POLICY NOTE

THE MAXIMUM NUMBER OF JUDGES (SCOTLAND) ORDER 2026

SSI 2026/xxx

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.

The purpose of this instrument is to increase the maximum number of persons who may be appointed judges of the Court of Session from the current 36 to 40.

Policy Objectives

2. The maximum number of judges of the Court of Session is currently 36, specified in section 1(1) of the 1988 Act, as amended by the Maximum Number of Judges (Scotland) Order 2022 (SSI 2022/096).

3. This Order will increase the maximum number of judges of the Court of Session, also known as senators of the College of Justice to 40.

4. Section 1(2) of the 1988 Act enables His Majesty by Order in Council to increase the maximum number of persons who may be appointed as senators of the Court. Section 1(3) provides that no recommendation shall be made to His 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 in part due to Lord Colbeck being appointed as Chair of the Sheku Bayoh Inquiry, following the resignation of the previous Chair. There are already three senators engaged in other Inquiries. These judges continue to carry out Court of Session business where their workload permits. However, their capacity is limited, as their primary focus remains on their Inquiry responsibilities. Further there is one senator sitting as the President of the Employment Appeal Tribunal and another senator has been appointed as President of the Upper Tribunal Administrative Appeals Chamber.

6. There is also one senator who works 0.8 FTE. Increasing the maximum number of judges to 40 may also provide further opportunities to facilitate more flexible working arrangements for existing and new judges, while also assisting with workloads. We believe this approach may help attract a broader and more diverse range of applicants to the role, while maintaining a cost-effective and affordable approach.

7. There remain significant pressures across both the High Court and the Court of Session, and these have been further exacerbated by the loss of another senator to Inquiry work. As of August 2026, there are 34 temporary judges, comprising of 25 salaried sheriffs acting as temporary judges along with nine other retired judicial office holders sitting in retirement as temporary judges. While these arrangements assist in managing existing pressures, these resources are fully utilised within the High Court and provide limited additional capacity to further mitigate the impact on Court of Session business. The increased reliance on temporary

judges as an intended short term solution also places additional demands on the sheriff court, which is currently managing existing vacancies. This risks simply shifting pressures from one court to another, rather than addressing underlying capacity challenges across the system. The Order seeks to help minimise this risk and start to move away from reliance on short term, temporary fixes. This is particularly important given that the current level of reliance on temporary judges is the highest on record.

8. One additional senator is immediately required to enable a replacement for Lord Colbeck to be appointed, without adding additional pressure on the sheriff courts. Increasing the statutory maximum number of senators to 40 would create capacity for up to three further appointments, as and when they are required. Forecasting by the Scottish Courts and Tribunals Service (SCTS) indicates that pressure on High Court business is expected to increase over the coming years.

9. Increasing the statutory maximum number of senators above what is immediately required at this stage would provide greater flexibility to respond quickly to emerging business needs and support longer-term judicial workforce planning. This represents a proportionate and cost-effective approach to ensuring the resilience and sustainability of the judiciary.

Consultation

10. To comply with the requirements of section 1(3A) of the 1988 Act, the Lord President has been consulted on the draft Order. The Lord President responded to the consultation on 4 August 2026 and raised no concerns.

Equality Impact Assessment

11. The SSI is not expected to have any direct impact on people with protected characteristics, as its primary purpose is administrative, namely increasing the maximum number of judges. The Judicial Appointments Board for Scotland is responsible for recommending individuals to the First Minister who are suitable for appointment as senators of the Court of Session. In carrying out its functions, the Board is under a statutory duty to have regard to the need to encourage diversity in the range of individuals available for selection and recommendation for judicial appointments.

Financial Effects

12. The Order will raise the maximum number of judges to 40 however there is no immediate intention to recruit additional senators to that level. Rather, the intention is to recruit one additional senator, raising the headcount to 37 senators at this time, which will cost £416,807 per year. There will be no immediate financial implication as the costs of raising the number of senators from 36 to 37 will be offset by the Sheku Bayoh Inquiry meeting the cost of remunerating Lord Colbeck as Chair. Thereafter, it is expected there will be future retirements and natural attrition. However, if additional senators are required to support an increase in court business beyond 37, this would result in additional costs of £416,807 per senator to cover the remuneration of senators above 37 up to a maximum of 40

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

Scottish Government
Civil Law and Legal System Division
Justice Directorate
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