

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Schedule 3 - the Scottish Court Service

Status of SCS

161. As mentioned in paragraph 115 above paragraph 1 of this schedule establishes the SCS as the holder of an office, which office shall also be known as the SCS, for the purposes of the order to be made under section 104 of the Scotland Act 1998 which will provide that the office known as the SCS is included within the Scottish Administration.

Membership

162. Paragraph 2(3)(d) provides that there shall be three lay members of the SCS.
163. Paragraph 2(5) enables the Scottish Ministers to modify the membership of the SCS by order but only with the consent of the Lord President and only in so far as it does not affect the judicial majority.

Procedure for appointment of members

164. Paragraph 3(1) provides that the Lord President is to appoint the members of the SCS other than the Lord Justice Clerk and the Chief Executive. This is because the Lord Justice Clerk is an *ex officio* member and the Chief Executive is appointed by the SCS as a whole in terms of paragraph 14(1) and not appointed by the Lord President alone. Sub-paragraphs (2) to (4) make provision for regulations to be made prescribing the procedure to be followed for nominations or selection. For example regulations made under this paragraph might provide that the Senators of the College of Justice would nominate the judicial member listed at paragraph 2(2)(c) and that the six sheriffs principal would nominate the judicial member listed at paragraph 2(2)(d).

Term of office

165. Paragraph 5(3)(b) covers the scenario of a person failing to be qualified as a member of the SCS in terms of which they were appointed under paragraph 2(2) and (3). If they failed to remain qualified they would cease to hold office as a member of the SCS. For example, if the solicitor member of the SCS (appointed under paragraph 2(3)(b)) lost his or her practising certificate they would automatically cease to hold office as a member of the SCS under this paragraph.

Suspension of judicial members

166. Paragraph 8 provides that if a judicial member of the SCS is suspended from his or her position as judge, sheriff principal, sheriff or JP, he or she will also be suspended from acting as a member of SCS during that period.

Committees

167. [Paragraph 10](#) enables the SCS to establish committees. For example it may establish an estates committee or an audit committee. A person who is not a member of the SCS, such as an external consultant, may be appointed to be a member of such a committee.

Chief Executive and other staff

168. [Paragraph 14](#) provides that the SCS must appoint a Chief Executive and may appoint such other staff as it considers appropriate. Such staff will be civil servants as they will be within the Scottish Administration as provided for in the Section 104 order mentioned at paragraph 161 above.

Power to use local authority premises

169. [Paragraph 16](#) provides for the SCS to require a local authority to let or sub-let premises to the SCS or make such premises available for use by the SCS. Where the SCS requires a local authority to do the former this is subject to agreement on the terms of the lease (including the rent payable) and to the agreement of any third party who has an interest in the premises. Where the SCS requires a local authority to do the latter the SCS must reimburse the authority for any reasonable expenses in respect of heating, lighting and cleaning and must allow the premises to continue to be used for any business normally conducted there. This re-enacts the provisions made in Part 2 of the 1971 Act in relation to sheriff courts and in section 60 of the 2007 Act in relation to JP courts and extends it to all courts for which the SCS is responsible. (Part 2 of the 1971 Act and section 60 of the 2007 Act are repealed by paragraphs 2(5) and 5(3)(b) respectively of Schedule 5 to the Act.) Subparagraph (4) provides that the SCS may in turn allow any premises let or used by them under this paragraph to be used by other persons on the condition that it does not adversely interfere with the business normally conducted there. An example might be where the SCS allows part of such premises to be used by the Crown Office and Procurator Fiscal Service.

Freedom of Information

170. [Paragraph 18](#) provides that the SCS is covered by the requirements of the Freedom of Information (Scotland) Act 2002.

Transfer of staff

171. [Paragraph 19](#) provides for the statutory office holders listed in section 59(2) of the Act (who are also currently employed by the Scottish Ministers and therefore meet the requirements in both subparagraphs (1)(a) and (b)) and members of staff in the existing SCS to transfer to the new SCS on the date that this paragraph comes into force. Staff on secondment or loan to the existing SCS do not transfer and neither does the existing Chief Executive. Subparagraphs (4) and (5) transfer the contracts of employment for those staff from the Scottish Ministers to the SCS. It also provides that the contract of employment of staff is not terminated by the transfer and has effect as though originally made between the person and SCS.

Transfer of property and liabilities

172. [Paragraph 20](#) enables the Scottish Ministers to transfer the property held or used by them for or in connection with the purposes of the Scottish courts or the judiciary of those courts and any property used for the purposes listed in section 62(1) (administrative support for other persons) to the new SCS. It also enables the Scottish Ministers to transfer the corresponding liabilities to the new SCS. In terms of section 70 such an order would be made by negative resolution procedure. Subparagraphs (3) to (12) make supplementary provision for such an order (and are similar to the provision made in section 116 of the Scotland Act 1998). Subparagraph (3) provides that the order may provide for the creation of rights or interests, etc and provide for the property

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etc. to be determined (rather than specified in the legislation itself). Subparagraph (4) ensures that the order overrides "any provision (of whatever nature)" that may otherwise prevent, penalise or restrict the transfer. Subparagraphs (5) to (10) and (12) make further provision to ensure that rights of pre-emption, etc. do not operate as a result of the transfer; that compensation may be payable to any person who may be prevented from exercising such a right and for the determination of any disputes. Subparagraph (10) extends the scope of subparagraphs (4) to (9) to cover the creation of rights or interests, or the doing of anything else, in relation to property. Subparagraph (11) makes provision for a certificate issued by the Scottish Ministers to be conclusive evidence of a transfer.