

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minor modifications, the [Senior Judiciary \(Vacancies and Incapacity\) \(Scotland\) Act 2006 \(asp 9\)](#) which is repealed by paragraph 6 of Schedule 5.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

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.

Section 5 - Lord Justice Clerk

23. This section makes similar provision for the incapacity or suspension of the Lord Justice Clerk and provides in such eventuality for his or her functions to be carried out by the senior judge of the Inner House.

Section 6 - Periods when both sections 4 and 5 apply

24. **Section 6** makes provision for what would happen were both the Lord President and the Lord Justice Clerk to be incapacitated or suspended at the same time or in the event of both posts being vacant. It provides that in such a situation their functions would be carried out by the two most senior judges of the Inner House. In particular the most senior would carry out the Lord President's functions and the other (i.e. "the second senior judge") would carry out the Lord Justice Clerk's functions .
25. By way of illustration - the Inner House comprises the Lord President, the Lord Justice Clerk, and, in order of seniority, Judges 1, 2, 3, 4, 5, 6, 7, 8 and 9. The Lord President is incapacitated. The Lord Justice Clerk is carrying out the functions of that office, with Judge 1 carrying of the functions of the Lord Justice Clerk. The Lord Justice Clerk becomes incapacitated before the Lord President returns to duty. Following the scheme of this section, Judge 1 then "steps up" and exercises the functions of the Lord President; Judge 2 assumes powers to carry on the functions of the Lord Justice Clerk.

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.

Section 8 – Interpretation of Chapter 2

30. This section gives certain words specific meanings for the purposes of Chapter 2. Subsection (1) makes clear that incapacity arises only on the grounds of ill health. Subsection (2) makes clear that it is seniority of appointment to the Inner House that is relevant to which judge is most senior in terms of the Act procedure. Subsection (3) recognises that the Lord President is also the holder of the office of Lord Justice General. The effect is that the functions relating to that office can also be carried on under the provisions of the Act.
31. Subsection (4) preserves the provisions that already exist in statute allowing the Lord Justice Clerk to carry out a function of the Lord President or Lord Justice General. One example is section 2(1) of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#). This provides that the High Court will sit at such places as the Lord Justice General whom failing the Lord Justice Clerk shall determine. By applying section 4(2) to such existing statutory provisions, subsection (2) makes clear that in the event of a vacancy or the incapacity of the Lord Justice General, such a function of the Lord Justice General may be exercised by the Lord Justice Clerk “whom failing” the senior judge of the Inner House acting as Lord Justice Clerk under the Act provisions.