POLICY NOTE

THE MAXIMUM NUMBER OF JUDGES (SCOTLAND) ORDER 2022

SSI 2022/96

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 35 to 36.

Policy Objectives

2. The maximum number of judges of the Court of Session is 35, specified in section 1(1) of the 1988 Act, as amended by the Maximum Number of Judges (Scotland) Order 2016 (SSI 2016/423).

3. The Order increases by one the maximum number of judges of the Court of Session, also known as senators of the College of Justice, to 36.

4. Section 1(2) of the 1988 Act enables Her Majesty by Order in Council to increase the maximum number of persons who may be appointed as judges of the Court. Section 1(3) provides that no recommendation shall be made to Her 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 as a consequence of the upcoming appointment of a Court of Session judge as Chair of the Covid Inquiry ("the Inquiry") from 2022. The appointee will be seconded to the Inquiry. During the secondment, the judge will not be available to sit in court however will remain a judge for the purposes of the statutory limit in section 1(1) of the 1988 Act.

6. The Inquiry is expected to last several years. This appointment will coincide with the retirement of Lady Smith. The maximum number of judges was last increased in 2016 when Lady Smith was appointed as Chair of the Scottish Child Abuse Inquiry. Lady Smith will be succeeded by a new judge sitting in the court. A number of judges also perform additional duties which reduces their availability for court sitting. Three judges work reduced hours which equates to a reduction in the senatorial complement of 0.6 against full time equivalents.

7. The Lord President has therefore indicated a further judge is required as the demand on senatorial resource is at an all-time high; mainly due to the current number of High Court trials proceedings per day as well as the prospective number under Covid-19 pandemic recovery modelling. The additional judge will help meet the demands of the business in the Court of Session (civil business) and the High Court (criminal business). Options, other than appointment of an additional judge, were considered:

a) Short-term increase in number of judges of the Court of Session – It is not possible to increase the maximum number of judges for a specified period of time as there is no legislative power to allow this where the absence is caused by a judge chairing a public inquiry.

b) Increased reliance on Temporary Judges – Section 20B of the Judiciary and Courts (Scotland) Act 2008 provides for the appointment of temporary judges. The Lord President, head of the judiciary in Scotland, does not consider this a realistic option. There are currently twenty temporary judges appointed, which is considered a high number. The current practice is that temporary judges are all drawn from the sheriff court ranks. To appoint any more would only transfer and increase the existing strain on the sheriff courts.

8. The Lord President has been consulted and considers that the appointment of an additional judge is required to ensure the efficient disposal of business in the Scottish Courts. The Lord President also requested in his consultation response that consideration be given to making changes to the primary legislation to alter the maximum number of judges from an absolute limit of persons to instead being calculated on the basis of a maximum number of full-time equivalent judges.

9. This change to the primary legislation would allow greater flexible working for judges. The Scottish Government intends to consider making this change when suitable primary legislation is available.

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.

Equality Impact Assessment

11. There is no direct impact on the protected characteristics. The Judicial Appointments Board for Scotland are responsible for recommending individuals suitable for appointment to the office of Judge of the Court of Session. In carrying out its functions, the Board has a statutory obligation to have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.

Financial Effects

12. The increase to the number of judges will cost £318,000 per year, however, it will ensure a judge can lead the Covid Inquiry and that the court recovery programme can continue as currently modelled. The additional cost for this will be accounted for in the draft Scottish Budget for 2022/23. The Covid Inquiry will meet the costs of the salary and pension of the judge to be appointed to chair it.

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

Scottish Government
Civil Law and Legal System Division
Justice Directorate
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