

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 2 – Senior Judiciary: Vacancy, Incapacity and Suspension

Section 7 - Supplementary

26. Subsections (1) and (2) deal with the possibility that at the point when it becomes necessary to invoke the provisions of sections 4, 5 or 6, the judge of the Inner House who would have taken on the functions, is unavailable. The provisions provide that, in such circumstances, the next most senior judge who is available should take the place of his or her more senior colleague. So using the illustration in paragraph 25, 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. This provision may assist in situations where the next most senior judge has judicial or other commitments which would prevent him or her from taking on the additional functions.
27. Subsection (3) sets out which judges will count towards the total number of judges for the purposes of calculating the majority of judges required to sign the declaration in sections 4(3) and 5(3).
28. Subsection (4) makes provision for circumstances when both the Lord President and the Lord Justice Clerk are incapacitated, to address a potential difficulty with the arrangements for declaring incapacity: if the Lord Justice Clerk were to become incapacitated at the same time as or shortly after the Lord President, the declaration of the Lord President's incapacity under section 4(3)(a) could not proceed because the Lord Justice Clerk would be unable to participate as required by section 4(4) and would not yet have been declared incapacitated under section 5(3)(a) such that section 4(5)(b) would apply. In these circumstances, subsection (3) enables the declaration to proceed without the participation of the Lord Justice Clerk. The provision works in a similar way as regards declarations of incapacity under section 5.
29. Subsection (5) makes it clear that during periods when a judge is carrying out the functions of the Lord President or the Lord Justice Clerk under sections 4 and 5, that judge will continue to receive his or her usual remuneration and will not receive any remuneration due to the Lord President or the Lord Justice Clerk.