

JUDICIARY AND COURTS (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT

Part 2 – the Judiciary

Chapter 4 – Judicial Conduct

Judicial conduct

Sections 28 and 29 - Rules about investigations etc. and Powers of the Lord President

68. These sections enable the Lord President to establish a judicial conduct scheme and are pursuant on the Lord President's responsibility in section 2(2)(e) of making and maintaining appropriate arrangements for the investigation and determination of any matter concerning the conduct of judicial office holders and the review of such determinations.
69. **Section 28(1)** provides that the Lord President may make rules for the investigation and determination of issues of judicial conduct and for reviews of any such determinations. Subsection (2) contains a non-exhaustive list of the matters that may be covered by the rules. Subsection (3)(a) would enable the Lord President to, for example, make provision in the rules in terms of subsection (2)(f) for different people to conduct investigations dependent on whether a judge or sheriff was the subject of the investigation. Subsection (3)(b) provides for the publication of these rules.
70. **Section 29** enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out at subsection (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and subsection (3) makes it clear that this does not restrict what the Lord President may do informally.

Judicial Complaints Reviewer

Sections 30, 31, 32 and 33 – Judicial Complaints Reviewer, tenure, guidance and the Lord President's powers on referral

71. **Section 30** provides for the appointment by the Scottish Ministers (with the consent of the Lord President) of a Judicial Complaints Reviewer ("the Reviewer"). Under subsection (5), certain categories of persons are disqualified from appointment as the Reviewer. This is to ensure the independence of the person appointed from political, ministerial or judicial influence. The functions of the Reviewer are: on request of the complainant or of the judicial office holder who has been the subject of the investigation, to review the handling of an investigation in terms of procedure; where

the procedure has not been followed to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures. The Reviewer role is only procedural. The Reviewer is not given the function of reviewing the merits.

72. **Section 31** sets out the details of the Reviewer's appointment. Subsection (1) gives the Scottish Ministers the power to determine, with the consent of the Lord President, the period of tenure and the terms and conditions of appointment of the Reviewer. The circumstances in which the Reviewer may be removed from office are set out at subsection (5). Provision is made at subsection (4) for the Scottish Ministers to effect such a removal and for the consent of the Lord President to be obtained before a removal can take place. Whilst the Reviewer may be re-appointed (subsection (7)) a limit of 5 years is placed on their total, consecutive or otherwise, period of office by subsection (8).
73. **Section 32** provides that the Reviewer must comply with any guidance that the Scottish Ministers may issue about the carrying out of the Reviewer's functions. Subsection (2) places a duty on the Scottish Ministers to consult the Lord President before issuing any such guidance.
74. **Section 33** provides for the end of the process. It provides that where the Reviewer refers a case to the Lord President under section 30(2)(b) the Lord President may vary or revoke the determination (or part thereof); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers appropriate.

Suspension

Section 34 – Suspension

75. This section makes provision for suspension of judicial office holders where the Lord president considers it necessary for the purpose of maintaining public confidence in the judiciary. Subsection (4) provides that the suspension would be done by the Lord Justice Clerk if the Lord President is unavailable, or where both are unavailable by the senior judge of the Inner House. Such suspension does not affect a judicial office holder's salary. An example of the type of situation in which this might be used is where an alleged incident of a serious nature involving a judicial office holder is reported widely in the press.
76. This power is separate from the suspension provisions in Chapter 5 of Part 2 of the Act. Suspension under this section is not dependent upon a tribunal having been convened.