

POLICY NOTE

THE MAXIMUM NUMBER OF JUDGES (SCOTLAND) ORDER 2016

SSI 2016/423

1. The above instrument is made in exercise of the powers conferred by section 1(2) of the Court of Session Act 1988 (“the 1988 Act”). The instrument is subject to affirmative procedure. This instrument is to be laid before the Scottish Parliament and approved by resolution in advance of being made at a meeting of the Privy Council.

Policy Objectives

2. The maximum number of judges of the Court of Session is 34, specified in section 1(1) of the 1988 Act, as amended by the Maximum Number of Judges (Scotland) Order 2004 (SSI 2004/499).

3. The Order increases by one the maximum number of judges of the Court of Session, to 35.

4. Section 1(2) of the 1988 Act enables Her Majesty by Order in Council to increase the maximum number of persons who may be appointed as judges of the Court. Section 1(3) provides that no recommendation shall be made to Her Majesty to make an Order unless a draft has been approved by resolution of the Scottish Parliament.

5. An increase in the number of judges of the Court of Session is required as a consequence of the appointment of Lady Smith as Chair of the Scottish Child Abuse Inquiry (“the Inquiry”) on 1 August 2016. Lady Smith is an Inner House judge of the Court of Session on secondment to the Inquiry. During the secondment, Lady Smith will not be available to sit in court however she remains a judge for the purposes of the statutory limit in section 1(1) of the 1988 Act.

6. The Inquiry is expected to last until at least October 2019. An additional judge is required to meet the demands of the business in the Court of Session (civil business) and the High Court (criminal business). Options, other than appointment of an additional judge, were considered:

- a) Short-term increase in number of judges of the Court of Session – It is not possible to increase the maximum number of judges for a specified period of time as there is no legislative power to allow this where the absence is caused by a judge chairing a public inquiry.
- b) Increased reliance on Temporary Judges – Section 20B of the Judiciary and Courts (Scotland) Act 2008 provides for the appointment of temporary judges. The Lord President, head of the judiciary in Scotland, does not consider this a realistic option. The serious nature of much of court business, with a high proportion of cases involving allegations of sexual abuse, make it important that cases are tried, if possible, by full-time rather than temporary judges. Further, given the potential length of the Inquiry, reliance on temporary judges to conduct the business of the High Court and the Court of Session is not sustainable.

7. The Lord President has been consulted and considers that the appointment of an additional judge to maintain a full complement is required to ensure the efficient disposal of business in the Scottish Courts.

8. It was necessary to make an appointment to the Inner House from among the Outer House judges to cover the absence of Lady Smith. The elevation of Lord Turnbull to the Inner House took effect on 1 September 2016. This appointment is within the statutory maximum number of judges in the Inner House in terms of section 2(2) of the 1988 Act. Once this Order is made, the Judicial Appointments Board for Scotland will be asked to make a recommendation to Scottish Ministers for the appointment of a new judge to fill the resultant vacancy in the Outer House.

Consultation

9. To comply with the requirements of section 1(3A) of the 1988 Act, the Lord President has been consulted on the draft Order.

Equality Impact Assessment

10. There is no direct impact on the protected characteristics. The Judicial Appointments Board for Scotland are responsible for recommending individuals suitable for appointment to the office of Judge of the Court of Session. In carrying out its functions, the Board has a statutory obligation to have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.

Financial Effects

11. The increase in the number of judges will be cost neutral as far as the budgets for judicial salaries and pensions are concerned. The Inquiry will meet the costs of Lady Smith's salary and pension.

12. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Civil Law and Legal System Division
Justice Directorate
September 2016