

JUSTICE 1 COMMITTEE

Wednesday 27 October 2004

Session 2

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JUSTICE 1 COMMITTEE 32nd Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING ALSO ATTENDED

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 5

Scottish Parliament

Justice 1 Committee

Wednesday 27 October 2004

[THE CONVENER *opened the meeting at 10:02*]

Interests

The Convener (Pauline McNeill): Good morning and welcome to the 32nd meeting of the Justice 1 Committee this year. I ask members to switch off their mobile phones if they have not already done so.

Item 1 on our agenda is a declaration of interests. I begin by welcoming Mary Mulligan to the committee. It is a welcome back to justice because Mary has been a member of the Justice 2 Committee. A pattern seems to be emerging, which is no bad thing. I invite her to declare any relevant interests.

Mrs Mary Mulligan (Linlithgow) (Lab): Thank you for your welcome; it is good to be back. Since the last time I was on a justice committee, I have not acquired any relevant interests.

Item in Private

10:03

The Convener: Item 2 is to consider whether we should take item 4 in private. Item 4 is on the committee's approach to stage 2 of the Emergency Workers (Scotland) Bill. Do members agree to take item 4 in private?

Members *indicated agreement.*

Subordinate Legislation

Maximum Number of Judges (Scotland) Order 2004 (draft)

10:03

The Convener: Item 3 is subordinate legislation. I welcome once again to the committee Hugh Henry, the Deputy Minister for Justice, and I refer committee members to the note that the clerk has produced on the draft Maximum Number of Judges (Scotland) Order 2004. I ask the minister to speak to and move motion S2M-1874.

The Deputy Minister for Justice (Hugh Henry): Thank you for the opportunity to move this motion. The draft order that we are considering today is the legislative vehicle for increasing the maximum number of judges who serve in Scotland's higher courts. The Court of Session and the High Court are the flagship for the delivery of justice to our people. The judges have a huge responsibility, which, I would argue, they carry out with distinction. Our superior courts have an international reputation that I believe is justified. I want that to continue.

However, we have to acknowledge that the courts are under pressure, particularly in relation to criminal business. That is partly due to the success of the police in detecting crime and the Crown in bringing forward cases for prosecution. Those improvements are desirable, but they put a substantial strain on the limited number of judges who are available to hear cases. The need to concentrate resources on criminal trials has had unfortunate consequences elsewhere in the system, and I want to refer to two of those consequences.

First, there is a substantial backlog of cases in the criminal appeal courts. We accept that it is taking far too long for some convicted people to have their appeals heard. Secondly, there are substantial delays in dealing with civil business in the Court of Session. I think that we all understand why we need to give priority to criminal cases, but equally, people who are looking for justice in our civil courts have a right to a good service from our courts.

I move on to what we are doing. Since 1999, the number of permanent judges has increased from 27 to 32. That was meant to be a short-term increase while five judges were absent for more than a year. Four of those judges presided at the Lockerbie bombing trial in Holland and another judge took the inquiry into the Paddington rail disaster. When those judges returned to duty, the Lord President proposed that the figure of 32 should be maintained because of the volume of

business in the courts. Ministers accepted that proposition at the time and all 32 posts were retained.

The Lord President has statutory responsibility for organising the business of the superior courts, and it was he who approached ministers to request an increase from 32 judges to 34 judges. He did so after thoroughly reviewing other options that were available to him, which included the use of temporary judges. Ministers have responded positively to him on that front by providing extra temporary help on a short-term basis. That said, the Minister for Justice has given a public commitment to reducing the reliance of the courts on temporary assistance and had discussions earlier this year with the Lord President about the way forward on that matter. There will be further discussions in due course.

On the financial implications, the cost of recruiting two additional judges will be approximately £427,000 in a full year. That cost will fall on the Scottish consolidated fund.

The draft order is important. By approving it, we will indicate the high value that we place on the reputation of the higher courts in Scotland and our determination to maintain that reputation. I am happy to respond to any questions that members may have.

I move,

That the Justice 1 Committee recommends that the draft Maximum Number of Judges (Scotland) Order 2004 be approved.

The Convener: Thank you, minister. We will now debate the draft order.

Stewart Stevenson (Banff and Buchan) (SNP): It is not easy for me to oppose the motion, so I do not plan to do so. However, I would like the minister to assure me and members of the committee that the proposed increase is sufficient to address the numbers that we have seen in the past week. I recall that the numbers show 57 per cent of cases at the higher level being progressed to timetable, although the target was 80 per cent. Is an increase of two judges sufficient to enable future targets—which I presume will be of a similar order—to be met in serious criminal cases? Should that not happen, are you and the Minister for Justice accountable for that target and any replacement target that may come along?

Hugh Henry: Ministers will clearly be accountable for the overall workings of our justice systems, but the specific responsibility for identifying the numbers that are required lies with the Lord President. It is clear that the Lord President believes that the increase that he has requested is sufficient. We have responded to him by accepting his proposition for an increase of two judges and we have said that we will continue to

review matters. If the Lord President thinks at some point in the future that the increase is insufficient, he will no doubt come back to us with a further proposition.

The Lord President has identified the need to increase the maximum number of judges by two and we have accepted his request, which is what we bring to the committee today. I have no reason to doubt that the Lord President's conclusion, which was reached after careful consideration of a number of options, was correct. That is not to say that the Lord President will not have to respond to future trends and events and come back to ministers. However, we shall consider any such request carefully—indeed, sympathetically—because although we cannot give an outright guarantee in advance, we have been able to respond to any request that the Lord President has made.

Stewart Stevenson: Without wishing to put you in a position of criticising the Lord President, have you taken steps to discuss with him the way in which he came up with the increase in the number of judges from 32 to 34 in relation to the target? Your statement seemed to express your position in a different way by saying that you have no reason to believe that the increase is not adequate. That could mean that you have not discussed how he came up with the number or it could mean that you have and are content.

Leaving aside any increase in business, which is a different matter—we have to run a demand-led system—I seek to discover whether we can properly hold ministers to account on targets if we have difficulties in future or whether our concerns should be laid on the table of the Lord President.

Hugh Henry: I do not seek to suggest that any blame or responsibility should be apportioned to the Lord President. Ministers accept their responsibilities and we will deal appropriately with any concerns about the workings of our court system. We are clear about the separation of responsibilities between ministers and the courts and we would not seek to interfere improperly in the job that our judges do.

Equally, however, we have a responsibility to ensure that the justice system is properly funded and works effectively. We have had full and constructive discussions with the Lord President. We have explored a range of possibilities that he looked at in detail and he has come back to us to explain carefully his reasoning. We have accepted that and we believe that the increase in the maximum number of judges that he seeks is appropriate.

It would not be constructive at this stage for ministers to say publicly that we have a different view on how many judges are needed. The Lord

President is in a unique position to ascertain the needs of our judicial system. He is charged with a particular responsibility that he carries out superbly well. Although we have accepted what he had to say, that does not mean that neither he nor ministers will not continue to discuss on-going problems in the court system.

As Stewart Stevenson will be aware, we have taken other measures to improve the workings of our High Court system. Some of those are at an early stage—the Bonomy reforms are still taking time to bed in, but we hope that, in the fullness of time, they will also make a contribution to more effective working. It might be that, all things being equal, we could reduce the reliance on temporary judges through the increase in the number of judges.

The Convener: You mention the Bonomy reforms. Out of those discussions came a recommendation that there should be two additional judges initially to deal with the reforms. Does that mean that there will be a further order for another two judges to deal with Bonomy?

Hugh Henry: No. We are in the process of replacing a number of judges and we believe that the extra judges will fulfil our commitment. We currently have 32 permanent judges and the draft order seeks to increase that number to 34, which will reflect the previous commitments and comments that have been made.

The Convener: Does that mean that the draft order for an additional two judges is a direct result of the Bonomy reforms? I ask because nothing is said about that in the Executive note attached to the draft order. You will recall from the discussions that we had about the Criminal Procedure (Amendment) (Scotland) Bill that two additional judges were to be created specifically to deal with Bonomy. If the Bonomy report is the reason why we now have a draft order before us for an extra two judges, I would have thought that the Lord President would have told us that.

10:15

Hugh Henry: The draft order reflects a number of things, including the changes that are a result of Bonomy. We cannot isolate those changes from other things that are happening in our system, but the changes address very particular problems. Having considered the proposals that resulted from Bonomy and the pressures on the courts, the Lord President concluded that two additional judges would be required to ensure the effective working of our judicial system. Ministers are keen to support that view. We are also taking steps to replace a number of judges who have said that they will be retiring.

The Convener: So, although nothing in the Executive note says so, this draft order for two

additional judges is the response of the Lord President to increasing business and the Bonomy reforms.

Hugh Henry: Yes. The Bonomy reforms are part of the Lord President's overall assessment of the demands on the system.

The Convener: If it was expected that two additional judges would be required as a result of Bonomy, it would have been helpful, for the sake of continuity, if that information had been in the Executive note. Two additional judges are required because of the increase in business, but the need for another two judges was identified previously. If you think back to the Criminal Procedure (Amendment) (Scotland) Bill, you will remember that it was identified under Bonomy that two additional judges would be required for two years. That is why I am a bit confused. You are saying that the draft order includes the Bonomy reforms, but those two additional appointments were not to be permanent. I thought that they were only for the first two years. Has something changed since Bonomy?

Hugh Henry: I am not party to the particular decisions of the Lord President but he has assessed his overall needs—taking account of increased business, the changes brought about by Bonomy and the particular demands at the beginning of the process. He concluded that, in order to cope with all that, he required two additional permanent judges.

The Convener: I realise that you cannot speak for the Lord President but I would ask that the committee receive some clarification from you—or, if you think it more appropriate, from the Lord President. It appears to me that the Lord President has changed his position. The two additional judicial positions under Bonomy were for the first two years. We questioned that at the time, but that was his position. Am I correct?

Hugh Henry: I do not think that the Lord President has changed his position. He has reflected on the current demands and has assessed that more than simply a temporary increase is required.

The Convener: But that is a change. That is all I am asking about. We are now talking about permanent positions.

Hugh Henry: Yes, they are permanent positions. The requirement is in response to the way in which demands have changed—partly as a result of Bonomy and partly as a result of increased demand. I will certainly see whether I can clarify that for the committee but I want to make it absolutely clear that we are talking not about two extra temporary judges but about two extra permanent judges.

The Convener: I welcome that and have no difficulty with it, but it is a change from the position that the committee discussed under the Bonomy review and I seek clarification that the position has changed. If it has, I welcome the change.

Margaret Smith (Edinburgh West) (LD): The minister said that the appointment of extra judges, which I support, was needed to deal, for example, with the backlog in criminal appeals and civil business. However, we now hear that it is needed to implement the Bonomy reforms. I admit that I was thinking that we were getting two permanent judges to deal with the backlog and that, somewhere along the line, we would consider an order for two temporary judges to deal with the Bonomy reforms in the way that the convener has outlined.

From our previous work, we understand that the Executive's view was that two judges were needed for two years to deal with the impact of the Bonomy review, but we are now getting two more judges permanently, which means that, for their first two years, they will probably fail to make any significant impact on the backlog in criminal appeals and civil business but that they might have an impact on those aspects in the fullness of time. What proportion of the judges' time will be spent on dealing with the backlog? Will most of their time in the first two years be taken up with the impact of the Bonomy review? If that is the case, the backlog, which most of us find unacceptable, will continue.

Hugh Henry: I do not think that I said that the two judges were being appointed as a result of the Bonomy reforms. I think, and hope, that I said that the Lord President had reflected on a number of matters, including the Bonomy reforms and the increased demand, and had looked at the judicial system's overall requirements. We believe that, in the long term, the Bonomy reforms will reduce the burdens on the High Court, although there might be additional pressures in the beginning. The Lord President has reflected on the whole, has considered the pressures that will result from the Bonomy reforms and which will be brought about by increased demand and has concluded that the best way to reflect the short-term demands of those factors and the long-term demands on the civil and criminal system is to have two additional permanent judges rather than a temporary response.

In the meantime, temporary judges are also available and if, in the fullness of time, our system changed—if demand reduced or the Bonomy reforms were so effective that we did not need as many judges and there were no other pressures—we could reduce the number of judges. However, there is no immediate prospect of that. The Lord President believes that the way to respond to the

demands on the system, whatever the reason for them, is not to increase the number of temporary judges but to increase the number of permanent judges.

Margaret Mitchell (Central Scotland) (Con): I find your responses somewhat confusing. It is unclear whether the new judges are being appointed to deal with the backlog of business to which Margaret Smith referred—the civil court backlog and the delays that have been mentioned. The Lockerbie judges went off to adjudicate at the Lockerbie trial and came back to discover that extra judges were still needed, and we are now looking at two extra judges. I am not clear whether you are saying that the Bonomy report and the Criminal Procedure (Amendment) (Scotland) Act 2004 are beginning to kick in and that you see a need for more judges or that the new judges' appointment is a separate issue. The committee needs to have a definitive answer on that and we do not seem to have had it.

Hugh Henry: I am sorry that I am not being as clear as you would like. I will try to repeat what I have said.

We hope that, in the long term, the Bonomy reforms will reduce the burden. However, we accept that, in the short term, we need to respond to a number of increased pressures. The Lord President has simply reflected on the need, as he perceives it, for extra judges to cope with the introduction of the reforms and the increased demand on the system. He has not said, "I want more judges because of Bonomy" or "I want more judges because of increased demand." Instead, he has said, "To cope with pressures on the system, which include the Bonomy reforms and increased demand, I require two extra permanent judges." We have agreed to that request. We have not demarcated specific roles for the extra two judges. We have not said that they will be used to respond to the Bonomy reforms for the first two years and thereafter to cope with increased demand, nor have we said that the two judges are to be used to cope with increased demand and are not to be used for Bonomy.

To return to Margaret Smith's comment, I should point out that the two extra judges will simply share the burden of the overall work load along with the other judges. We are not demarcating specific roles for any judge. As I said, the Lord President has made his request in order to deal with increased pressures on the system; he has not done so for any particular reason such as the introduction of the Bonomy reforms.

I do not know whether I have been clear enough or whether there is another way of making the point.

The Convener: I think that you have made the point quite clear.

I want to move to another issue. The minister has outlined clearly the position that the Lord President has reached after reflecting on the criteria. I realise that I am repeating myself, but we are trying to square this with the financial memorandum to the Criminal Procedure (Amendment) (Scotland) Act 2004, which said specifically that two non-permanent judges would be needed to deal with Bonomy. I simply want to clarify, because it seems as if the position has changed, whether the Lord President has recommended this particular approach after reflecting on the whole matter. I do not know whether members seek any other clarification and I do not really want to go back over the matter: the minister has clearly outlined the background to the appointment of the two judges.

Mr Bruce McFee (West of Scotland) (SNP): I acknowledge the minister's comment that he is not imposing any demarcation lines and that the appointments are being made to cope with the general work load. Indeed, anyone can read that into the second-last paragraph of the Executive note. I accept all that at face value. However, is it your contention that, at the end of two years and with the appointment of the two extra judges, the Bonomy reforms will be on target and will have reduced the backlog of cases?

Hugh Henry: Yes. We believe that, in the fullness of time, the Bonomy reforms will lead to improvements in the workings of our High Court system. That is not only our belief; the whole Parliament has accepted that introducing those changes will make a very positive contribution to the system. We share the Parliament's views in that regard. However, we must overlay those improvements with the pressure of increased demand. If we were to take a static view of the Bonomy reforms, we would simply say, "We'll appoint a couple of temporary judges and when the Bonomy reforms kick in we won't need the same number." Unfortunately, demand is increasing in the civil and criminal justice systems. The Lord President has tried to reflect that increased demand by asking for an increase in permanent judges.

I repeat the point that I made earlier. I am sure that if demands on the civil and criminal justice systems were to reduce substantially at some point, the Lord President would come back to us and say that he did not need the number of judges that he had. However, I do not foresee that happening for some time.

Margaret Smith: How many temporary judges are there?

Hugh Henry: There are 18 temporary and part-time judges.

Margaret Smith: You said in your introduction that the Lord President had reviewed the use of temporary judges and that the Minister for Justice wants to reduce the number of temporary judges. Does the Lord President have proposals to reduce the number? If not, when might there be a reduction?

10:30

Hugh Henry: There is no specific proposal at present to reduce the number of temporary judges. We hope that having an extra two judges will eventually reduce our dependence on temporary judges.

The Convener: Will the appointment of the two new judges be done through the Judicial Appointments Board for Scotland?

Hugh Henry: Yes. The Judicial Appointments Board will be charged with carrying out those appointments. The board has advertised to replace a number of judges who have retired and I hope that, from the applications that come in, we will be able not only to replace those judges but to appoint the two extra judges. That process is under way. The board will be asked to interview candidates and make recommendations to the First Minister.

The Convener: Are there any other points you wish to make?

Hugh Henry: No.

The Convener: I think that you have probably covered the issues.

Motion agreed to.

That the Justice 1 Committee recommends that the draft Maximum Number of Judges (Scotland) Order 2004 be approved.

The Convener: As usual, we are required to report to Parliament on the draft order. When we do that, we usually reflect points that have been raised in debate. Are there any additional points that members wish to emphasise?

Members: No.

The Convener: The report will be published by Monday 1 November. I thank the minister for attending.

That draws to a close the public part of our meeting; we have agreed to discuss our approach to stage 2 of the Emergency Workers (Scotland) Bill in private.

10:32

Meeting suspended until 13:18 and thereafter continued in private until 13:21.

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