



## PE01458: Register of Interests for members of Scotland’s judiciary

### Section 23(7) of the Scotland Act 1998 – Note by SPICe

#### Background

1. At page 1 of his [letter of 18 April 2013](#) to the Public Petitions Committee (the Committee) in relation to the above petition, the Lord President stated that he would have to decline the Committee’s invitation to attend to give oral evidence for reasons of “constitutional principle”, noting in particular that:

“Section 23(7) of the Scotland Act provides *inter alia* that the Parliament may not require a judge to attend its proceedings for the purposes of giving evidence. This is not a loophole. It is a necessary part of the constitutional settlement by which the Parliament is established. Its purpose is to protect the independence of the judiciary, a vital constitutional principle that is declared in section 1 of the Judiciary and Courts (Scotland) Act 2008”;

and that,

“when a committee invites a judge to give evidence before it, I have to decide whether the subject matter might infringe the principle of judicial independence and whether the evidence required could be satisfactorily given in writing.”

2. It is worth noting that the [Scottish Court Service Framework Document](#) from October 2013<sup>1</sup> also deals with this issue. It notes in particular that:

“4.2 The Scottish Parliament has the power to require the attendance of any non-judicial member or officer of the SCS. Section 23 of the Scotland Act 1998 provides that neither the Lord President nor other members of the judiciary can be required to appear before the Scottish Parliament and this restriction applies in relation to their respective roles as members of the SCS as well as to their judicial function.

4.3 Notwithstanding the above, the Lord President will consider invitations received from the Parliament relating to judicial members of the SCS, and, in consultation with other judicial members of the SCS and the relevant Committee of the Parliament will decide whether it is

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<sup>1</sup> This is a framework agreement between the Scottish Court Service (SCS) and the Scottish Government in relation to the governance, financing and operations of the SCS

appropriate for a judicial member to attend, consistent with their responsibilities within the SCS.

4.4 No member of the SCS would expect to be asked any questions about matters which did not relate directly to their role within the SCS. In particular, judicial members would not answer questions about the exercise of their judicial functions, for which they are not constitutionally accountable to the Scottish Parliament.”

3. The briefing below is written in response to the Committee’s request for information on what considerations were made during the passage of the Scotland Bill (the Bill) in the UK Parliament in relation to exempting judges from having to give evidence to the Scottish Parliament.

### **Section 23 and section 23(7) of the 1998 Act**

4. Section 23(1) of the 1998 Act gives the Scottish Parliament a general power to require any person “to attend its proceedings for the purpose of giving evidence” or “to produce documents in his custody or control.” Under section 25, failure to attend proceedings/to provide documents indicated in a notice provided by a parliamentary clerk is an offence.
5. There are various exceptions to the section 23(1) powers and, in relation to the judiciary, section 23(7) states that the Scottish Parliament may not impose a requirement (to give evidence or produce documents) on:

“(a) a judge of any court, or

(b) a member of any tribunal<sup>2</sup> in connection with the discharge by him of his functions as such.”

### **Section 23 of the 1998 Act and the judiciary – passage through the House of Commons/House of Lords**

6. The provision which became section 23 of the 1998 Act (clause 23 of the Bill) was discussed at various points during the passage of the Bill.
7. The main debates on the application of clause 23 to judicial bodies appear to have occurred on the following dates:
  - House of Commons Committee Stage – 29 January 1998.<sup>3</sup>
  - House of Commons Committee Stage – 12 May 1998.<sup>4</sup>
  - House of Lords Second Reading Debate – 17 June 1998.<sup>5</sup>
  - House of Lords Committee Stage – 21 July 1998.<sup>6</sup>

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<sup>2</sup> Tribunal is defined in section 126 of the 1998 Act as “any tribunal in which legal proceedings may be brought”

<sup>3</sup> See [HC Deb 29 January 1998 vol 305 cc571-99](#)

<sup>4</sup> See [HC Deb 12 May 1998 vol 312 cc245-55](#) at col 255

<sup>5</sup> See [HL Deb 17 June 1998 vol 590 cc1567-85](#) at col 1571

- House of Lords Report Stage – October 28 1998.<sup>7</sup>

8. Although other aspects of clause 23 were the subject of long debates, the debates do not appear to have looked in any depth at the general rationale behind exempting the judiciary. In addition, there are few substantive explanations by government representatives for the reasoning behind the application of clause 23 to the judiciary. However, the following aspects of the debates do shed some light on the provision.

*House of Commons Committee Stage – 29 January 1998*

9. It appears that the original clause was drafted to read that the power to require witnesses to attend proceedings or provide documents:

“is not exercisable in relation to... a judge of any court or a member of any tribunal which exercises the judicial power of the State.”<sup>8</sup>

10. During the above stage, an amendment was moved by Bernard Jenkin (Conservatives) to remove the phrase “which exercises the judicial power of the State”, apparently with the aim of extending the scope of the exception to a wider range of bodies. In his speech, Mr Jenkin expressed the following view on the general rationale behind the provision:

“It is obvious that judges should not be called to account to a legislature for their decisions, but the same surely applies to those who act in a judicial or quasi-judicial capacity, even if it is not a state capacity: for example, the heads of self-regulatory organisations; ombudsmen of private industries; arbitrators, who might be dealing with contracts or insurance matters; and—this may be a matter dear to the hearts of Liberal Democrats—the Church courts, which are non-state courts but have a judicial capacity none the less.”<sup>9</sup>

11. Tam Dalyell (Labour) and Jim Wallace (Liberal Democrats) subsequently put questions to the Minister (Henry McLeish) on whether kirk sessions; children’s hearing members; or judges of international courts would be exempt from giving evidence to the Scottish Parliament. The Minister agreed to clarify this by letter. The letter in question was sent to Mr Dalyell, Mr Wallace and Michael Ancram (Conservatives) on 2 March 1998. As regards the general rationale behind the clause, the letter notes that the provision,

“ ... was included in the Bill to protect the independence of judges and other persons who require to take decisions about breaches of the law, and the need for them to exercise their judgment free from the possibility of interference by the Scottish Parliament.”<sup>10</sup>

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<sup>6</sup> See [HL Deb 21 July 1998 vol 592 cc768-800](#) at col 776

<sup>7</sup> See [HL Deb 28 October 1998 vol 593 cc1917-26](#) at col 1920

<sup>8</sup> Col 577

<sup>9</sup> Col 574

<sup>10</sup> Source: House of Commons Library (deposited paper 1998-6179)

12. The Minister further argued during the Committee stage that the phrase, “exercise of the judicial power of the state” was self-explanatory as,

“it refers to those courts and tribunals whose functions are judicial in character. There are bodies called tribunals that do not exercise the judicial power of the state—a phrase previously used in legislation—and they ought not to be excluded from the Parliament’s power to summon persons to give evidence.”<sup>11</sup>

Following the Minister’s statement, Mr Jenkin withdrew his amendment.

13. The debate also included consideration of more general aspects of the rationale behind clause 23 which are perhaps relevant to the approach taken with regard to the judiciary. In particular, Mr Jenkin expressed the view that the approach of having clearly prescribed powers to call witnesses in the 1998 Act, as opposed to the (potentially) unlimited powers held by Westminster, was due to the different nature of the two bodies:

“Whereas this Parliament has absolute power, we are delegating powers to the Scottish Parliament. It is incumbent on us to make it clear in the Bill how we expect those powers to be used. We heard from the Secretary of State yesterday about supremacy, and he made it clear that this Parliament remains sovereign. Therefore, although we are delegating powers for which the Scottish Parliament will be responsible, we remain indirectly responsible for the way in which they are exercised.”<sup>12</sup>

This point was also made by Jim Wallace, who stated,

“If we accept, for the purposes of the debate, that power is devolved, it must be expressly set down in the Bill that the Scottish Parliament has the power to compel witnesses and to compel the production of documents, or it could be challenged by anyone who did not turn up.”<sup>13</sup>

#### *House of Commons Committee Stage – 12 May 1998*

14. There appears to have been no substantive debate on the application of clause 23 to the judiciary during the above committee stage. However, a technical amendment was accepted with the resulting clause reading that the power to require witnesses to attend proceedings or provide documents is not exercisable in relation to:

“a judge of any court, or a member of any tribunal which exercises the judicial power of the State, in connection with the discharge by him of his functions as such.”

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<sup>11</sup> Col 594

<sup>12</sup> Col 574

<sup>13</sup> Col 586

*House of Lords Second Reading Debate – 17 June 1998*

15. During this debate, the Scottish Office Minister (Lord Sewel) introduced the Bill to the House of Lords and indicated very generally that the rationale behind the relevant provision was to protect the judiciary's position in the constitution (i.e. judicial independence), stating that,

“ ... let me mention here another central feature of the constitution—the judiciary ... it is important that safeguards to protect the position of the judiciary should be built in. The Bill therefore provides that judges and tribunal members cannot be summoned to give evidence to the parliament.”<sup>14</sup>

*House of Lords Committee Stage on 21 July 1998*

16. There seems to have been no discussion of the general rationale behind the application of clause 23 to the judiciary on 21 July 1998. The issue of the meaning of the phrase “which exercises the judicial power of the State” did, however, resurface and an amendment was moved by the Earl of Mar and Kellie (Liberal Democrats) to remove the phrase. Questions were raised on this amendment regarding which judges and tribunal members would be exempted from giving evidence on the grounds that they exercise the judicial power of the state. The response from the Government (Lord Hardie) was that,

“the European Court of Justice, the European Court of Human Rights and children's panels would all be tribunals exercising the judicial functions of the state ... As I have already said ... tribunals not exercising the judicial function of the state would, for example, be private arbitrations in relation to a commercial contract, or certain administrative tribunals which did not have a judicial function”<sup>15</sup>

17. Following this response, the amendment was withdrawn.

*House of Lords Report Stage on October 28 1998*

18. With the exception of Lord Sewel's statement that, “the protection for judges and members of tribunals is retained”,<sup>16</sup> there was little discussion of the rationale behind clause 23 during this stage of the Bill. A decision was, however, taken to replace the phrase “which exercises the judicial power of the State” with a separate definition of tribunal as “any tribunal in which legal proceedings may be brought”.<sup>17</sup> This wording was ultimately retained in the final provisions of the 1998 Act (section 126).

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<sup>14</sup> Col 1571

<sup>15</sup> See col 777

<sup>16</sup> Col 1920

<sup>17</sup> See col 1921

19. Mention was also made of the difference between the Westminster approach to calling for evidence and that laid down in the Bill. In particular, the Earl of Mar and Kellie stated that,

“The power to call for witnesses and documents has to be mentioned in this Bill because of the statutory nature of the parliament. Obviously the Parliament at Westminster has these powers, but they are not written down for well-known reasons.”

## **Conclusion**

### *Scottish Parliament*

20. Based on the above overview, it is clear that the main consideration behind the provision was to protect the independence of the judiciary within the new constitutional framework set up by the 1998 Act. It also seems clear that there was a desire to have statutory restrictions instead of the informal conventions used by the UK Parliament (see below) - in part due to the delegated nature of the Scottish Parliament's power and perhaps also reflecting the fact that the Scottish Parliament was a new and untested body at the time.

21. However, other than some technical discussions, and mention of the fact that judges should not have to account to the legislature for their decisions, there was little discussion of what the “independence of the judiciary” means in practice. In particular, there does not appear to have been a debate on possible tensions between this principle and the Scottish Parliament's role in scrutinising policy, nor on examples of instances when it might be desirable to be able to call a judge, or a judge with a leadership role, to give evidence.

### *UK Parliament*

22. The position at the UK Parliament is different from that in Scotland. The powers of UK parliamentary committees are not laid out in statute, but are instead derived from the UK Parliament's power to call for “persons, papers and records”. At least in theory, these powers are backed up by the ability of the UK Parliament to punish non-members for contempt.<sup>18</sup>

23. UK parliamentary committees could use these powers to compel judges to give evidence. However, in practice, judges normally attend UK parliamentary committees voluntarily. Constitutional conventions also exist which limit the scope of any questioning. In particular, according to [the Judicial Executive Board's Guidance to Judges on Appearance before Select Committees](#), there are established conventions that judges are not required to comment on the following matters:

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<sup>18</sup> This is the official UK Government position – see its [Consultation Paper on Parliamentary Privilege](#) (April 2012), at page 60. Others have, however, questioned whether these powers of compulsion exist in current times – see, for example, the Constitution Society's 2012 report entitled [Select Committees and Coercive Powers – Clarity or Confusion?](#)

- the merits of individual cases;
- the personalities or merits of serving judges, politicians, or other public figures, or more generally on the quality of appointments; and
- the merits, meaning or likely effect of provisions in any Bill or other prospective legislation and the merits of government policy<sup>19</sup>

24. These exceptions are, however, subject to certain qualifications. In particular, it is noted that it is, “generally not inappropriate for a judge to refer to concluded cases as examples of practice when discussing or explaining general principles of law or practice.”<sup>20</sup>

25. As regards commenting on the personalities or merits of serving judges, the guidance also indicates that,

“The convention may operate differently with respect to the Lord Chief Justice and Heads of Division, who, by virtue of their particular functions, leadership responsibilities, and representative roles, may have cause to comment on, for instance, the quality of judicial appointments.”

26. The guidance also notes that the rule that judges should not comment on the merits of Bills/policy etc. operates,

“to prevent a judge’s impartiality from being called into question in the event of subsequently being asked to apply or interpret those provisions in a case in court, and is a crucial aspect of judicial independence.”

However, it is also noted that,

“with respect to the meaning or merits of existing legislation, there is an accepted practice of responsible comment on the way in which an Act works, including unexpected consequences of legislation.”<sup>21</sup>

The document also indicates that, where the Bill or policy directly affects the operation of the courts or aspects of the administration of justice within the judge’s particular area of judicial responsibility, the judge may comment on the practical operation or technical aspects of the Bill or policy. In addition, where government consultations are about issues for which judicial comment is appropriate, a response may be given by certain senior members of the English judiciary who have leadership/advisory roles.<sup>22</sup>

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<sup>19</sup> See [the Judicial Executive Board’s Guidance to Judges on Appearance before Select Committees](#) (October 2012) page 2

<sup>20</sup> Para 7

<sup>21</sup> See paras 10–13

<sup>22</sup> Para 14 – i.e. the Lord Chief Justice, the Heads of Division, the Judicial Executive Board or the Judges’ Council

27. So, although UK parliamentary committees are expected by convention not to require the judiciary of England and Wales to comment on certain matters, these rules are not blanket ones. The result is that relevant members of the judiciary could, at least in theory, be required to give evidence to a UK parliamentary committee. [The Judicial Executive Board's Guidance to Judges on Appearance before Select Committees](#) does, however, note that, "it is extremely unusual and very unlikely to be the case that a parliamentary committee will order a judge to attend."<sup>23</sup>
28. A brief summary of these rules, and references to other relevant UK material, can be found on [the website of the Judiciary of England and Wales](#).

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<sup>23</sup> Para 26