

Equalities, Human Rights and Civil Justice Committee

4th Meeting, 2022 (Session 6), Tuesday 8 February 2022

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following draft affirmative instrument:

- [2022/Draft: The Maximum Number of Judges \(Scotland\) Order 2022](#)

2022/Draft: The Maximum Number of Judges (Scotland) Order 2022

2. The draft SSI is being laid before the Scottish Parliament under section 1(3) of the Court of Session Act 1988. The affirmative instrument is subject to approval by resolution.
3. 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.
4. This 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.

Delegated Powers and Law Reform Committee Consideration

5. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [21 December 2021](#). The DPLR Committee agreed that it did not need to draw the Parliament’s attention to the instrument on any grounds within its remit.

6. A copy of the Scottish Government Policy Note is included at [Annexe A](#) together with links to any associated documents.

Equalities, Human Rights and Civil Justice Committee Consideration

Procedure for Affirmative instruments

7. The draft instrument was laid on 16 December 2021 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to affirmative procedure (Rule 10.6). It is for the Equalities, Human Rights and Civil Justice Committee to recommend to the Parliament whether the instrument should be approved.
8. The Cabinet Secretary for Justice and Veterans has, by motion [S6M-02595](#), proposed that the Committee recommends the approval of the instrument. **The Committee is therefore required to report to the Parliament by 8 February 2022.**
9. The Cabinet Secretary for Justice and Veterans is due to attend the Committee meeting on 8 February to answer any questions on the instrument and to move the motion for approval.

Recommendation

10. **It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instrument.**
11. **The Committee is asked to delegate to the Convener authority to approve a short, factual report on the instrument for publication.**

Clerks to the Committee
3 February 2022

Annexe A

Scottish Government Policy Note

The Maximum Number of Judges (Scotland) Order 2022

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.

Purpose of the instrument

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

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).

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.

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.

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.

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.

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.

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.

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

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

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

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.

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.