

JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

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Introduction

The judges of the Court of Session and the High Court of Justiciary have a jurisdiction which encompasses both civil and criminal cases.¹ As a result, whatever has been their professional field in private practice, persons who are appointed judges require to be operate at a high level of competence in both civil and criminal law and procedure in order to deal with the most important cases in both fields.

There are thirty four judges in Scotland. The Court of Session is divided into an Inner House and an Outer House. Most of the work of the former involves hearing and determining appeals and the latter deals with cases at first instance. Of the complement, eleven judges are Inner House judges and the remainder sit in the Outer House. Outer House judges frequently sit with Inner House judges on an Inner House Bench. Pressure of appellate business requires them to do so.

All judges of the Court of Session are, by virtue of that office, also Commissioners of Justiciary, that is, judges of the High Court. As such they may and do sit as trial judges or as appellate judges in the High Court.

The senior judge is the Lord President of the Court of Session and Lord Justice-General, who is head of the Court of Session and of the High Court of Justiciary. He presides over the First Division of the Inner House. In addition to his judicial duties, he has a wide range of administrative and other functions to perform in his supervision of all the business of both courts and in exercise of his responsibility for relevant policy. He has also a wide range of administrative and other functions in relation to tribunals and the legal profession in Scotland.

The reform of the governance of the Scottish judiciary by the Judiciary and Courts (Scotland) Act 2008 (“the 2008 Act”) has greatly increased the responsibilities of the Lord President, who is with effect from April 2010 Head of the Scottish Judiciary and responsible for the efficient disposal of business in all of Scotland’s courts. The administrative responsibilities associated with these three new roles are likely to be very onerous.

The second most senior judge in Scotland is the Lord Justice Clerk who presides in the Second Division of the Inner House and alternates with the Lord President to preside over appellate sittings of the High Court of Justiciary in the most important cases. In addition to various statutory and other functions, he acts as head of the Court of Session and High Court of Justiciary in the absence of the Lord President and is frequently consulted by the Lord President on sensitive and difficult issues in relation to the administration of the courts or otherwise. The Lord Justice Clerk of the day may also be asked to preside over inquiries or reviews of national importance. Lord Cullen of Whitekirk, when Lord Justice Clerk, presided over the Ladgrove Crescent rail disaster inquiry. The current Lord Justice Clerk, Lord Gill, was

¹ In their civil capacity they are Senators of the College of Justice and in relation to criminal matters they are Lords Commissioners of Justiciary.

responsible for the far-reaching reform proposals in the Scottish Civil Courts Review which was published in September 2009 and which, if implemented, will radically change the structure of the civil courts and the management of court business.

Other judges may also be asked to preside over inquiries of high significance; for example, Lord Cullen prior to becoming Lord Justice Clerk, presided over the Dunblane Massacre Inquiry and the Piper Alpha Inquiry; Lord Penrose presided over the Equitable Life Inquiry. Lord Clyde presided over the Orkney Inquiry into allegations of wide ranging child abuse.

The implementation of the 2008 Act has not only materially increased the administrative workload of the Lord President and Lord Justice Clerk but also has necessitated the delegation of administrative duties to other judges.

Qualifications and experience

People are formally eligible for appointment as a judge if they are:

- (a) Advocates of five years' standing;
- (b) Writers to the Signet of ten years' standing who have passed the examination in civil law two years before taking up their seat on the Bench;
- (c) Sheriffs Principal and Sheriffs who have exercised their respective functions continuously for a period of at least five years; and
- (d) Solicitors who have had rights of audience before either the Court of Session or the High Court of Justiciary or both continuously for a period of not less than five years.

The formal qualifications bear little relationship to the actuality of the experience required for appointment to the Bench. Most judges are appointed in their early fifties after having practised law, conducting cases as advocates in the supreme courts, for many years. It is traditionally from amongst the most able advocates that the members of the Scottish Bench have been recruited. Solicitor advocates who have built up similar professional experience are also candidates and the Scottish Bench has included some judges who have distinguished themselves on the shrieval bench before their appointment as judges.

A judge must now retire on his or her seventieth birthday and is entitled to full pension rights after twenty years of judicial service.

Judicial Duties

The workload of judges is significant and people who seek appointment as judges should be aware of this. The description of the work of a judge by the Judicial Appointments Board for Scotland contains the following:

“For the fulfilment of such judicial duties it should be anticipated that it will be necessary to work at home during most evenings of the week and also at weekends.”

The principal activities of judges are set out below.

Criminal Proceedings

The High Court of Justiciary exclusively tries all charges of murder, treason, rape, breach of duty by magistrates and certain statutory offences. It also tries the most serious of other crimes. A judge of the High Court of Justiciary sitting at first instance presides over trials of people accused of those offences. This involves controlling the proceedings in court, ruling on legal challenges, summing up to the jury and, if there is a conviction, sentencing the accused. Important issues of law can arise in High Court trials and not uncommonly result in appeals which become landmark cases.

All first instance judges of the High Court of Justiciary are also appointed to supervise the preparation of criminal cases for trial by holding preliminary hearings to ensure that cases are not assigned to trial diets before they are ready to proceed. First instance judges also write reports for the Parole Board when they have imposed certain custodial sentences and, when required, appeal reports for the High Court of Justiciary sitting as an appeal court. These reports require to be written within a tight time scale.

When engaged on criminal business, judges also deal with criminal appeal sifts outside court hours.

When the High Court of Justiciary sits as an appellate court, it is normal for three judges to hear appeals against conviction and for two judges to sit when hearing appeals against sentence. The Court also hears appeals in cases which the Scottish Criminal Cases Review Commission refers to it. In particularly important or difficult cases, or where the court considers whether to overrule a previous binding authority, a larger court of five or more judges may be convened. The Lord Justice General or the Lord Justice Clerk will ordinarily preside over such a larger court.

There is no appeal to the United Kingdom Supreme Court in criminal cases but that court has become involved with Scottish criminal law through human rights challenges in the form of devolution issues.²

Civil Proceedings

Court of Session judges when sitting at first instance hear cases on a wide range of civil matters. Normally they sit alone but occasionally they may sit with a civil jury in specified cases. The cases which Court of Session judges hear include cases based on delict (tort), contractual disputes, judicial review of administrative action, property law, revenue, company law and intellectual property cases. In recent years judges have also dealt with a large number of immigration appeals and judicial reviews. Cases of constitutional importance have also become more frequent. Judges are thus required to cover a wide spectrum of work.

There are designated judges for commercial, company, insolvency and intellectual property cases. Two judges work full time on commercial and company cases and another judge devotes one half of his time to that work. The Lord President appoints judges to work in those specialist areas usually for three years. Another judge spends a significant part of her time as a judge of the Employment Appeal Tribunal which involves sitting to hear appeals (mainly in Edinburgh but , from time in time , in London) and sifting appeals and considering requests for directions, out of hours. Many judges in the course of their careers in the Outer House are designated to work in one or more of these specialisms.

Judges produce reasoned judgments or opinions after hearing civil cases. Normally they produce these opinions by working outside court hours but, after particularly complex or lengthy cases, they can also obtain writing time in court hours if the judicial workload permits. Judges also deal with written unopposed motions outside court hours when engaged on civil business. Occasionally judges have also to consider whether to authorise the commencement of proceedings by party litigants or vexatious litigants. Judges also require to be able to give *ex tempore* reasoned judgments in appropriate cases .

There is a specialist court with three judges, the Lands Valuation Appeal Court, over which the Lord Justice Clerk currently presides, and which hears appeals on valuation for rating cases. Three judges sit on another specialist court, the Registration Appeal Court, which hears appeals in relation to electoral registration. All Court of Session judges are *ex officio* eligible to sit on the Upper Tribunal of the new United Kingdom tribunal system and the Lord President has nominated several to sit on the specialist Finance and Tax Chamber of the Upper Tribunal. It is likely that arrangements will be made for judges to sit on the Competition Appeal Tribunal.

The Inner House comprises two Divisions, namely the First Division over which the Lord President presides, and the Second Division, of which the Lord Justice Clerk is the president. Not infrequently an Extra Division, over which another Inner House judge presides, is convened. The Divisions hear cases on appeal from the Outer House, the Sheriff Court and certain tribunals and other bodies. In recent years immigration appeals have considerably increased the workload of the Inner House.

In most cases a Division comprises three judges but if a case is particularly important or difficult, or if it may be necessary to overrule a previous binding authority, the Lord President or Lord Justice Clerk may convene a larger court of five or more judges.

A party may, in appropriate cases, appeal from the Inner House to the United Kingdom Supreme Court in civil matters.

Administrative Duties

The primary function of all judges, at first instance or in an appellate capacity, is to hear and determine cases. But changes in court practice in recent years

and the assumption by the judiciary of greater responsibility for case management and the administration of the court service have increasingly involved judges in additional administrative duties.

There are four administrative judges (appellate: civil and criminal; first instance: civil and criminal respectively) to whom the Lord President has delegated responsibility for certain aspects of the efficient operation of the courts. They are the judicial members of the Supreme Courts Programming Board.

In criminal cases the preliminary hearing judges are responsible for the efficient case management of criminal cases. One judge, who sits in the High Court in Glasgow for almost all of the year, is responsible for managing that court. The principal commercial judge manages the business of the commercial court. Commercial judges and intellectual property judges are responsible for the management of their cases to ensure the efficient use of court resources.

Two judges are respectively the chairman and a member of the Judicial Studies Committee which organises the training of all judicial office-holders. One judge is the part-time chairman of the Scottish Law Commission. Another judge is responsible for judicial welfare. One judge is a member of the Judicial Appointments Board. Another judge is a member of the Parole Board. Two judges, other than the Lord President, serve on the Court of Session Rules Council and one serves on the Criminal Courts' Rules Council with the Lord Justice General and the Lord Justice Clerk. One judge is deputy chairman of the Boundaries Commission for Scotland. Two judges serve on the Public Information Officer Steering Group. One judge is responsible for the implementation in Scotland of the new United Kingdom tribunal system. One judge is on the Judicial Advisory Group relating to the redevelopment of Parliament House. Many judges serve on working groups which are set up to devise or respond to reform proposals.

The United Kingdom's European and international commitments have caused judges to be involved in international bodies. One judge is a member of the International Hague Network of Judges and family liaison judge for the European Civil Judicial Network and another represents the Judicial Council for Scotland on the European Network of Councils for the Judiciary.

The implementation of the 2008 Act has further increased the administrative duties of judges. The anticipated unification of the Scottish judiciary has resulted in the creation of the Judicial Council for Scotland. Six judges serve on that Council and on its specialist sub-committees. Several judges have been involved in the creation of the independent Scottish Court Service which is responsible for the staffing and administration of the courts, the provision of related services, and the development, maintenance and efficient use of court buildings in Scotland. The Lord President, the Lord Justice Clerk and one other judge are members of the Court Service.

Other Activities

Judges assist public understanding of the law and the justice system by giving lectures and speeches on matters relating to the law in the universities or at professional conferences. They also give lectures at judicial training conferences arranged by the Judicial Studies Committee. They assist in international programmes for judicial exchanges and those for young lawyers such as those facilitated by the British Council .

Judges also represent Scotland and the United Kingdom at judicial exchanges and international meetings.