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JUDICIARY AND COURTS (SCOTLAND) BILL

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On 30 January 2008, the Scottish Government introduced the Judiciary and Courts (Scotland) Bill in the Scottish Parliament.

The Bill aims to strengthen the independence of the judiciary by:

- providing a statutory commitment to uphold judicial independence
- modernising the organisation and leadership of the judiciary
- reducing the involvement of central government in the day to day running of the court system.

The Bill intends to place the Judicial Appointments Board for Scotland on a statutory footing and introduces revised governance arrangements for the Scottish Court Service.

This briefing describes the key provisions contained in the Bill, provides relevant background information and examines some of the key areas of debate which have arisen during the development of these proposals.

The Scottish Parliament

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KEY POINTS OF THIS BRIEFING

- The Judiciary and Courts (Scotland) Bill was introduced in the Parliament on 30 January 2008
- The Bill aims to strengthen the independence of the judiciary by:
  - providing a statutory commitment to uphold judicial independence
  - modernising the organisation and leadership of the judiciary
  - reducing the involvement of government in the day to day running of the court system
- The Lord President believes that "the bill presents an opportunity for the Scottish Parliament to make law of considerable constitutional significance, which will place the relationship of the judiciary with the Scottish Government, and with the Parliament itself, on a new footing"
- The Bill places an obligation on the First Minister, the Lord Advocate, the Scottish Ministers and all other persons with responsibility for matters relating to the judiciary and administration of justice, to uphold the continued independence of the judiciary
- The Bill also contains provisions which would establish the Lord President as head of the Scottish judiciary with overall responsibility for making and maintaining the arrangements for the efficient disposal of the business in all courts and new statutory responsibilities in relation to judicial conduct, training, welfare and deployment
- The Bill does not significantly alter the role, remit and composition of the existing non-statutory Judicial Appointments Board for Scotland, but establishes it on a statutory basis
- The Bill provides for the appointment of the Lord President and Lord Justice Clerk and essentially formalises the process which was used in relation to the recent appointment of Lord Hamilton (the current Lord President)
- The Bill confers on the Lord President responsibility for dealing with issues of conduct and, in particular, enables the Lord President to make rules in relation to the investigation and determination of any matter concerning the conduct of judicial office holders. The Bill also establishes a Judicial Complaints Reviewer, to review the handling of investigations into judicial conduct
- The Bill provides revised procedures for the removal from office of any person holding judicial office
- The Bill transfers responsibility for the court service from the Scottish Ministers to the Scottish Court Service which is to be a body corporate chaired by the Lord President and with a judicial majority

INTRODUCTION

Content of the Bill

The Judiciary and Courts (Scotland) Bill ("the Bill") was, together with Explanatory Notes (and other accompanying documents) (references in this briefing are to the "Explanatory Notes") and a Policy Memorandum, introduced in the Parliament on 30 January 2008.

The Bill aims to strengthen the independence of the judiciary by:

- providing a statutory commitment to uphold judicial independence
- modernising the organisation and leadership of the judiciary
- reducing the involvement of government in the day to day running of the court system

The Bill consists of 72 sections in five parts. These parts relate to:

- judicial independence
- the judiciary (including judicial appointments and judicial conduct)
- the courts
- the Scottish Court Service
- miscellaneous provisions (orders and regulations, interpretation and consequential modifications)

This briefing describes the key provisions contained in the Bill, provides relevant background information and examines some of the key areas of debate which have arisen during the development of these proposals.

Review and consultation

The Scottish Government introduced the Bill after a series of reviews and consultations which were initiated during the previous administration. The key publications in this process are listed below. All relevant documents are available on the Scottish Government's website – in a section dealing with the Bill.

- 'Agency Review of the Scottish Court Service' (Scottish Executive 2006a) – report by Douglas Osler. Scottish Executive Justice Department review of the structure and governance of the Scottish Court Service. Made recommendations relating to the future governance of the Supreme and Sheriff Courts in Scotland and the future relationship between the Scottish Court Service (SCS) and judiciary. For the purposes of this SPICe briefing, this document is referred to as "the Osler Review"

- 'Strengthening Judicial Independence in a Modern Scotland' (Scottish Executive 2006b) – Scottish Executive consultation on the unification, appointment, removal and management of Scotland's judiciary. Contains proposals to modernise the organisation and leadership of Scotland's judiciary; provide a statutory guarantee of judicial independence; place the reformed judicial appointments system on a statutory basis; and standardise the procedures for the removal of judges. For the purposes of this SPICe briefing, this document is referred to as "the consultation paper"

Sixty responses were received, of which 43 are published (20 on behalf of organisations and 23 from individuals, mainly judges and sheriffs). The published responses are available in full on the Scottish Government website. It is understood that the other responses were submitted on a confidential basis or were non-substantive responses. This SPICe briefing includes some analysis of these published responses. The Scottish Government (2008a) has produced an analysis of the written consultation responses

- 'Proposals for a Judiciary (Scotland) Bill' (Scottish Executive 2007) – a draft bill and plans for other aspects of future legislation. For the purposes of this SPICe Briefing, this document is referred to as "the draft bill". Twenty-six responses were received. These responses have recently been published on the Scottish Government website but were not available at the time of writing this briefing

It should be noted that responses referred to in this briefing are responses made to the consultation paper and not to the Bill itself or the draft bill, and that opinions may have shifted since they were originally expressed.

The current Scottish Government indicated its intention to introduce a bill to implement these proposals on 5 September 2007 (Scottish Parliament 2007a).

Key areas of debate

The Lord President believes that "the bill presents an opportunity for the Scottish Parliament to make law of considerable constitutional significance, which will place the relationship of the judiciary with the Scottish Government, and with the Parliament itself, on a new footing". The Faculty of Advocates' response to the consultation paper expressed disappointment that the consultation failed to acknowledge the importance of the matters under discussion and argued that, as they relate to matters of 'constitutional significance', the proposals should have been the subject of an independent assessment by Royal Commission. The Law Society of Scotland and the Society of Solicitors in the Supreme Courts of Scotland also favoured further consultation. Following further dialogue with the judiciary, the previous Scottish Executive refined its proposals and, on the basis that support for a broader independent inquiry was not universal, would be time consuming and would duplicate work that had already done, decided that an independent inquiry was not necessary. The Policy Memorandum describes the consultation on the policy which is being implemented through this Bill as 'extensive'.

Terminology

The judiciary in Scotland comprises:

- judges of the Court of Session (preside over the Court of Session and are, by virtue of appointment, also judges of the High Court of Justiciary)
- sheriffs principal (responsible for securing the efficient disposal of sheriff court business within their sheriffdom)
- sheriffs (preside over sheriff courts in Scotland)
- stipendiary magistrates or justices of the peace (preside over the district or justice of the peace courts)

The Bill lists at section 39 those offices which are to be included within the term 'judicial office holder'.

The courts in Scotland comprise:

- the Court of Session (supreme civil court)
- the High Court of Justiciary (supreme criminal court)
- the sheriff court ('inferior' court which deals with civil and criminal proceedings)
- the district or justice of the peace court (court of summary criminal jurisdiction with limited sentencing powers)

The High Court of Justiciary is Scotland's supreme criminal court. The final appeal from the Scottish civil courts is to the House of Lords Appellate Committee presided over by Lords of Appeal in Ordinary ('Law Lords'). The Constitutional Reform Act 2005 includes provision for the creation of a new UK Supreme Court which will take over the appeals function of the Appellate Committee of the House of Lords. The UK Supreme Court is expected to open for business in October 2009.

JUDICIAL INDEPENDENCE

Content of the Bill

Part 1 of the Bill deals with judicial independence. It consists of a single section placing an obligation on the First Minister, the Lord Advocate, the Scottish Ministers and all other persons with responsibility for matters relating to the judiciary and administration of justice, to uphold the continued independence of the judiciary. In particular, section 1 prohibits the First Minister, the Lord Advocate and the Scottish Ministers from seeking to influence particular judicial decisions through any special access to the judiciary. Section 1 also provides that the Scottish Ministers must have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions. The term judiciary in this section of the Bill applies to the judiciary of the Supreme Court of the United Kingdom and any other court established under the law of Scotland.

Background

The ability of the judiciary to act without interference from the other branches of government or from other extraneous influences is a concept of fundamental importance to our constitutional arrangements. The 2002 Bangalore Principles of Judicial Conduct state that:

> "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."[1]

The Latimer House Guidelines identified three key elements in relation to preserving judicial independence – (i) judicial appointments; (ii) funding; and (iii) training.[2]

Historically, by ensuring that the remuneration of judges was not at the whim of the Crown, and providing security of tenure for holders of judicial office, a degree of judicial independence from the government has been provided. Conventions which protect the judiciary from criticism from ministers and civil servants, restraint on the part of legislators, and the *sub judice* rule also help to preserve the integrity and independence of the judiciary. Additionally, judges regard their right to control the procedural rules of court and to have responsibility for the delivery and content of judicial training to be important components of judicial independence.

The nature of judicial independence differs from jurisdiction to jurisdiction. In the U.S. there is a strict separation of powers underpinned by the US Constitution. The courts in Australia have budget autonomy from government. The Republic of Ireland now has an autonomous courts service in which the judiciary is represented on the governing board.

In the UK there has been a recent trend towards providing a statutory guarantee of judicial independence. Section 3 of the Constitutional Reform Act 2005 (c 4), and section 1 of the Justice (Northern Ireland) Act 2002 (c 26), provide England, Wales and Northern Ireland with such guarantees. Section 1 of the Justice (Northern Ireland) Act 2002 states simply:

[1] United Nations 2002.
[2] Commonwealth Secretariat 2003.

> "Those with responsibility for the administration of justice must uphold the continued independence of the judiciary."

Key areas of debate

It has recently been suggested that there is now greater potential for conflict between the executive and the judiciary than there was in the past and that the need to safeguard judicial independence is now more important than ever.[3] Increasing occurrences of judicial review and the interpretation of European obligations are two growing areas of potential conflict between the executive and the judiciary in Scotland. Concern about judicial independence also arose recently following the collapse of the World's End murder trial (HM Advocate v Sinclair). Lord Hamilton, the Lord President, voiced concern that the Lord Advocate thought it appropriate to challenge, in a public and political forum, a final decision of the court.[4] Any apparent problems relating to judicial independence should not, however, be overstated. The Sheriffs' Association, for example, in its response to the consultation paper, did not consider that there has been any serious attempt to undermine judicial independence in Scotland nor that there is a current crisis.

A number of organisations (such as the Law Society of Scotland and the Society of Solicitor Advocates) supported enshrining judicial independence in statute. However, concern was also expressed that the proposals drew heavily on UK legislation without necessarily considering Scottish solutions. The Sheriffs Principal questioned whether a statutory statement of what is already a recognised constitutional principle would actually add anything of value. One judge, writing anonymously, had difficulty finding anything in the consultation paper which would make him feel more independent and suggested that the proposals were less about the independence and more about the management of the judiciary.

The Faculty of Advocates favoured the creation of an independent court service and was of the view that the provisions contained in the consultation document were not sufficient to demonstrate independence of the court establishment as a whole. It considered that the supreme courts can only be truly independent if both the court establishment and the judges are independent and that the statutory duty should also, therefore, apply to the public servants who serve the courts. The Faculty argued that the courts should be served by public servants responsible to the Lord President and judiciary, not civil servants subject to direction by the Scottish Ministers and that the courts should receive financial provision from the Scottish Parliament rather than from the Scottish Executive. The governance of the Scottish courts is considered in more detail later in this briefing.

A number of responses to the consultation paper questioned what sanctions would be available for non-compliance with the statutory guarantee of judicial independence.

The Sheriffs' Association raised the question of whether the Scottish Parliament had the competence to legislate on aspects of judicial independence in Scotland given that they are essentially constitutional matters.

In responding to the issues raised during the consultation, the then Scottish Executive observed that placing in statute what has long been a matter of convention and common law would be a powerful and obvious reminder to those in the executive branch of government (and others) of the constitutional significance of judicial independence. The Policy Memorandum recognises

[3] See, for example, Judges' Council response to the consultation paper (the response from the Judges' Council was submitted on behalf of the judiciary of the Court of Session) or Ministry of Justice (2007).

[4] Letter from Lord Hamilton, the Lord President to Elish Angiolini, the Lord Advocate, 26 September 2007.

that a statutory provision in itself is not an effective guarantee and refers to other measures in the Bill which will also strengthen judicial independence.

HEAD OF THE JUDICIARY

Content of the Bill

Part 2 (Chapter 1) of the Bill contains provisions which would establish the Lord President as head of the Scottish judiciary with overall responsibility for making and maintaining arrangements for the efficient disposal of the business in all courts and new statutory responsibilities in relation to judicial conduct, training, welfare and deployment. The specific provisions of this part of the Bill are considered in more detail below.

The additional costs associated with the Lord President's new responsibilities include costs for judicial cover, support staff, operational support services and accommodation. The Explanatory Notes estimate the annual cost of judicial cover to be £160,000. Additional staff costs are estimated to be in the region of £250,000 per annum. The estimated costs for accommodation are a one-off capital cost of £200,000 and annual costs of £24,000. However, the Scottish Government anticipates these costs will be offset by savings within the Courts Directorate of around £243,000 per annum.

Background

The Lord President is widely recognised as Scotland's pre-eminent judge and currently has formal responsibility, along with the Scottish Ministers, for the general organisation and administration of business before the supreme courts. At present, the Lord President is not responsible for the administration of the business of the sheriff or district courts. In the case of the sheriff courts, this function is carried out partly by the sheriffs principal and partly by the Scottish Ministers.

In practice, the functions of Ministers are carried out by the Scottish Court Service (SCS). The SCS provides services to users of the supreme and sheriff courts by clerking courts; supporting the judiciary; creating, storing and processing case records; fielding inquiries from public and professional users; providing technical and procedural advice; and accepting payments of fines and court fees. It also manages and develops the court estate, maintains the court buildings and provides security, cleaning and catering facilities. It employs over 800 people. Responsibility for the operation of district/JP courts is currently being transferred from local authorities to the SCS on a phased basis. Further information about the management and operation of the court system is provided below under the heading 'Governance of the Scottish Court Service.

Key areas of debate

In response to the consultation paper, a submission from the Judges' Council supported the proposal to unify the judiciary on condition that the judges have strategic control of the SCS and that the SCS is answerable to the Lord President. However, the response also noted that it would be necessary to establish the means by which such a court service would be accountable

to Parliament while preserving judicial independence. The response also observed that any increase on the current workload of the Lord President was unrealistic. The Sheriffs Principal had no fundamental difficulty with creation of a unified judiciary presided over by a Lord President.

The Faculty of Advocates did not consider that the proposals to unify the judiciary were justified and expressed concern at focussing too much power in the hands of a single individual. The Commonwealth Magistrates' and Judges' Association also observed that any provision which gives a single individual responsibility for overseeing and administering the functions of an entire branch of government must have proper safeguards in place for appointment and removal.

In response to the issues raised by the consultation, the then Scottish Executive (2007) indicated that it would continue its discussions with the judiciary before finalising its proposals for the head of the judiciary.

Securing the efficient disposal of court business

Sub-section 2(2)(a) of the Bill confers on the Lord President responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish Courts. Section 2(3) of the Bill gives the Lord President the authority to give directions "of an administrative character" to sheriffs principal and section 3 allows the Lord President to delegate administrative tasks for which he or she is statutorily responsible to other holders of judicial office. Some functions, such as making and maintaining arrangements to secure the efficient disposal of business in sheriff courts and justice of the peace courts and making rules for the judicial conduct scheme, cannot be delegated by the Lord President.

The consultation recognised that, in light of the increasing burdens on the supreme courts, it is no longer possible for the Lord President to personally supervise the management of the day to day business of the courts. As a result, discretionary responsibility for part of this function has already passed to other judges and court officials. In its response to the consultation, the Faculty of Advocates agreed that there was a need for an administrative role for judges to support the Lord President in securing the proper disposal of cases. However, the Judges' Council did not consider that such a statutory provision was necessary as judges of the Court of Session traditionally operate on a collegiate basis and the Lord President is able to obtain assistance from them when required.

Welfare, training and guidance to the judiciary

Sub-section 2(2)(d) confers on the Lord President a general responsibility for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders.

The Latimer House Guidelines state that judicial training should be organised, systematic, ongoing and under the control of an adequately funded judicial body. The Osler Review reported that appraisal, career progression, professional development and management training would enhance the judiciary's contribution to justice, not devalue it.

The consultation paper proposed to give the Lord President an overall power to direct the activities of the Judicial Studies Committee (JSC). The JSC is the body responsible for judicial

training in Scotland. In his foreword to the 2005-06 annual report of the JSC, Lord Wheatley (its chair) observed that it has limited financial resources and that insufficient training is offered, particularly to new judges (Judicial Studies Committee, 2006).

In its response to the consultation paper the Sheriffs' Association expressed concern that the overall level of training provision was inadequate and at the non-release or withdrawal of sheriffs from training courses because of the pressure of court business. Victim Support Scotland emphasised the importance of providing adequate training in relation to the needs of vulnerable witnesses, particularly in relation to the limits of acceptable examination and judicial intervention. The Scottish Consumer Council (SCC) observed that, once appointed, judicial office holders are effectively in office for life. The SCC considered it essential, therefore, that judges and sheriffs receive regular relevant training. Scottish Women's Aid suggested that training should include input from relevant outside specialist organisations. The Judges' Council argued that responsibility for judicial training should remain in the hands of the judiciary and that any form of appraisal should be operated within the judiciary, under the control of the Lord President and without the involvement of any other branch of government.

Judicial training has been raised within the context of public petition PE997 (Petition 2006) which called for all sheriffs who deal with child custody cases to be given appropriate training, a proposal which received general support from those consulted by the Public Petitions Committee. Sheriff Crowe, in a subsequent response to the Justice Committee, stressed that it would not be in the interest of litigants for the Lord President's ability to devise and implement training to be constrained by legislative requirements (Scottish Parliament Justice Committee 2007).

Judicial Council for Scotland

Although it does not form part of the Bill, it was originally proposed to establish a statutory judges' council to complement existing representative bodies such as the Sheriffs' Association and the District Courts Association (Scottish Executive 2006b). It was expected that this body would offer opportunities for improved communication between the judiciary and the government. Following the consultation, it was decided that a non-statutory body, to be known as the Judicial Council for Scotland, should be established with a remit of providing the Lord President with the means to seek and obtain the views of all branches of the judiciary (Scottish Executive 2007). Such a body has now been established.

Representing the views of the judiciary to Parliament and engaging with the Government

Subsections 2(2)(b) and (c) of the Bill confer on the Lord President responsibility for representing the views of the Scottish judiciary to the Scottish Parliament and the Scottish Ministers and for laying before the Scottish Parliament written representations on matters of importance relating to the Scottish judiciary or the administration of justice. This reflects powers already conferred on the Lord President (by section 5 of the Constitutional Reform Act 2005) to make representations to the UK Parliament on reserved matters.

The consultation paper recognised the importance of close co-operation between the judiciary and the Executive and the benefits to be gained from the Lord President, with recognised authority over the judiciary, being more closely involved in the strategic work of the SCS. The consultation sought views on the greater involvement of the Lord President in the strategic work of the government. One judge, responding anonymously to the consultation, voiced opposition

to the Lord President, or any other judicial representative, being directly involved in the work of the government.

Support staff

Under the existing arrangements, support staff for the senior judiciary are provided by civil servants employed by the Scottish Government and the SCS. The previous Scottish Executive anticipated that additional staffing would be required to support the Lord President and senior judiciary in discharging the additional responsibilities which would be placed upon them. The consultation paper questioned whether the supply of civil servants from the executive branch of government to support the judiciary is consistent with the principle of judicial independence.

The Bill makes provision for those SCS staff employed by the Scottish Ministers to transfer to the new body corporate. The staffing arrangements of the reformed SCS are considered in more detail below (see section on the Governance of the Scottish Court Service).

Conduct

Subsection 2(2)(e) of the Bill gives the Lord President responsibility for investigating, determining and reviewing matters concerning the conduct of judicial office holders. These proposals are considered in more detail below (see section on Judicial Conduct).

JUDICIAL APPOINTMENTS

Content of the Bill

The Bill does not drastically alter the role, remit or composition of the existing non-statutory Judicial Appointments Board for Scotland ("the Board"). Section 9 provides for the establishment of the Board on a statutory basis and outlines its functions. Section 10 places the following judicial offices within the Board's remit:

- judge of the Court of Session
- Chairman of the Scottish Land Court
- temporary judge
- sheriff principal
- sheriff
- part-time sheriff
- other judicial offices as specified by order

Justice of the peace advisory committees, rather than the Board, will continue to be responsible for making recommendations for the appointment of JPs.

The inclusion within the Board's remit of the office of temporary judge (except where the individual to be appointed is or has held judicial office as a Chairman of the Scottish Land Court, sheriff principal or sheriff) is of particular note. In response to the consultation paper, the Scottish Consumer Council argued that procedures for the appointment of temporary judges should be the same as those for other categories of judicial office. The Law Society of Scotland

also agreed that appointments of temporary judges should fall within the remit of the Board. The previous Scottish Executive (2007) concluded that the existing arrangements for the appointment of temporary judges were not consistent with the principles of equality of opportunity and transparency of process and have, therefore, included the office of temporary judge within the Board's remit.

Section 11 of the Bill provides that the Scottish Government may make a judicial appointment only if the Board has recommended the individual for appointment. Where the Board has recommended an individual for appointment and the relevant Minister has decided not to accept the recommendation, the Minister must give the Board notice of this decision and provide reasons for the decision. In such circumstances, the Board is required to reconsider its decision and make a further recommendation (either of the same or a different individual).

The detailed provisions in relation to the Board are considered in further detail below.

Background

The Board was established in June 2002 on a non-statutory basis. Its creation was intended by the then Scottish Executive to ensure that the way judges are appointed is seen to be entirely free from inappropriate influence (Scottish Executive 2006b). A commitment to place the Board on a statutory footing was given by the then Scottish Executive when the Board was first established administratively in 2002 and was a Partnership Agreement commitment of the previous administration (Scottish Labour and Scottish Liberal Democrats 2003). In the meantime, the Scottish Ministers issued general guidance to the Board providing it with autonomy to develop its own practices and procedures.

The primary function of the Board is to recommend to the Scottish Government individuals for judicial appointment. Under the current arrangements, the Scottish Ministers are expected to adhere to the Board's recommendations (unless there is a compelling argument against). Since 2002, the Scottish Executive/Government has accepted all of the Board's recommendations for appointment.

The Scottish Government (2008b) recently published research findings into the judicial appointment and conduct schemes in four other jurisdictions: England and Wales, Canada, Australia and New Zealand. Although these four jurisdictions have broadly similar legal systems, they have different procedures for making judicial appointments.

In England and Wales, although the selection process for judicial appointments is now in the hands of a Judicial Appointments Commission, formal appointments are still made by the Lord Chancellor. The UK Government is currently considering how it can reduce further the current level of executive involvement in the judicial appointments process and on whether Parliament should be involved in the appointment process. A UK Government consultation on the topic closed on 17 January 2008 (Ministry of Justice 2007).

Key areas of debate

A common justification for establishing a transparent process for appointing judges is that such a process enhances public confidence in the system. A contrary argument suggests that there is no correlation between satisfaction with the legal system and the way judges are appointed. Instead, this argument holds that what matters to the population is not how judges are

appointed but whether they are effective in delivering justice.[5]

Since it was established in 2002, the performance of the Board has received some criticism. For example, Professor Bonnington (2005), writing in the Law Society Journal, claimed that some lawyers "of less than average legal ability" have been appointed to the bench. Professor Bonnington's response to the consultation paper was also critical of the quality of lay representatives on the Board. In a recent Scots Law Times article, Sheriff Douglas J Cusine (2007), highlighted the failure of the Board to consult relevant professional bodies (the Law Society and the Faculty of Advocates), relying instead on the candidates nominated referees, as a particular short-coming of the existing recruitment procedures. Sheriff Cusine expressed concern that the Board's current recruitment methodology may provide an incomplete or even misleading picture of the candidate concerned. In response, the Board (2007b) presented a robust defence of its procedures and argued that Sheriff Cusine's article was "misconceived in a number of key respects".

On the other hand, the House of Commons Committee on the Lord Chancellor's Department (2003) found that "the Judicial Appointments Board had settled down well, and was seen as successful even by those who had initial reservations about its creation or its structure".

Generally speaking, responses to the consultation paper were supportive of the current Board's performance. However, the Faculty of Advocates argued that there ought to be a fuller consultation on the role and membership of any judicial appointments body before it is enshrined in statute. The Faculty also argued that the Scottish Government should have no direct involvement in the appointment of members of the Board and that those appointed to provide support services to the Board should not be civil servants.

The Judges' Council expressed serious concern at the length of time it takes to appoint candidates to replace retiring judges and at the reluctance of some potentially good candidates to apply for judicial office. On the other hand, in its response to the consultation paper, the Board observed that there is currently no requirement on members of the judiciary to give a reasonable period of notice of their intention to retire and it recommended that there should be a statutory requirement on judges to give a specified period of notice of an intention to retire, unless the reason for retirement would prevent them from doing so. It has been suggested that the existence in Scotland of a generalist judiciary may deter the recruitment of those lawyers who specialise in a particular field from applying for judicial appointment either because they wish to retain their specialist interest or because potential candidates do not consider themselves adequately qualified to preside over cases in which they have no first hand experience. Concern has also been expressed that those appointed to the bench may not always have the ability to deal with both civil and criminal business to the standard which meets reasonable public expectation.

Membership

Schedule 1 of the Bill provides for the membership of the Board. The Bill provides for three categories of Board member – lay, legal and judicial (previously there were only two categories of Board member – lay and legal). Although the draft bill provided that it would be for the Scottish Ministers alone to appoint the members of the Board, the Bill (as introduced) gives the Lord President responsibility for appointing judicial members, with the Scottish Ministers retaining responsibility for appointing legal and lay members. The Bill provides that the number

[5] Bell (2003)

of lay members is to be equal to the combined total of judicial and legal members, ensuring that the balance between lay and other members is retained. The Bill provides that the chair of the Board, to be appointed by the Scottish Ministers, is to be one of the lay members.

The current non-statutory Judicial Appointments Board in Scotland has an equal balance of lay and legal members. This would appear to be unusual amongst similar bodies internationally which generally contain a majority of legal members. In England and Wales, for example, the Judicial Appointments Commission has five judicial members, five lawyer members and five lay members.

The Scottish Ministers are currently responsible for appointing members to the Board. In June 2007 the Government made four new appointments to replace those members of the Board whose appointments had expired. Three of the new appointments were made on the recommendation of an independent selection panel and the fourth was nominated from among the six sheriffs principal. The Bill makes no provision as to the criteria or process to be used by the Lord President or the Scottish Ministers for appointing Board members, although appointments by the Scottish Ministers will be subject to the Office of the Commissioner for Public Appointments in Scotland's Code of Practice for Ministerial Appointments to Public Bodies in Scotland.

The consultation paper questioned whether increasing the membership of the Board to enable an additional serving judge to sit on it would offer greater reassurance of objectivity in assessing a candidate's legal ability and fitness for judicial office. A number of organisations responded that all appointment boards should be composed of a majority of persons from within the judiciary. However, the existing Board argued that the balance of lay and legal members with a lay chair is a particular strength of the existing arrangements. The Scottish Consumer Council suggested that there is a case for an additional judicial member on the Board but, given that the majority of appointments are sheriffs, there is a stronger case for including another sheriff on the Board. Whilst the Board favours retaining its existing composition, it agreed that if its membership is to be increased it should be with a further sheriff, balanced by an additional lay member.

Removal of Board Members

Schedule 1 of the Bill also provides for the removal of members of the Board by the Lord President (in the case of judicial members) and by the Scottish Ministers (in the case of legal or lay members). The grounds for removal are failure (without reasonable excuse) to discharge functions for a six month period; conviction of any offence; insolvency; and otherwise being unfit.

In response to the consultation paper, the current Judicial Appointments Board and the Law Society of Scotland suggested that a distinction should be drawn between different types of offence (ie between minor offences such as fixed penalty speeding or parking offences and more serious offences). The Judges' Council expressed concern that the ground of being otherwise unfit gives too wide a power to remove Board members.

Staffing

The current non-statutory Board's staffing complement is 3.6 full-time equivalent civil servants seconded from the Scottish Government. The consultation paper sought views on whether the

Board should be established independently of the Executive and have its own support staff. However, the Scottish Government has concluded that classifying the Board as an Executive NDPB with responsibility for its own administration and staff would be overly bureaucratic and less efficient.

Merit and diversity

The Bill provides that recommendations for appointment to judicial office must be based solely on merit (s 12). However, the Board is also required to have regard to the need to encourage diversity (s 14).

The Latimer House Guidelines state that judicial appointments should be made on merit with appropriate provision for the progressive removal of gender imbalance and other historic factors of discrimination.

In relation to diversity, of the 148 appointments to judicial office the Board has made since 2002, 22% were female appointees. This is within the context of 74% of applicants being male (Judicial Appointments Board 2007a). The Board's Annual Report for 2006-07 also shows that of the nine applicants for the post of judge of the Court of Session, only one was under the age of 50. In common law or hybrid jurisdictions, such as Scotland, judges are usually appointed after having pursued a successful legal career, normally as a court lawyer. As a consequence, judges are generally of a more mature age.

The Board has established a Diversity Working Group which includes representatives of the Faculty of Advocates and the Law Society of Scotland.

In response to the consultation paper, the Scottish Consumer Council referred to the work of the Department for Constitutional Affairs and the Commission for Judicial Appointments in England and Wales aimed at increasing diversity among the judiciary and suggested that more could be done to broaden the range of those appointed in Scotland. Many respondents expressed the view that appointments should be made on merit alone.

Assessment of legal knowledge, skills and competence

Section 13 of the Bill provides that only the judicial and legal members of the Board may take part in any assessment by the Board of an individual's knowledge of the law and skills and competence in the interpretation and application of the law. Some responses to the consultation paper expressed the view that it should be for judges alone to determine whether the legal ability of a candidate is adequate for the judicial office applied for and pointed out that judicial office and the practice of law are wholly different from academic life.

The Bill does not exclude from judicial appointment applicants with criminal convictions, nor does it require candidates to declare such convictions. Neither would a criminal conviction necessarily lead to removal from judicial office. The Board has published a statement of principles in relation to any criminal convictions of candidates for judicial appointment. The statement provides that the Board will take such convictions into consideration when assessing the suitability of candidates for judicial appointment but will consider the individual circumstances of each conviction declared by a candidate.

Guidance

The Bill allows the Scottish Ministers and the Lord President to issue guidance to the Board on the procedures to be followed in the exercise of its functions (s.15). The Board must have regard to such guidance. It is anticipated that such guidance will relate to the manner in which the Board is to publicise vacancies and identify candidates for any appointment.

Since the original guidance was introduced in 2002, no subsequent guidance has been issued to the Board by the Scottish Ministers.

In response to the consultation paper, the Faculty of Advocates argued that the proposal to allow Scottish Ministers to issue guidance to the Board was unacceptable and contrary to the principle of judicial independence. Professor Bonnington stated that it would be "extremely dangerous" to give ministers the power to issue guidance to the Board. The Sheriffs Principal argued that Ministers should only have power to issue guidance to the Board in certain limited circumstances and that guidance, by definition, should not be binding. However, the current Board supported the proposal provided that the guidance issued does not compromise its independence.

Annual Report

The Bill requires the Board to submit to the Scottish Ministers an annual report which Scottish Ministers must lay before the Scottish Parliament (s.17). The draft bill provided that the Board must comply with any directions given by the Scottish Ministers as to the form and content of the report. However, this requirement has been removed from the Bill (as introduced).

Appointment of Lord President and Lord Justice Clerk

The two most senior judges in Scotland are the Lord President of the Court of Session (who also holds the office of Lord Justice General in relation to the High Court of Justiciary) and the Lord Justice Clerk.

Section 18 of the Bill provides for the appointment of the Lord President and Lord Justice Clerk and essentially formalises the process which was used in relation to the recent appointment of Lord Hamilton (see below). Section 19 provides that recommendations for the appointment of the Lord President and Lord Justice Clerk must be based solely on merit.

These appointments are not to be the responsibility of the Judicial Appointments Board (although the appointments panel will include the chair and another a lay-member of the Board). Instead, the First Minister will be required to establish a panel to recommend a short-list of candidates who are suitable for appointment to fill the vacancy. The First Minister must then make a specific nomination to the Prime Minister who recommends the appointment to the Queen. The Prime Minister and the Queen would thus retain their formal role in the appointment process.

Following the announcement that Lord Cullen was to retire as Lord President in November 2005, a four person panel was appointed to consider expressions of interest from suitably qualified people for the post of Lord President. The panel comprised two senior judicial figures and two lay professionals drawn from the existing Judicial Appointments Board. Then First Minister, Jack McConnell MSP, nominated Lord Hamilton after taking account of the advice

provided by the special panel. On 24 November 2005, Lord Hamilton was appointed Scotland's new Lord President by the Queen. The First Minister stated that:

> "Lord Hamilton has also been appointed through the most open and transparent procedure ever for choosing a new Lord President. That is a welcome development, and one that fits Scottish Ministers' desire for public appointments at all levels to be open to every suitably qualified candidate".[6]

Where previously the procedures for appointment to the two senior judicial posts in Scotland had been governed by convention, the passage of the Scotland Act 1998, enshrined in statute for the first time provisions relating to the appointment and removal of the Lord President and Lord Justice Clerk. Section 95 of the Scotland Act 1998 (c 46) provides that it shall be for the UK Prime Minister to recommend to the Queen the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk. However, the Prime Minister shall not recommend to the Queen the appointment of any person who has not been nominated by the First Minister for such appointment.

Some responses to the consultation paper questioned whether it was necessary to have lay representation on the panel to make recommendations for the appointment of the Lord President and Lord Justice Clerk.

Appointment of retired judges and sheriffs principal and sheriffs

At present retired sheriffs must apply to the Board if they wish to seek appointment as a part-time sheriff. The consultation paper proposed an arrangement that would allow a retired sheriff to be re-employed (in the same way as a retired Court of Session judge may presently be invited to sit) without having to apply to the Board. It is generally considered that this approach offers flexibility to act swiftly when necessary by enabling appointment at short notice. Section 22 of the Bill enables the re-employment of retired judges without the consent of the Scottish Ministers. Such re-employment would not fall within the remit of the Board. Section 24 provides that a sheriff principal may, as a temporary measure, appoint a former sheriff principal or sheriff to act as a sheriff in that sheriffdom.

Eligibility of solicitors for appointment as judges

Section 20 of the Bill will amend the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c 40) ("the 1990 Act") to extend eligibility to solicitors who have held rights of audience in either the Court of Session or the High Court of Justiciary for a continuous period of not less than five years.[7] The amendment is intended to reflect current practice where solicitors tend to specialise in either civil or criminal work.

The consultation paper included proposals to extend to all practising solicitors eligibility for appointment as a Court of Session judge. Although the then Scottish Executive (2007) rejected this proposal (the rationale being that those with no experience of appearing before the superior courts are not qualified to preside over those courts), it did indicate its intention to amend the 1990 Act to extend eligibility for appointment as a judge of the Court of Session to solicitors

[6] Scottish Executive news release, 'New Lord President named', 24/11/2005, http://www.scotland.gov.uk/News/Releases/2005/11/24115035.

[7] The 1990 Act extended eligibility to solicitors who had rights of audience in **both** the Court of Session and the High Court for a continuous period of five years, however, few solicitors have sought rights in both courts.

who, for a continuous period of not less than five years, have held rights of audience in either the Court of Session or the High Court of Justiciary.

The Scottish Consumer Council favoured extending the eligibility for appointment to the office of judge of the Court of Session to all practising solicitors on the grounds that it may increase diversification among the judiciary. The Society of Solicitor Advocates and the Law Society of Scotland also supported the proposal that eligibility should be extended to all practising solicitors. On the other hand, the Lord President, the Judges' Council, the Sheriffs Principal and the Faculty of Advocates all considered that experience of pleading before the superior courts was an essential qualification for appointment as a judge of the Court of Session.

SENIOR JUDICIARY: VACANCY, INCAPACITY AND SUSPENSION

Where the office of Lord President is vacant or when the Lord President is either incapacitated or suspended, section 4 of the Bill enables the functions of the Lord President to be performed by the Lord Justice Clerk. The Bill provides that incapacity arises only on the grounds of ill health. Section 5 enables the functions of the Lord Justice Clerk to be performed by the senior judge of the Inner House.

Schedule 5 of the Bill repeals the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 (asp 9) ("the 2006 Act") (which was passed by Parliament on 15 June 2006 under the Emergency Bill procedure). However, Chapter 2 of Part 2 of the Bill re-enacts these provisions with only minor modifications to reflect comments made during the passage of the 2006 Act. The Scottish Government considers it prudent to subject these provisions to the normal parliamentary procedure.

On 1 June 2006, the former First Minister announced to Parliament that the Lord President of the Court of Session (Lord Hamilton) had been ill for some time and remained under medical care with no firm date for a return to work (Scottish Parliament 2006). During the Lord President's absence, Lord Gill, the Lord Justice Clerk, carried out many of the responsibilities of the Lord President. However, certain decisions could be made and actions taken only by the Lord President and the absence of powers at that time for the Lord Justice Clerk to act in his or her place presented difficulties in operating the superior courts. The 2006 Act was intended to ensure that there were no disruptions to the smooth running of the courts, or other aspects of public administration, when either or both of the two most senior judges in Scotland are unable to carry out their duties due to incapacity, or when one (or both) of the posts is vacant.

JUDICIAL CONDUCT

Content of the Bill

Part 2 (Chapter 4) of the Bill makes provisions in relation to judicial conduct.

Section 2 confers on the Lord President responsibility for dealing with issues of conduct and section 26 enables the Lord President to make rules in relation to the investigation and determination of any matter concerning the conduct of judicial office holders. Following such an investigation, and in addition to any informal measures, the Lord President may issue formal

advice, a formal warning or a reprimand (s.27).

Sections 28-31 provide for the creation, tenure and operation of a Judicial Complaints Reviewer, to be established to review the handling of an investigation into judicial conduct where requested by the complainant or the judicial office holder. The Reviewer's role is procedural only and he or she will not review the merits of a particular case. If an investigation is referred by the Reviewer to the Lord President on the grounds that it has not been carried out in accordance with the rules, the Lord President may: vary or revoke the original determination of the investigation; initiate a fresh investigation; confirm the determination; or take such other action as is considered appropriate. Based on an estimation of the likely number of cases, the Financial Memorandum calculates that the Judicial Complaints Reviewer will be employed for an average of eight days per month at an estimated cost of £24,000 per annum.

Section 31 of the Bill gives the Lord President (or, where the Lord President is absent, the Lord Justice Clerk) the power to suspend a judicial office holder where it is considered necessary for the purpose of maintaining public confidence in the judiciary.

Background

The exercise of disciplinary powers over the judiciary is a sensitive issue. Judicial office holders are not employees. They are public office holders, appointed by or under the authority of the Queen and constitutionally independent of the legislature and the executive. In the consultation paper, the then Scottish Executive made it clear that no Minister or official, however senior, should be in a position to issue any disciplinary penalty or advice to a member of the judiciary. However, with no sanctions existing for conduct or actions which fall short of unfitness for office, the then Scottish Executive considered that the existing arrangements for dealing with unacceptable conduct were unsatisfactory.

The Scottish Government considers it important for public confidence in the legal system that appropriate arrangements are in place for dealing with judicial conduct and that such a process should be open, transparent and easily accessible. However, the Scottish Government also anticipates that the investigation of complaints will be confidential and the outcome will not generally be publicised.

The Scottish Government calculates that in the region of 180 complaints per year are made about the Scottish judiciary either directly to the judiciary or to the Scottish Government. The majority of such complaints relate to sheriffs. This is not surprising given that sheriffs preside over the majority of court proceedings. A significant proportion of complaints relate to sentencing and other judicial decisions and a proportion are found to be without substance. The experience in England would seem to suggest that the existence of a formal complaints process may result, at least initially, in a significant increase in the number of complaints received.

Key areas of debate

During the consultation process, the Judges' Council argued that the current informal arrangements for dealing with disciplinary issues have operated for many years without significant public criticism or dissatisfaction and did not, therefore, support proposals for change. The Judges' Council did, however, note that in some jurisdictions informal guidance is issued by senior judges to judicial office holders as regards their conduct generally. The former Scottish Executive (2007) agreed that there was no current problem with complaints about judicial

conduct but wished to put in place a more structured process for dealing with complaints. The Judges' Council did not consider that a mechanism to give the complainer the right to have an independent person review the administration of the case to ensure the set procedures had been followed was necessary, arguing that those entrusted with judicial office may reasonably be expected to act with fairness and propriety.

In its response to the consultation paper, the SCC expressed support for the introduction of a code of conduct for judicial office holders and a complaints procedure for dealing with complaints about the way in which members of the public are treated by sheriffs and judges. The SCC also argued that the procedure for dealing with issues of conduct should be set out in statute or in regulations. However, it drew an important distinction between complaints about the *conduct* of a judge or sheriff and *decisions* made by him/her.

REMOVAL OF JUDICIAL OFFICE HOLDERS

Content of the Bill

Part 2 (Chapter 5) of the Bill provides for the removal from office of any person holding judicial office. The need to preserve judicial independence is central to any procedures relating to the removal of holders of judicial office.

The Bill provides for the establishment of a tribunal to consider the fitness of all judicial office holders (s 33 for supreme court judges and s 38 for sheriffs). The First Minister must, when requested to do so by the Lord President, and may, in other circumstances where it is thought fit to do so, constitute a tribunal to consider fitness of an individual for judicial office.

Under the terms of the Bill, a tribunal convened to consider the fitness of a Court of Session judge:

- may investigate and report on whether a person is unfit to hold office by reason of inability, neglect of duty or misbehaviour
- is constituted to include two individuals who hold high judicial office, one long-standing advocate or solicitor and one lay member
- may recommend to the First Minister that the subject of the investigation be suspended from office
- may require any person to attend its proceedings or produce documents (subject to standard legal obligations)
- is required to submit a report in writing to the First Minister which must then be laid before the Scottish Parliament

Where such a tribunal has been established, the Lord President may, at any time before the tribunal reports, suspend the subject of the investigation from office (s 34). The First Minister may also suspend the subject of the investigation from office where the tribunal recommends doing so. Suspension during investigation lasts until the Lord President or the First Minister (depending on who has instructed the suspension) order otherwise.

The provisions in relation to the fitness for and removal from shrieval office amend the Sheriff Courts (Scotland) Act 1971 (c 58) ("the 1971 Act") to bring them into line with the tribunal

proposals for Court of Session judges.

If a finding of unfitness is made against a sheriff, removal from office would require a statutory instrument to be laid before Parliament.

The Bill enables the Court of Session, by act of sederunt[8], to make further provision as to the procedures to be followed by tribunals considering fitness for office.

The Bill does not provide any specific review or appeal mechanism for judges or sheriffs. However, as the two cases referred to below demonstrate, such decisions may be contested through judicial review.

Background

Section 95 of the Scotland Act 1998 (c 46) provides that a judge of the Court of Session may be removed from office only by the Queen on a recommendation of the First Minister. The 1998 Act provides that the First Minister shall only make such a recommendation if the Parliament resolves that such a recommendation should be made. Provisions are also included in the 1998 Act for a tribunal to be constituted to investigate and report on whether a Court of Session judge is unfit for office by reason of inability, neglect of duty or misbehaviour. Under the 1998 Act, the Scottish Parliament is able to legislate to establish more detailed procedures for the removal of judges.

Prior to the passing of the Scotland Act, no formal procedure existed for removing Court of Session judges and there have been no reported instances of the removal of a Court of Session judge, although resignations are not unknown. The tenure of a Court of Session judge is said to be *ad vitam aut culpam* (for life or until fault).

Arrangements for investigating questions of fitness of a sheriff or part-time sheriff are set out in the 1971 Act. Allegations of unfitness of a sheriff principal or sheriff are investigated jointly by the Lord President and the Lord Justice Clerk. Those against a part-time sheriff are examined by a three person tribunal. There have been few modern examples of sheriffs being removed from office. In 1977, a sheriff was removed from the bench for open involvement in political activity (promoting plebiscites on home rule) and in 1992 another sheriff was removed on grounds of inability. These appear to be the only recent instances of a sheriff being removed from office. In both cases the decision was contested, unsuccessfully, through judicial review.

Key areas of debate

In response to the consultation paper, there was some opposition to the presence of non-judicial members on the tribunal panel. The Law Society of Scotland argued that the power of suspension should only apply within the context of a criminal investigation brought to the attention of the Lord President by the Lord Advocate, or where criminal charges are pending. The Sheriffs' Association expressed the view that there should be no interference with the present statutory arrangements for investigating questions of fitness of a sheriff or part-time sheriff as set out in the 1971 Act.

[8] Acts of sederunt are ordinances for regulating the forms of procedure before the Court of Session.

THE COURTS

The Court of Session

For the purposes of hearing cases, the Court of Session is divided into an Outer House and an Inner House. The Outer House consists of 24 Court of Session judges sitting alone or, in certain cases, with a civil jury. They hear cases at first instance on a wide range of civil matters. The Inner House is essentially an appeal court (although it has a small range of first instance business). It is divided into the First and the Second Divisions, of equal authority, and presided over by the Lord President and the Lord Justice Clerk respectively. The Divisions hear cases on appeal from the Outer House, the Sheriff Courts and certain tribunals and other bodies. Each division is made up of five Judges. The Court of Session Act 1988 (c 36) ("the 1988 Act") currently provides that the quorum for a Division of the Inner House shall be three judges.

Part 3 (s 40-42) of the Bill amends the 1988 Act which provides for the constitution, administration and procedure of the Court of Session.

Section 40 of the Bill places a requirement on the Scottish Ministers to consult with the Lord President before making an order to increase the number of Court of Session judges. This section also requires such an order to be approved by resolution of the Scottish Parliament (rather than by the UK Parliament, as is the case currently). Section 41 requires the Scottish Ministers to consult with the Lord President before altering the number of judges in the two Divisions of the Inner House. Section 42 of the Bill provides the Court with flexibility to vary the quorum for business of the Inner House depending on the nature of proceedings under consideration. For example, in considering procedural matters the quorum may be reduced to one, but when considering the substance of an appeal the quorum would be three or more. The Bill provides for the quorum to be set by act of sederunt.

The Lands Valuation Appeal Court

Part 3 (s 43) of the Bill makes similar amendments in relation to the quorum for the Lands Valuation Appeal Court. The Lands Valuation Appeal Court considers appeals against the determination of the local Valuation Appeal Committee or the Lands Tribunal as to the value to be set on heritable property for the purposes of the raising of local rates.

Sheriff courts

There are currently six sheriffdoms in Scotland, each headed by a sheriff principal. Scottish Ministers are currently responsible for the organisation and administration of the sheriff courts, a function currently discharged by the Scottish Court Service. The sheriffs principal have general responsibility for securing the speedy and efficient disposal of business in the courts of their sheriffdom.

Sections 44-53 of the Bill make various amendments to the 1971 which provides for the constitution, organisation and administration of the sheriff courts. In particular, the Bill transfers various areas of responsibility from the Scottish Ministers to the Lord President. However, the new provisions are intended to be more consistent with the Lord President's new responsibilities

as Head of the Scottish Judiciary.

Section 44 of the Bill confirms the sheriff principal's responsibility for ensuring the speedy and efficient disposal of business in the sheriff courts of his or her sheriffdom. It allows sheriffs principal to give directions of an administrative character to sheriffs within their sheriffdom and to SCS staff. Section 15 of the 1971 Act already provides sheriffs principal with the ability to give instructions of an administrative nature to sheriffs within their sheriffdom in order to secure the effective discharge of functions.

Section 45 of the Bill repeals sections 1 and 9 of the 1971 Act, removing the Scottish Ministers' role in relation to the organisation and administration of sheriff courts and the ability of Scottish Ministers to give administrative directions.

Section 18 of the 1971 Act provides Scottish Ministers with a default power enabling them to take over the functions of a sheriff principal where it is considered necessary for the efficient disposal of court business. Section 46 of the Bill transfers this default power to the Lord President.

In addition, the Bill transfers from the Scottish Ministers to the Lord President the following functions:

- altering boundaries of sheriffdoms; forming new sheriffdoms; and providing for the abolition of sheriffdoms (s 47)
- deciding where sheriff courts should sit (s 48)
- moving sheriffs and sheriffs principal from one sheriffdom to another (s 50)
- approving residence and leave of absence of sheriffs principal (s 51)
- responsibility for the number, residence and deployment of sheriffs (s 52)
- approving extended leave of absence of sheriffs (s 53)

Section 49 removes the ability of Scottish Ministers to appoint sheriffs to assist them in an organisational and/or administrative capacity.

In response to the consultation paper, the sheriffs principal and the Sheriffs' Association agreed with the proposal to give the Lord President the power to deploy a sheriff on a compulsory basis when it is considered to be in the interests of the administration of justice to do so. The Faculty of Advocates expressed some concern that the provisions on compulsorily transfer may be used following disagreement with decisions made by a sheriff and wished to see transfers taking place only in consultation with the Lord President and the relevant sheriff principal.

District and justice of the peace courts

Part 3 (s 54 and s 55) of the Bill relates to district and justice of the peace courts. Section 54 transfers from Scottish Ministers to the Lord President general responsibility in relation to the establishment of justice of the peace courts. Section 55 confers on sheriffs principal responsibility for ensuring the efficient disposal of business in the JP courts in their sheriffdom and authorises them to give directions of an administrative character to justices of the peace within their sheriffdom and to SCS staff.

The Criminal Proceedings etc (Reform) (Scotland) Act 2007 (asp 6) ("the 2007 Act") provided for the establishment of justice of the peace courts (JP courts) in place of district courts, a process which is now being taken forward on a phased basis. Scottish Ministers currently have

a number of general responsibilities in relation to the establishment of district courts and JP courts and sheriffs principal have responsibility for the efficient administration of any JP court located in their sheriffdom.

Under the process of court unification provided for in the 2007 Act, responsibility for administering district/JP courts will transfer to the SCS on a phased basis. Unification will bring the entire summary judiciary within each sheriffdom under the responsibility of the sheriff principal and the role of local authorities in court administration will come to an end. Under the phased approach, the courts within the sheriffdom of Lothian and Borders are to be unified first - by March 2008. This is to be followed by the sheriffdom of Grampian, Highland and Islands by June 2008. Planning work has already started in the remaining four sheriffdoms. The unification process has been described as the biggest challenge faced by the SCS (Scottish Court Service 2006).

GOVERNANCE OF THE SCOTTISH COURT SERVICE

Background

The Scottish Court Service (SCS) was established administratively in 1995 as an Executive Agency of the Scottish Office. The agency is currently part of the Scottish Government Justice Department and is responsible for the administration of the supreme courts and the sheriff courts. It will also have responsibility for the justice of the peace courts as the 2007 Act is implemented. At present the judiciary do not have formal authority over the governance of the SCS. The Chief Executive of the SCS has sole and personal responsibility to Ministers and Parliament for its effective operation. However, the SCS does have a duty to ensure that judicial interests are respected and that the judiciary is consulted about service development. Indeed, the Osler review found that informal contacts between the judiciary and the SCS were generally constructive and productive.

A review of the structure and governance of the Scottish Court Service (the Osler Review) was established with Ministerial approval in June 2005. The Osler Review made recommendations relating to the future governance of the supreme and sheriff courts in Scotland and the future relationship between the SCS and judiciary. It concluded that there would be distinct advantages in legislating to create a unified judiciary with its own management structure. Specifically, in relation to the relationship between the SCS and the judiciary, the Osler Review recommended:

- that there should be a further detailed review of the steps involved in moving to a unified judiciary with its own management structure
- a representative of the unified judiciary should be appointed as a non-executive Director of the new Board of SCS
- further consideration should be given to the relationship between a unified judiciary with its own management structure and the SCS

Osler also recommended that the SCS should remain an Executive Agency, stating:

> "I believe a close relationship between the SCS and its parent Department is essential to achieving a coherent approach to the delivery of justice in Scotland". (Scottish Executive

2006a)

Following the Osler review, the first steps were taken to involve the judiciary in the strategic governance of the Scottish Court Service. While responsibility for the SCS continued to rest with the Chief Executive, a Strategic Board was established to advise the Chief Executive. The membership of that Board, which first met in March 2007, initially included a supreme court judge and a sheriff principal as well as an independent member and a senior Justice Department official and has since been expanded to include a sheriff and a JP.

Content of the Bill

Section 56 of the Bill establishes the SCS as a body corporate[9] of 13 members, chaired by the Lord President with a majority of judicial members. The SCS will continue to be part of the Scottish Administration[10] but will not be part of the Scottish Government (ie not under the direct authority of the Scottish Ministers). To achieve the designation of the SCS as a separate entity within the Scottish Administration, an order will need to be made at Westminster under section 104 of the Scotland Act 1998. The Scotland Office has already agreed in principle to make such an order.

The functions of running the court service will be transferred from the Scottish Ministers to the SCS corporate body which will be chaired by the Lord President and which will have a judicial majority. Schedule 3 of the Bill provides that the Board of the SCS is to consist of judicial and non-judicial members. The judicial members are to comprise the Lord President, the Lord Justice Clerk, another judge of the Court of Session, a sheriff principal, two sheriffs and a justice of the peace. The non-judicial members are to comprise a practising advocate, a practising solicitor, the Chief Executive[11] and three lay members. The Lord President is to appoint members of the Board in accordance with procedures prescribed by the Scottish Ministers. The Lord President may remove a member of the Board if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

The SCS will be responsible for determining and implementing policy. However, it will operate within a set of priorities set out in a corporate plan agreed with the Scottish Ministers (s 62). In addition, the SCS will require to have regard to guidance given to it by the Scottish Ministers (s 65). If Scottish Ministers consider that the SCS is failing to properly carry out its functions, they may, by order, provide for those functions of the SCS to be carried out instead by themselves (s 66).

It is anticipated that SCS staff will remain civil servants. Staff of the Scottish Administration are Crown servants and part of a unified Home Civil Service. The Prime Minister, as the Minister for the Civil Service, is responsible for civil servants and is advised by the Head of the Home Civil Service. The Minister for the Civil Service has, however, delegated to the First Minister responsibility for a wide range of terms and conditions of service for staff of the Scottish Administration, subject to conditions set out in the Civil Service Management Code. By retaining civil service status, the Scottish Government hopes to avoid the cost and controversy associated with moving staff to non-civil service contracts and recognises that the administration of the courts, as a core function of the state, is properly carried out by Crown servants.

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[9] A body corporate is a collection of persons which, in the eyes of the law, has its own legal existence (and rights and duties). Bodies corporate are not necessarily companies, but companies are by definition bodies corporate.

[10] The Scottish Administration is the statutory umbrella term used in the Scotland Act 1998 for the Scottish Executive, junior Scottish Ministers, certain non-Ministerial office-holders and their staff.

[11] The Chief Executive of the SCS is appointed by authority of Schedule 3, para 14(1).

The Financial Memorandum states that changes to the SCS governance arrangements will not achieve any savings. In fact, it is estimated that there will be additional costs of £15,000 per annum arising from the appointment, payment and expenses of SCS members. The provision of temporary judicial cover whilst judges and sheriffs are engaged on duties associated with the SCS is expected to cost an additional £40,000 per annum. The overall budget implications directly attributable to the new governance arrangements are, therefore, estimated to be in the region of £55,000 per annum.

Key areas of debate

It may be argued that, as the SCS is an Executive Agency of the Scottish Government, clear channels of accountability currently exist between, for example, Scottish Ministers and the Scottish Parliament. Handing over strategic management of the SCS to a corporate body chaired by the Lord President may, therefore, diminish such accountability. The Lord President cannot be required to give evidence to Parliament[12] and has done so only once since 1999 in relation to the passage of the Constitutional Reform Act 2005. Removing government involvement in the operation of the SCS may also inhibit its ability to influence the strategic direction and management of the courts.

On the other hand, it could be argued that the current governance arrangements are not satisfactory as they allow Scottish Ministers to intervene in the running of the court system but provide the judiciary with no formal influence over the way in which resources are used to support the operation of the courts.

[12] Section 23(7) of the Scotland Act 1998 prevents compelling a judge to appear before Parliament.

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