

**THE OFFICE OF
SENATOR OF THE COLLEGE OF JUSTICE**

This paper has been provided by the Judicial Office for Scotland.

Introduction from the Lord President

The Rule of Law is fundamental to the functioning of a modern democracy. A vital part of ensuring the observance of the Rule of Law is an independent judiciary comprised of lawyers of high quality and ability. You may be considering whether you wish to become one of the judges of the Supreme Courts of Scotland - the Court of Session and the High Court of Justiciary. I therefore take this opportunity to explain why being a judge is both worthwhile and fulfilling.

The work is varied and demanding. Whatever areas of law you have been practising in, you can, from the outset, anticipate being asked to preside in a variety of first instance civil business and in the trial of serious crime. You will be assisted in understanding any relevant practices and procedures, with which you are unfamiliar, by the Judicial Institute's training programme. With a small number of judges in the Supreme Courts, everyone needs to be able to master any aspect of the law. Particularly in the first few years, the work may require a readiness to revisit your academic studies in order to make sure that your legal knowledge is up to date in the main areas of work with which the Supreme Courts are concerned.

Especially now, when measures of physical distancing are in place, judges will be expected to conduct some, particularly procedural, hearings remotely. For Outer House procedural business this will often be by WebEx video conferencing. An ability to master digital technology is an important tool in a modern judge's armoury.

As a judge, you will be entrusted with ensuring that Scots law continues to meet the needs of today. You will take decisions that may fundamentally affect the lives of fellow citizens. They will expect and trust you to carry out your task to the best of your professional ability. I have found my time on the bench intellectually challenging, stimulating and rewarding. If you are successful in your application, I am sure that you will too.

Lord Carloway

The Judges of the Supreme Courts

- 1) The judges of the Supreme Courts are judges of the Court of Session and the High Court. They have a jurisdiction which encompasses civil and criminal cases, both at first instance and in an appellate capacity.¹ There is presently a maximum of 35 judges. At their head is the Lord President of the Court of Session. The Lord President presides over the First Division and, as Lord Justice General, in a number of significant criminal appeals. The Lord President is the chairing member of the Scottish Courts and Tribunals Service Board. He is also the head of the Scottish Tribunals in terms of the Tribunals (Scotland) Act 2014. The Lord Justice Clerk presides in the Second Division. Traditionally the Lord Justice Clerk has particular responsibility for criminal law and procedure. She chairs the appellate sittings of the High Court in many important cases. She also deputises for the Lord President in administrative matters as required.
- 2) There is a maximum of 12 judges in the Inner House. The remaining judges sit in the Outer House. Outer House judges are occasionally asked to sit in the Inner House, especially if the appeal concerns a matter within his or her particular expertise.
- 3) An Outer House judge is paid £192,679 *per annum* and an Inner House judge £219,396. All judges who are eligible only for the Judicial Pension Scheme 2015 and are not active members of the JUPRA Scheme, currently also receive a Recruitment and Retention Allowance (RRA) of 11% of salary. This is a targeted, temporary, taxable and nonpensionable allowance². A new reformed Judicial Pension Scheme is to be introduced for all judges in April 2022. Details of the 2022 scheme can be found in draft Regulations³ which follow a UK wide consultation on the issue⁴. The new scheme will be a non-tax registered scheme and so will resolve the issue currently temporally addressed by payment of the RRA. Once enacted, the provisions of the Public Services Pensions and Judicial Offices Bill⁵ will also increase the Mandatory Retirement Age for Judges from the current age of 70 to 75 and provide a choice of benefits for existing judicial office holders in the same factual and legal

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. The term judge is used throughout this document in place of either description

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806480/government-response-ssrb-june-2019.PDF

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005437/jps-2022-draft-scheme-regulations.pdf

⁴ <https://www.gov.uk/government/consultations/consultation-on-a-reformed-judicial-pension-scheme>

⁵ <https://bills.parliament.uk/publications/42278/documents/567>

position as the *McLeod* claimants⁶ for the remedy period of April 2015 to 31 March 2022

- 4) On appointment after 1 April 2022 Judges of the Court of Session will be entitled to enter the Judicial Pension Scheme 2015 only if there is a delay in the introduction of the new reformed scheme. Details of the 2015 scheme are contained in a guide issued by the Ministry of Justice (which is responsible for administering all judicial pensions in the UK). A copy of the guide forms part of the application pack. Candidates should consider taking independent financial advice on the tax and other financial implications of joining the scheme, preferably in advance of making an application.

Qualifications and experience

- 5) Those formally eligible for appointment 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.
- 6) Persons who are appointed have to demonstrate a level of competence that marks them out from their peers. Their ability needs to be demonstrated not just in the branch or branches of the law in which they have regularly practised. They must also demonstrate an ability to work effectively in other branches of the law that may arise in the course of their judicial duties, including new or emerging areas.
- 7) JABS encourages diversity and particularly welcomes applications from groups currently under-represented in the Judiciary. The principles of fair and open competition will apply. Recommendation for appointment will be made solely on merit.

⁶ <https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-orsjudgment.pdf>

Judicial Duties

- 8) A newly appointed judge will begin work in the Outer House and the High Court. The precise division of work will depend upon circumstances and pressure of business. At present, there is a high level of demand in the first instance courts of the High Court. All new judges can expect to conduct criminal trials. Those who have specialised in criminal may wish to preside only, or mostly, in such trials. Those from a civil background will have the opportunity to preside for prolonged periods in the commercial, family and other courts in the Outer House. The workload of a judge is challenging, but stimulating and rewarding. The decisions of judges on controversial matters can attract substantial, and often critical, scrutiny in the media. Judges are expected to be sufficiently robust in character to withstand public criticism, even when it is ill-informed.

Criminal Proceedings

- 9) A judge sitting at first instance must be able to preside over trials of people accused of the most serious offences. They must control the proceedings, rule on legal challenges, direct the jury on the law and, if there is a conviction, sentence the accused. Important issues of law can arise. Judges require to write reports for the Parole Board when they have imposed long term prison sentences. When required, they also prepare appeal reports for the High Court sitting in its appellate capacity. These reports must be written within a relatively short time scale and cover the issues of fact and law arising in the trial and challenged on appeal.
- 10) Judges deal with criminal appeal sifts (applications for leave to appeal). These are either single judge conviction and sentence sifts, or two and three judge sentence and conviction sifts to be carried out in conjunction with a judge or judges sitting in the same building. A judge may be asked to sit as part of a court to hear criminal appeals
- 11) The bulk of criminal trial work is carried out in Glasgow, where there are 9 courts, and Edinburgh which has 4 trial courts. There is a dedicated court in Aberdeen. The High Court also sits in certain sheriff court buildings, including Inverness and Livingston as business requires. Judges sitting out of Edinburgh are provided with a car and driver, although they may elect to stay overnight if they prefer. Those with child or other care responsibilities may express a preference to sit only in and around Edinburgh or, depending upon their residence, Glasgow.
- 12) A small number of judges are appointed to manage criminal cases at Preliminary Hearings. These Preliminary Hearings are designed to

ensure that cases are not assigned to trial diets before they are ready to proceed. An Outer House judge is appointed as the First Instance Crime Administrative judge. He or she will sit mostly in Glasgow and supervise the operation of criminal trials under the general guidance of the Lord Justice Clerk. He or she will be a member of, and report to, the Supreme Courts Programming Board.

Civil Proceedings

- 13) Outer House judges are expected to decide a wide range of civil matters. Normally they sit alone, but occasionally they may sit with a civil jury. In recent years, first instance judges have had to deal with a large number of judicial reviews in immigration cases. Cases of constitutional importance, including those challenging the actions of Government and Parliament, have become more frequent. An aptitude in the civil field, especially if accompanied by efficiency in producing succinct and readily understandable opinions, may result in appointment to the specialist commercial court, or as the judge with particular administrative responsibility for personal injury or family litigation.
- 14) There are four designated judges for commercial and corporate cases. The Lord President appoints judges to work in those areas, usually for a maximum of three years, although this may be extended. Another judge is selected to sit part time on the Employment Appeal Tribunal. All Court of Session judges are *ex officio* entitled to sit in the Upper Tribunal of the reserved (UK) tribunals (including the Finance and Tax Chamber) and the devolved Scottish Tribunals. The Lord President designates specific judges to sit occasionally in these tribunals in Scotland and elsewhere in the United Kingdom (usually London).
- 15) As a generality, other than in cases involving complex issue of fact and law, Outer House judges are expected to deliver *ex tempore* opinions at, or very soon after, the conclusion of a hearing. If a judge has elected to reserve judgment, he or she is expected to produce a final opinion within 3 months and, in most cases, much sooner. After particularly complex or lengthy cases, a judge may be allocated specific writing time during the court day on request to the Keeper of the Rolls. Outer House judges deal with a wide range of written applications, including those seeking permission to commence proceedings by judicial review or ordinary actions by party litigants.
- 16) An Outer House judge acts as the Administrative Judge who monitors the key performance indicators for civil first instance cases. He or she will, like the counterpart in criminal trials, sit on and report to the Supreme Courts Programming Board. Outer House judges may be given roles in a variety of different areas. These are listed below, but include part time work as President of the Scottish Tribunals, and membership of the

Judicial Appointments Board, the Parole Board and the Sentencing Council.

The Inner House and High Court (appellate)

- 17) Appointment to the Inner House is an ambition of most (but not all) Outer House judges. Although experience in the Outer House is likely to be an important element, the selection of Inner House judges is on merit. The successful candidate will be expected to produce sound civil opinions within a reasonable time and to operate in the collegiate atmosphere of the Divisions. He or she should have had a good track record of presiding over High Court trials and producing opinions of the type described above (para 13) promptly. Appointment is dependent upon the agreement of the Lord President and Lord Justice Clerk. At present appointments normally occur after about 10 years of Outer House work, although it can be earlier in exceptional cases.
- 18) Work in the appellate courts is markedly different from sitting at first instance. New Division judges will initially gain experience as the second or third judge in civil or criminal appeals. He or she will be expected to participate fully in the cases and to be prepared to write the leading Opinion when requested to do so by the chair. He or she should be in a position to express his or her views in oral discussion. The normal method of working is towards a consensus, especially in criminal cases where certainty is important. Nevertheless, each judge must have the strength of character to dissent on reasoning and decision, where appropriate.
- 19) All cases of importance, as determined initially by an Inner House Procedural Judge, will be directed to a hearing before one of the “permanent” (ie First or Second) Divisions. The Keeper of the Rolls, in consultation with the Lord President and the Lord Justice Clerk, will determine the precise composition of the bench. These will, if possible, be selected from members of one Division, but a judge with particular expertise in an area of civil law (possibly from the Outer House) may be involved.
- 20) The Lord Justice Clerk presides over criminal cases of notoriety, importance or interest. These are selected by the Criminal Appeals Administrative Judge. The Lord Justice General may also sit in these cases, sometimes with the Lord Justice Clerk.
- 21) Extra Divisions, or benches of the High Court without the Lord Justice General or Lord Justice Clerk, hear more routine appeals. Relatively new Division judges can expect to chair some of these benches, especially in relation to sentencing. The arrangements for writing time in the Inner House are regarded as generally satisfactory.

Administrative Duties

- 22) In addition to their judicial work, judges may be given responsibility for some administrative duties. The main administrative duties are:
- a) Administrative Judge (four appellate civil and criminal; and first instance civil and criminal).
 - b) President of the Scottish Tribunals.
 - c) Supervising family or personal injury litigation.
 - d) Supervising the business of the commercial court.
 - e) Chairman and Vice Chairman of the Judicial Institute.
 - f) Chairman of the Scottish Law Commission (part-time).
 - g) Member of the Judicial Appointments Board for Scotland.
 - h) Member of the Parole Board.
 - i) Member of the Scottish Civil Justice Council (two judges).
 - j) Member of the Criminal Courts' Rules Council.
 - k) Member of the Scottish Sentencing Council.
 - l) Deputy Chairman of the Boundaries Commission for Scotland.
 - m) Member of the International Hague Network of Judges and family liaison judge for the European Civil Judicial Network.

Six judges serve on the Judicial Council for Scotland and its Committees. One of these is the representative on the European Network of Councils for the Judiciary.

Other Activities

- 23) Judges promote public understanding of the law and the justice system by giving lectures and speeches in the universities or at professional conferences. They give lectures at judicial training events. They assist in international programmes for judicial exchanges. Judges represent Scotland and the United Kingdom at judicial exchanges and international meetings.

The first few months of appointment

- 24) The following will be provided for all newly appointed judges:

- a) An induction course

The Judicial Institute gives all newly appointed judges induction training over five days,⁷ including presentations, problem exercises and facilitated discussions on the following topics:

⁷ Lord President's Judicial Training Determination No 1 of 2011

- i) Judicial ethics and conduct;
- ii) Court management, including criminal jury management;
- iii) Procedural and evidential issues (civil and criminal);
- iv) Assessment of witnesses;
- v) Opinion writing and ex tempore decision making;
- vi) Sentencing;
- vii) Contempt of court;
- viii) Social context, equal treatment and diversity issues;
- ix) Unrepresented litigants;
- x) Vulnerable witnesses; and
- xi) Use of information and communications technology.
- xii) Judicial welfare

If a newly appointed judge requests specific coaching in a particular area of practice, the Judicial Institute may be able to provide it. However, the Institute does not normally provide training on the substantive law. That is a matter which all judges are expected to manage for themselves.

b) Sitting-in

Newly appointed judges must complete at least three sitting-in days with an experienced judge in order to familiarise themselves with the judicial environment on the bench, observe the work undertaken there, and have the opportunity to discuss with a serving judge on how best to approach and organise for the challenges ahead.

c) Mentoring

A new judge will be offered the assistance of a mentor, drawn from among the other judges, to whom he or she can turn on a confidential basis for support in the early period of his or her appointment. The scheme is voluntary. If a new judge opts for a mentor, the scheme envisages a mentoring relationship which lasts for one year. The relationship can last for a judicial career. This assistance will be in addition to the support that the judges as a whole will give to those newly appointed. A newly appointed judge can seek assistance at any time from the Lord President or Lord Justice Clerk.

- 25) These measures are intended to provide reassurance to the new judge and accord with best international practice.

