**SENIOR JUDICIARY (VACANCIES AND INCAPACITY) (SCOTLAND) BILL**

**POLICY MEMORANDUM**

**INTRODUCTION**

1. This document relates to the Senior Judiciary (Vacancies and Incapacity) (Scotland) Bill introduced in the Scottish Parliament on 13 June 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 65–EN.

**POLICY OBJECTIVES OF THE BILL**

2. This Bill makes proposals that will allow the functions of the two most senior judges to be carried out when either, or both, is incapacitated by reason of ill health, or when the office is vacant. These judges are the Lord President of the Court of Session, who also holds the office of Lord Justice General, and the Lord Justice Clerk. The objective of the Bill is ensure that there is no disruption to the operation of the courts and in those areas of public administration in which the senior judges have responsibilities, owing to the absence of those judges for those reasons.

3. The Lord President is head of the Court of Session. In addition to functions as the presiding judge of the Court, a range of responsibilities of public administration are placed by statute on the Lord President alone. The position is similar when the Lord President carries out his role in the criminal rather than the civil courts, namely that of Lord Justice General, the head of the High Court of Justiciary. The Lord Justice Clerk is the second most senior judge (presiding in the Second Division of the Court of Session and with important duties in the criminal High Court of Justiciary). While fewer in number, certain functions are placed on this office alone and proposals are included in the Bill to ensure these matters can be dealt with during any time when the Lord Justice Clerk is incapacitated or the office is vacant.

4. The Bill proposes a process through which the Lord Justice Clerk and at least four other judges of the Inner House may, if they are satisfied of his or her incapacity, declare that the Lord President is unable to carry out his or her functions owing to ill health. This means that a majority of the judges of the Inner House, the most senior judges of the Court, must agree. On making this declaration to the First Minister, the Lord Justice Clerk would then be able to carry out any function which otherwise could be carried out only by the Lord President. In the case of a vacancy in the office of Lord President, the Lord Justice Clerk can act in his or her stead automatically. The Bill will also provide that during such time as the Lord Justice Clerk is
carrying out the functions of the Lord President, the senior judge of the Inner House will carry
out any function otherwise falling to the Lord Justice Clerk. The situations where the Lord
Justice Clerk is similarly incapacitated or his office is vacant, where both of the two senior
offices are vacant, or their holders are incapacitated, and where the senior judge who is replacing
the office-holder concerned is unavailable are also provided for. These arrangements will ensure
that there continues to be an orderly administration of the court system, and that everything that
needs to be done to meet the expectations of those relying on the system can be done.

CONSULTATION

5. The Bill is being introduced as an emergency measure, in order that it is available to deal
with the consequences of the ill health of the serving Lord President1. While this Bill has
accordingly not been the subject of specific consultation, the principle of giving the Lord Justice
Clerk authority to carry out the functions of the Lord President during the latter’s temporary
incapacity, or when the office was vacant, was included in a consultation on proposals for reform
of aspects of the judicial system in Scotland which the Executive conducted during the period
from February to May 2006. A broad range of individuals and organisations were included in
this consultation which was also the subject of comment in the media. The consultation paper,
*Strengthening Judicial Independence in a Modern Scotland*2, was distributed to all members of
the Judiciary, and to some 280 bodies across Scottish society. The distribution included the
voluntary and faith communities, bodies representative of particular groups, local government
and a number of public bodies. Of those who responded to this aspect of the consultation, almost
all were supportive of the proposal. Those that did not support the proposal did so on the basis
that a new provision was unnecessary.

6. The policy objectives can be achieved only by conferring power speedily on other judges.
These powers will be exercised for a limited period, namely while an office is vacant, or during
the incapacity of an office holder. This Bill proposes a means of achieving this, and in a way
that does not interfere with the independence of the judiciary, as the key decision about
incapacity is left with the senior judges. The proposals also provide that the functions of the
Lord President and the Lord Justice Clerk will be carried out by the next most senior judges. As
certain of these functions concern more junior judges, this arrangement is considered the
appropriate approach.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND
COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT.

7. The Bill has no impact in these areas.

1 First Minister’s Statement to the Scottish Parliament on 1 June 2006:
This document relates to the Senior Judiciary (Vacancies and Incapacity) (Scotland) Bill (SP Bill 65) as introduced in the Scottish Parliament on 13 June 2006

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