

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 2 – Senior Judiciary: Vacancy, Incapacity and Suspension

Section 4 - Lord President

16. This section makes various provisions for when the office of the Lord President of the Court of Session – the most senior judge in Scotland – is vacant, or when the Lord President is either incapacitated or suspended. This section together with sections 5, 6, 7 and 8 re-enact, with minor modifications, the [Senior Judiciary \(Vacancies and Incapacity\) \(Scotland\) Act 2006 \(asp 9\)](#) which is repealed by paragraph 6 of Schedule 5.
17. In any of these circumstances, subsection (2) provides that the functions of Lord President will be carried out instead by the Lord Justice Clerk, and that the functions of the office of Lord Justice Clerk will, in turn, be carried out by the senior Inner House judge. Subsection (2) also makes clear that all of the functions of the Lord President and the Lord Justice Clerk are covered. For example, the Lord President has statutory functions in relation to a wide range of tribunals, he has responsibility for making appointments to, for example, the Lands Tribunal for Scotland and he also has various rule-making powers. There are a number of provisions that require others to consult with the Lord President, or seek his approval, in the course of their activities. For example Ministers must consult with the Lord President before they appoint persons as temporary judges. All of these functions are covered in addition to his judicial functions.
18. Subsections (3)(a) and (4) provide for a decision that the Lord President is incapacitated. It is for the judges of the Inner House to decide this, and a majority of their number must sign a written declaration to this effect, which must be supplied to the First Minister. A majority of judges is calculated in accordance with section 7(3). The Lord Justice Clerk must be one of those judges except where subsection (5) applies, that is, where the Lord Justice Clerk is incapacitated, suspended or there is a vacancy in the office in terms of section 5, or where the judges making the declaration are satisfied that the Lord Justice Clerk is incapacitated in terms of section 7(4). Once the written declaration is received by the First Minister, the provisions of the Act for incapacity take effect.
19. No procedure is required in the case of a vacancy or suspension. As soon as the office of Lord President becomes vacant for any reason (for instance on the death, resignation, removal or retiral of the office holder) or when the Lord President is suspended, subsection (2) will take effect.
20. The powers under the Act will cease to have effect on one of three events occurring. The first would be the assumption of office of a new Lord President where there has been a vacancy. The second is when the First Minister receives a written declaration signed by

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2008 (asp 6) which received Royal Assent on 29 October 2008*

a majority of Inner House judges that they are satisfied the Lord President is no longer incapacitated. This is provided for in subsection (3)(b). There is no requirement that the same judges sign both declarations. The third is if the Lord President's period of suspension ceases and he or she resumes office.

21. Subsection (6) requires the First Minister to send a copy of either declaration concerning incapacity received from the judges to the Presiding Officer of the Scottish Parliament.
22. Subsection (7) prevents the Lord Justice Clerk, whilst he or she is undertaking the functions of the Lord President during a period of vacancy, incapacity or suspension, from deputising for the Lord President on a panel constituted under section 19(2) to recommend appointment to the office of Lord Justice Clerk.