](#) achieves the transition from the existing non-statutory Board to the statutory Board set up under the Act by providing that the existing Board will become the first statutory Board on the coming into force of schedule 1.