JUSTICE 1 COMMITTEE

Wednesday 28 March 2007

Session 2

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CONTENTS

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JUSTICE 1 COMMITTEE
13th Meeting 2007, 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)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Gillian Mawdsley (Scottish Executive Justice Department)
Ian Vickerstaff (Scottish Executive Legal and Parliamentary Services)
Richard Wilkins (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 28 March 2007

[THE CONVENER *opened the meeting at 11:07*]

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (SSI 2007/180)

The Convener (Pauline McNeill): Good morning. Welcome to the 13th and almost certainly final meeting of the Justice 1 Committee in this parliamentary session. We have received apologies from Stewart Stevenson.

Item 1 on the agenda is consideration of our legacy paper. [*Interruption.*] The agenda that I have seems to be different from the one that everyone else has.

Mike Pringle (Edinburgh South) (LD): I have two.

The Convener: The agenda has obviously been revised.

Item 1 is consideration of subordinate legislation. We will take evidence on two sets of regulations from Gillian Mawdsley, from the Scottish Executive Justice Department, and Ian Vickerstaff. I invite either Gillian or Ian to speak to the first set of regulations.

Gillian Mawdsley (Scottish Executive Justice Department): There were two policy objectives in making the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2007, which amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989/1491). Neither at nor subsequent to devolution has express provision been made for counsel's fees in criminal cases before the Judicial Committee of the Privy Council or for taxations in such cases. Taxation is a process in which disputes about fees charged are formally adjudicated. The new regulations provide for taxation and for a table of fees for counsel in such cases. That means that in cases in which criminal legal aid is available, if any dispute or question arises between the Scottish Legal Aid Board and a solicitor or counsel as to the amount of fees or outlays that are allowable to the solicitor or as to the amount of fees that are allowable to counsel from the legal aid fund, it may be referred to the registrar of the Judicial Committee of the Privy Council.

Review provisions have been included, so that anyone who is dissatisfied with a taxation decision by the registrar can lodge a petition that will be considered first by the board of the Judicial Committee. The regulations were made in full consultation with the registrar, who has confirmed that she is prepared to undertake taxations in Scottish cases. That will ensure a consistent approach throughout the United Kingdom, as decisions will be based on her expertise in the Judicial Committee's practice and procedures.

A table of fees is included as proposed new schedule 3 to the 1989 regulations. The table provides for fees to be paid at the same rate as for cases that originate in England and Wales, but the fees are only guidelines: higher fees may be paid to the Scottish Legal Aid Board when they are justified. If fees are not resolved by agreement with the board, the matter will go to the registrar for taxation. That was the first objective of the regulations.

The second objective was to make several changes to criminal fees for counsel in first-instance cases. The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113) introduced block fees for counsel and adjustments to take account of the Bonomy reforms, that is, the High Court reforms.

As the committee may be aware, amending regulations have been made to take on board several representations from the Faculty of Advocates. As a result of further representations that the faculty made following the continued monitoring of the solemn criminal reforms in the High Court, the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2007 provide for several further adjustments, of which the most significant includes provision for increased payments for preliminary hearings. Preliminary hearings were introduced as a direct result of the Bonomy reforms, to encourage early preparation and resolution of cases in response to Crown disclosure of evidence.

The regulations amend counsel's first-instance fees in relation to work done and outlays from 2 October 2006, which was the date on which the changes were finally agreed with the faculty. To introduce the changes to the benefit of the faculty, the regulations are intended to have retrospective effect.

The committee may recall mention of the case of Shelagh McCall v the Scottish ministers, in which it was held that it was ultra vires to make regulations that applied retrospectively when their application caused unfair detriment to people whom they affected. In general, the regulations provide for an increase in fees to counsel for first-instance proceedings. To ensure that counsel cannot suffer as a result of retrospective application, a saving provision has been included, which will ensure that, in continuing first-instance

cases in which counsel has undertaken separate preparation, the pre-existing higher fee can still be claimed, rather than that which the regulations provide. That situation might arise only very occasionally.

Taxation to resolve disputes for existing cases is to be provided as soon as possible. The reference to taxation applies to all proceedings that are concluded before 29 March 2007 and are referred to the Judicial Committee after that date. The table of fees will apply to proceedings that are concluded after 29 March 2007.

The Convener: Am I right in saying that the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2007 deal with two issues?

Gillian Mawdsley: Yes. Two separate policy intentions lie behind the regulations.

The Convener: Why are the two issues dealt with in a single instrument? Usually, an instrument is about a specific issue. We have dealt before with fees for preliminary hearings, which will now be dealt with in the regulations, which also concern proceedings before the Judicial Committee of the Privy Council.

11:15

Gillian Mawdsley: My colleague will be able to advise you in that regard. However, I can tell the committee that, in general, legal aid regulations are set out in principal sets of regulations. On this occasion, the principal set of regulations is the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. When seeking to amend those regulations, we usually try, where possible, to cover various policy areas in one set of regulations. Since amendment regulations were laid in 2005, further amending regulations have been made in respect of what we call cases of first instance, to take account of representations that we have received in various areas.

Under the changes made in 2004-05, preliminary hearings were introduced in the High Court. The 2005 regulations cover payments for those hearings, and the regulations that are before the committee simply seek to increase those payments to reward advocates for the work that they have to carry out on what are a fundamental part of the High Court reforms.

The Convener: The committee was involved in stages 1 and 2 of the Criminal Procedure (Amendment) (Scotland) Bill, which was based on the Bonomy reforms. Before we go any further, I want to be clear about the procedure. We have been asked to consider various sets of regulations on High Court reforms—I believe that, at one time, we dealt with what were called emergency regulations, and the previous set were described as temporary until further discussions had taken place with the Faculty of Advocates. Am I to understand that these regulations cover the discussions that you have had with the faculty on fees for preliminary hearings, and that we should expect other sets of regulations to emerge after you conclude discussions on the fees for the other aspects that have been raised with you?

Gillian Mawdsley: I think that I understand your question. The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 introduced the block fee system to which you have referred and made a number of adjustments to take account of contemporaneous changes to solemn procedure. You are absolutely right to say that the committee has already considered various amendment regulations, which were introduced in direct response to the faculty's representations.

The regulations under discussion this morning contain a number of smaller changes to other areas, but I have chosen to highlight only the substantial change with regard to fees for preliminary hearings. As I have said, we are, at the instigation of the Faculty of Advocates, seeking to increase those fees to reward advocates and provide them with fair remuneration for their work. The process of monitoring the reforms is on-going, and we hope that, in future, the regulations will be part of a review mechanism. The regulations that are before the committee, however, are our response to a number of representations that have been made.

The Convener: Does that mean that a future committee will have to consider further regulations on the specific points that we have been dealing with over the past year, or has the matter been resolved?

Gillian Mawdsley: A number of representations that were made by the Faculty of Advocates have been taken on board. However, I cannot rule out the prospect of its making further representations, because the reforms will continue to be monitored. There are no plans to make further changes to first-instance cases, but there are plans to introduce a new table of appeals and to deal with changes in civil legal aid that the faculty has suggested. Those changes are a work in progress that will be taken forward by a new Administration.

The Convener: I have to admit that I am somewhat confused about all this. However, in fairness to me and other members, I should say that the committee has had to deal with so many of these regulations that it has become quite difficult to follow things. Although the explanatory note sets out the intention behind the regulations, it does not provide us with any background information that would help us to understand their relation to the discussions that we have been observing over the past year or so.

When giving evidence to the committee, the faculty raised the issue of being able to refer fees that are in dispute. The regulations deal only with fees for counsel and with proceedings for the Judicial Committee of the Privy Council. Does that mean that the issue that the faculty raised with us is still outstanding and has not been resolved in relation to other criminal legal aid?

Gillian Mawdsley: I am not sure that I follow you. There was previously no provision for taxation of cases that appeared before the Judicial Committee of the Privy Council, but there is now. That means that if a dispute occurs about fees that are payable to solicitors or counsel in cases that come before the JCPC, there is a mechanism for resolution, if the dispute is not resolved in the first instance by the advocate and the Scottish Legal Aid Board.

The Convener: Yes, but am I correct in saying that when the dean of the Faculty of Advocates gave evidence to the committee, he expressed the faculty's view that it was dissatisfied with the system in general for fees that are in dispute? My recollection is that that was one of the problems that the faculty asked the Executive to resolve and that it was not just in relation to JCPC cases.

Gillian Mawdsley: I may be wrong, but I do not think that the dean of the faculty referred specifically to the JCPC.

The Convener: No, he did not—that is my point.

Gillian Mawdsley: I think that he may have talked generally about the block fees that were introduced in 2005.

The Convener: That is correct.

Gillian Mawdsley: You are right that the dean expressed concerns about that matter, but the concerns were subsequently addressed by the passing of the regulations that we have talked about and the most recent concerns will be met by the regulations that are before the committee. They followed consultation of and discussion with the faculty—the matter was resolved on 2 October 2006, as I said in the note. That is why the regulations are retrospective.

Margaret Mitchell (Central Scotland) (Con): I want to be clear about whether there are two new provisions. There is a provision to allow disputes about fees that are charged in civil or criminal cases to be resolved by the registrar of the JCPC. There is also a provision for taxation of such fees. Are those two separate provisions?

Gillian Mawdsley: It might be easier if my colleague explains the normal taxation system for resolving fee disputes, then I can explain the policy intention.

Ian Vickerstaff (Office of the Solicitor to the Scottish Executive): Where any dispute or disagreement about fees arises between the Scottish Legal Aid Board and counsel or solicitors, the latter can refer the matter for taxation. In High Court proceedings, the regulations provide that the questions will be referred to the auditor of the Court of Session. In sheriff or district court proceedings, the matter will be referred to the auditor of the sheriff courts for the districts in which the case is heard.

Margaret Mitchell: Can I stop you there? You used the phrase "for taxation". That does not refer to a dispute about tax on fees.

Ian Vickerstaff: No.

Margaret Mitchell: That is confusing. If you can explain that a bit more, I think we will be there.

Ian Vickerstaff: "Taxation" is the word that is used to describe the process by which disputes are resolved.

Margaret Mitchell: Right. What happened previously, if this is a new provision since devolution?

Ian Vickerstaff: Unfortunately, there was a gap in provision, which the regulations are plugging.

Margaret Mitchell: Was there no mechanism for airing grievances? Did they just fall by the wayside because nothing was done?

Ian Vickerstaff: Unfortunately, they did.

Gillian Mawdsley: What happened was that a number of cases were resolved by ex parte agreement. Cases were taxed by the registrar on a kind of party basis, after it was agreed to take the cases to the registrar. Not many cases end up at the JCPC. I do not think that there are any outstanding civil cases. There are approximately 10 cases that will now be resolvable, if they are not resolved informally—they will now go to the registrar for taxation. She has confirmed that she is prepared to take existing cases that can now be referred. There is therefore an equitable remedy for both parties.

Margaret Mitchell: A clear path has been set down for people to follow, on which everything is transparent, open and accountable. That is very much to be welcomed.

You referred to fees for counsel and said that preliminary hearings can now be taken into account, with payment provided. That is also to be welcomed. When the committee was working on the original bill, we realised that there would be front-loading of work and that that would have to be acknowledged. As the convener said, we heard from the Faculty of Advocates that the front-loading of work was not acknowledged, which was almost putting the system in jeopardy.

I want to ask about retrospective provisions and about the charging of more fees. I take it that the

savings provision will not impact on the client—in other words, that there will be no adverse affect on the person who has employed the Queen's counsel or solicitor.

Ian Vickerstaff: I will explain the point about retrospection and the savings provision—the savings provision is quite technical, but I will explain it as best I can.

The amendments that we are making for counsel in first-instance proceedings provide, in the main, for an increase in fees. The retrospective effect of the regulations will therefore not cause detriment to counsel. However, in respect of the scheme for payment for separate preparation, we felt that a small number of cases might slip through the net of the retrospective effects, so we have provided a savings provision such that, in that small number of cases, the existing scheme for payments for separate preparation will remain in operation despite the coming into force of the new regulations.

Margaret Mitchell: There is a kind of cushion for any eventualities.

Ian Vickerstaff: That is correct.

Margaret Mitchell: Thank you—that is helpful.

Mrs Mary Mulligan (Linlithgow) (Lab): In an earlier answer to Margaret Mitchell, you said that there had been no way of resolving disputes in the past, which was a gap in the provisions. Now that there is a way of resolving disputes, will there be an increase in the number of disputes, or will the new provisions be neutral in effect?

Gillian Mawdsley: I do not envisage an increase in the number of disputes. The Scottish Legal Aid Board and the advocate or solicitor, where appropriate, will normally seek to resolve the issue of fees in a case. The case will be referred to taxation only if they cannot resolve the issue between them.

As Margaret Mitchell said, the advantage is that we now have a transparent system with expertise that will work to benefit both parties. As I have said, I know of at least two cases that were referred by the parties, who were seeking to avail themselves of the expertise that was provided by the registrar.

I do not expect more disputes; we have simply resolved the situation so that cases will not sit indefinitely when people do not agree. There will now be a forum for resolving disputes equitably, which should benefit all parties.

The Convener: I want to add to what Margaret Mitchell said about provisions for preliminary hearings. The provisions are to be welcomed. The committee had been raising the issue and we are pleased with the changes to an important part of the procedure.

A future justice committee might have to pick up on issues that are left over from the discussions that led to the regulations. That committee would benefit from a short note outlining how we arrived at this point, because it is not immediately obvious. Committee members have limited knowledge and we just pick up on the issues every so often—we do not know when other issues will arise because we are not party to discussions. It would therefore be very helpful for a future committee to receive a short note with any future regulations, so that it can be clear about the background.

Gillian Mawdsley: I note what you have said, convener.

The Convener: Thank you very much.

Civil Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2007 (SSI 2007/181)

11:30

The Convener: We move on to deal with the Civil Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2007.

Gillian Mawdsley: The purpose of the regulations is to provide for taxation in proceedings in Scottish civil cases arising before the Judicial Committee of the Privy Council. The regulations are similar to those in the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2007.

Taxation is a process upon which disputes about fees charged are formally adjudicated. Unlike in criminal cases subsequent to devolution, express provision has been made in regulations for counsel's fees in civil cases that come before the Judicial Committee of the Privy Council. However, no express provision was made for taxation in such cases, as in criminal cases. In cases where civil legal aid is available, if any dispute or question arises between the Scottish Legal Aid Board and a solicitor or counsel about the amount of fees or outlays allowable to a solicitor or counsel from the fund, the regulations provide that such matters may be referred to the registrar of the Judicial Committee of the Privy Council.

The fees for counsel for any work in relation to proceedings in the Judicial Committee of the Privy Council is 90 per cent of the amount of fees that would be allowed on a taxation of expenses between solicitor and client, third party paying, if the work that was done was not legally aided.

A review mechanism has also been included so that anyone who is dissatisfied by a taxation decision of the registrar can lodge a petition that will be considered first by the board of the Judicial

Committee of the Privy Council. I confirm that the regulations were made after full consultation of the registrar, who has confirmed that she is prepared to undertake taxations should they arise in such cases. The policy intention is that there will be a consistent approach in such cases across the United Kingdom as decisions will be based on the benefit of our expertise in the procedures and practice.

As far as commencement is concerned, in order that a means for taxation to resolve disputes is provided in respect of all existing cases as soon as possible, the reference to taxation will apply to all proceedings commenced on or after 29 March 2007, and in respect of proceedings that are concluded before 29 March 2007 that are referred to the Judicial Committee of the Privy Council after that date.

Margaret Mitchell: What will be the practical effect of the regulations? Civil legal aid is quite a hot potato just now, especially in family law: there is real concern that the level of legal aid is not sufficient for it to be viable for practitioners to take such cases, which has led to the many practices not taking legal aid cases. Do the regulations provide for practitioners to challenge the work that is done and for an increased provision of civil legal aid for areas such as family law?

Gillian Mawdsley: I am well aware of the recent publicity about civil cases. The regulations are designed only to ensure resolution of disputes, so to that extent they will provide a mechanism of taxation. Far fewer civil cases than criminal cases are appearing before the Judicial Committee of the Privy Council, so it is recognised that there is a gap in the taxations that have been provided. The regulations are not designed to change the civil situation other than, for example, where a case arises that contains a unique point of law, is referred to the Judicial Committee, and counsel is employed. The regulations will, in such a case, provide a mechanism for resolving fee issues that might arise between counsel and a solicitor and, if the issue is not resolved directly between them, SLAB. That will be the limited effect of the regulations—they will not have a direct effect on civil legal aid or civil legal aid fees.

Margaret Mitchell: So it is a capping of legal aid. The applicant is entitled to the maximum legal aid and that is it. The question is about whether they achieve the maximum. Even if extra work has been done that goes over what is allowable under the maximum, there is no provision in the regulations to recoup the fees for that work.

Gillian Mawdsley: I will let my colleague Ian Vickerstaff—who is more familiar with the issue—answer the question about how such a taxation would operate.

Ian Vickerstaff: As Gillian Mawdsley explained, the regulations on civil fees make provision with regard only to Judicial Committee of the Privy Council proceedings. I think I am correct in saying that there has been only one civil case before the JCPC since devolution. We are not talking about a great many cases that will be affected by the regulations. There is provision in the principal regulations for payments for counsel to be made, unlike the criminal regulations, in which there was no provision before the current set of regulations was made.

On capping of fees, the registrar would, in any taxation, assess the fee in accordance with the House of Lords practice directions. As Gillian Mawdsley pointed out, two recent cases were remitted to the registrar on that basis and counsel was quite content with the fees determination. We do not think that that will be a problem.

Margaret Mitchell: If every case that could appeal did so, it would still be a small number.

Ian Vickerstaff: For civil cases, we are talking about such a small coverage—

Margaret Mitchell: And select issues.

Ian Vickerstaff: That is correct.

Gillian Mawdsley: If a civil case was referred to the registrar for taxation, the registrar, in seeking to make an award on the taxation, would have regard to the work that had been done. In other words, the advocate would be able to set out what he had done and there would be an assessment on the individual items of work, which would be put together and calculated. The advocate could say, "I've done X, Y and Z, and that's why I should be paid A, B and C."

If you are asking whether counsel would undertake a case before the JCPC, there is no reason why he would not seek to do so, because he could say why he thought that his fees should be at a certain level. The registrar, having regard to cases in England and Wales, would be able to say whether that was reasonable. I hope that that gives you the background to the procedure.

Margaret Mitchell: Yes. That is helpful.

The Convener: Is this becoming an issue now, particularly in relation to criminal cases, because of the number of devolution points that SLAB is now funding?

Gillian Mawdsley: I do not think that that is an issue. I think that what you are trying to say is that cases can be referred to the JCPC on devolution grounds, so, as part of criminal procedure, devolution issues are arising that are coming before the JCPC and, once they are there, there can be disputes over the fees.

The Convener: Do many more cases come before the JCPC because of devolution than was previously the case?

Ian Vickerstaff: I do not think so. There have been more criminal cases before the JCPC than civil cases, but the JCPC hears between 55 and 65 cases a year, including devolution cases. We are talking about one or two devolution cases a year from Scotland.

The Convener: We have no further questions. Your evidence has been helpful. Are members content to note the instruments?

Members *indicated agreement*.

Justices of the Peace (Scotland) Order 2007 (SSI 2007/210)

The Convener: Under agenda item 2, we will take evidence on the Justices of the Peace (Scotland) Order 2007 from Richard Wilkins of the Scottish Executive's Justice Department and Stephen Crilly of the Executive's Legal and Parliamentary Services. I welcome them to the Justice 1 Committee and thank them for coming along. Do they want to say anything about the order before we move to questions?

Richard Wilkins (Scottish Executive Justice Department): I have prepared a brief opening statement, although it covers some of the same ground as the Executive note. Would you rather move to straight to questions?

The Convener: It would be helpful to hear your opening statement.

Richard Wilkins: The Justices of the Peace (Scotland) Order 2007, together with the Criminal Proceedings etc (Reform) (Scotland) Act 2007, creates the statutory framework within which the Scottish Executive's reforms to lay justice can be implemented. In particular, the order provides a statutory basis for the committees that will oversee the recruitment, training and appraisal of justices within each sheriffdom. We intend to start establishing those committees in late April and May of this year. That is why the provisions of the order will come into force on 23 April.

The order makes it clear that ministers can appoint someone as a justice of the peace only if that person has been nominated for appointment by a justice of the peace advisory committee. The order also makes it clear that such JPACs must follow procedures that have been approved by the Judicial Appointments Board for Scotland. The board has set up an implementation group with sheriffs principal, the Scottish Executive and the District Courts Association. That group is considering what recruitment procedures should be followed in recruiting JPs in future. The overall intention is to ensure that JPs throughout the country are appointed by a process that is fair and transparent.

The order also sets out the functions that the training and appraisal committees will be required to perform. For example, training committees will be required to produce an annual training plan and an annual report on the training that has been made available to JPs in their areas. Appraisal committees will be required to produce a scheme for appraisal in their areas and must set out, among other things, the time intervals at which JPs will be appraised and the process by which JPs can appeal against the outcome of an appraisal. As with recruitment, the intention is to ensure that the committees in each sheriffdom fulfil certain national standards while still being able to take local decisions.

The members of the committees will be appointed by a panel chaired by the sheriff principal. That is consistent with the provisions of the 2007 act, which gave the sheriff principal responsibility for the efficient administration of the business of any JP court within their sheriffdom.

The order also provides that all new JPs must undergo a course of training approved by the Lord President before they are appointed as JPs and that all current JPs must attend a training course approved by the Lord President within two years of their taking up their new five-year appointments under section 67(7)(b) of the 2007 act. As with the other training provisions, the intention is to ensure a degree of national consistency in the arrangements for providing refresher and induction training for JPs.

Finally, it might be worth saying something about the consultation process that we used in preparing the order. The drafts have been discussed in some detail by the court unification and lay justice reference group and its successor body, the lay justice planning and delivery group. Those groups included justices of the peace and legal assessor representatives from the District Courts Association. They also included representation from the Judicial Appointments Board for Scotland, the Judicial Studies Committee, sheriffs principal, the Sheriffs Association, Victim Support Scotland, the Convention of Scottish Local Authorities, the Scottish Court Service and the Lord Lieutenants Association. It is also worth mentioning that all sheriffs principal—not just the sheriff principal representative on the lay justice groups—have been consulted on the policy content of the order. In addition, the Lord President has approved the contents of the order, as is required under section 69(4) of the 2007 act.

I hope that I have set out the policy background to the order but members are welcome to ask any questions that they have.

Margaret Mitchell: I seek some clarification. It is envisaged that the vast majority of JPs will serve on the bench but a number will remain just

signing JPs. Where do signing JPs fit into the equation?

11:45

Richard Wilkins: Various bits of the drafting might look complicated, because they take that situation into account. When we establish the committees, any JP will be able to stand for membership of a recruitment, training or appraisal committee. In practice, if a JP is unlikely to be eligible for appointment from December onwards, the panel is highly unlikely to select them, as they would be able to be a committee member only for a few months until December. However, under the 2007 act, such JPs are allowed to stand for appointment.

Members will notice that the requirement to advertise the vacancies is worded in a specific way. For example, article 7(5) of the order refers to article 7(4)(a)(ii), which says that, for a vacancy that arises "before the specified day",

"In making appointments to the JPAC, the sheriff principal … shall bring the existence of a vacancy to the attention of … all full justices appointed for a commission area any part of which falls within the sheriffdom".

Article 7(5) makes it clear that "full justices" are those who have been on the court rota in the preceding year. We will need to write out to advertise the vacancies only to justices of the peace who have been on the court rota and who are eligible for reappointment. The expectation is that those JPs will apply. I say, without pre-empting selection decisions, that they are by far the likeliest people to be selected.

Mike Pringle: I have not a question but a general observation. I welcomed the 2007 act. As a previous justice of the peace, I was interested in the provisions on justices. One issue that I pursued during the scrutiny of the bill was training. The order will address the problem that training of justices in some parts of Scotland has been abysmal and almost non-existent. After the order comes into force, every justice of the peace will be trained to the same standard, which is extremely positive and can only be good for the justice system and for the performance of justices of the peace in the JP court. The order is extremely welcome.

Margaret Mitchell: Richard Wilkins concentrated heavily on how JPs who do not serve on the bench fit in with the appointment process. Where do they fit into training? I presume that they do not have to undergo training, because they do not serve on the bench—they merely sign.

Richard Wilkins: Such JPs do not undergo training. From December 2007 onwards, signing justices will not exist. On the training requirement, article 12 says:

"Every JP shall, during each term of appointment, undertake at least such minimum period of approved training as is set down from time to time by the Lord President."

In practice, we expect the Lord President to set down the period of approved training that is required so that it applies from December onwards, when JPs will take up their new appointments. Therefore, the training requirement will apply only to full JPs who sit on the bench. In effect, it will not apply to signing justices, because they will not be justices from December, when the Lord President's requirement is likely to be imposed.

Margaret Mitchell: I declare an interest as a JP, although I do not serve on the bench as I am an MSP. I understood that the 2007 act provided for MPs, MSPs and councillors to remain JPs.

The Convener: That was also my understanding. I know councillors who are signing JPs, which is a good function. However, what Richard Wilkins says suggests that they will be barred.

Richard Wilkins: They will be barred from holding office as a justice of the peace. The 2007 act includes provisions that give all councillors signing powers.

The Convener: So a councillor will not need to be a JP to use that power.

Richard Wilkins: A councillor will not need to be a JP to be able to sign documents.

Mike Pringle: During the passage of the bill, I pursued the fact that someone who is elected as a councillor is immediately able to sign.

Richard Wilkins: Yes, under section 76 of the 2007 act, all councillors can sign documents and have signing powers in the manner of a signing JP.

There is no statutory provision in the order for training, but the District Courts Association has a signing manual for JPs. We have had discussions with the Judicial Studies Committee about updating that signing manual so that it can be made available to councillors as well as JPs.

Margaret Mitchell: What you are saying is contrary to my understanding of the 2007 act. I understood that people who had been bench-serving JPs and who were elected as MSPs or MPs would no longer be eligible to serve on the bench but would retain the signing function. I thought that the bill contained a provision that would allow them to continue as signing JPs, although that would not be opened up to councillors. How many councillors will be elected in May? Being a signing JP is quite an onerous function and under the old system the councillors who were fully serving JPs were closely vetted.

It is quite contrary to the vetting procedure if someone is eligible to function as a signing JP and can therefore sign very important documents just because they are elected. They will not have gone through any particular vetting procedure. I ask you to check the position, please, because what you are saying is entirely contrary to my understanding of the 2007 act.

Richard Wilkins: It is absolutely definitely the position. Section 76(1) of the 2007 act says:

"A person who is a JP or a stipendiary magistrate may not exercise the judicial functions of office (but may exercise signing functions) if the person is—

(a) a member of a local authority,

(b) a member of the Scottish Parliament,

(c) a member of the House of Commons or the House of Lords."

That might be the provision that you are thinking about. It means that, under the new system, if someone is appointed as a full JP and is then elected as a member of a local authority, they will not automatically lose their JP office straight away. They will not be able to sit on the bench but they will be able to perform signing functions. In other words, under the new system, people who are appointed as full JPs and are then elected to office will only be able to perform signing functions, although they will keep their JP office.

Margaret Mitchell: So you are not saying that everyone who is elected to a council or Parliament can perform the signing functions. That would mean that 129 people were eligible to sign, in the case of the Scottish Parliament, and that so many MPs would be eligible to sign. They would have to be appointed as a JP, or—

Richard Wilkins: No. Section 76(2) says

"A member of a local authority, despite not being a JP, may exercise signing functions in the same manner as a JP."

All local authority members will be able to exercise those signing functions.

Margaret Mitchell: Right. Is that the same for MSPs and MPs?

The Convener: Section 76 says that it is elected councillors.

Richard Wilkins: Yes. The provision gives signing functions to all elected councillors.

The Convener: Yes—they have signing functions, but they are not JPs.

Richard Wilkins: Yes.

The Convener: Margaret Mitchell is saying that if a bench-sitting JP is elected to public office, they will not be able to sit as a JP but their signing function can continue.

Margaret Mitchell: That means that the signing provision is much wider. All the new councillors who will be elected will now have the signing function.

Richard Wilkins: The numbers do not stack up quite like that. There is a reasonably even geographical spread of a large number of councillors who are able to sign. There are about 1,100 councillors in Scotland at the moment, and although I am not sure exactly how many there will be under the new system, the number will be roughly the same after the May elections. All those councillors, who are fairly evenly distributed across the country, will have signing functions.

About 1,900 justices of the peace are on the supplemental list at the moment, as are a further 800 justices of the peace who were full justices and who will no longer hold office as a JP because they do not sit on the bench.

The number of people with signing powers will reduce as a result of the provisions of the 2007 act; we are gaining some councillors but losing some people who currently hold office as JPs. However, although the supplemental list has been abolished, the provisions guarantee that a large number of people—fairly evenly spread across the country—will be publicly available and able to perform signing duties.

Margaret Mitchell: That is interesting.

The Convener: The order covers a lot of ground but, from what I have read, it seems quite straightforward. Ministers cannot appoint someone who has not come through the appointments process, but can they reject someone who has?

Richard Wilkins: Yes, they can.

The Convener: The retirement age will be set at 70. I cannot remember, but is there an existing retirement age?

Richard Wilkins: There is. At the moment, JPs move on to the supplemental list at the age of 70. Nobody is able to sit on the bench as a JP after the age of 70.

The Convener: What happens if someone is appointed at age 66? There is a five-year term.

Richard Wilkins: A person can still be appointed with a five-year term at the age of 66 or 67. The person would then serve just three or four years of the term and retire at the age of 70.

The Convener: Why is that necessary? Why can people not fulfil their term? I presume that the situation will not be all that common. Why are people forced to retire at 70? Is that provision compliant with age discrimination law?

Richard Wilkins: It is compliant with age discrimination provisions, which do not prevent the

setting of retirement ages. Asking people to retire at 70 is consistent with what happens with the rest of the judiciary. All professional judges in Scotland retire at 70, so High Court judges retire at 70, sheriffs—

The Convener: But they do not have a five-year term, do they?

Richard Wilkins: No, they do not. However, we felt that it would be more consistent to have a cut-off—

The Convener: I am sure that that is right. I raise the point simply because, in this day and age, I find it surprising. Perhaps it is because I am getting older, but I am surprised how many people are still working and functioning at that age.

Perhaps in future you will have to review the situation. Someone can be elected at that stage in life but then not be able to complete their term of office because they are forced to retire. What difference would it make if you let people go a year or two beyond 70?

Richard Wilkins: Our current feeling is that we would like to retain a standard age across the judiciary. However, as you can imagine, the issue is raised from time to time by justices of the peace as they reach the age of 70. I imagine that we will keep the issue under review.

The Convener: Committee members do not seem to have any further questions, so it only remains for me to thank you very much for coming to the committee. I can see that you have done a lot of speedy work since we signed off the Criminal Proceedings etc (Reform) (Scotland) Bill, so well done.

Richard Wilkins: Thank you.

Mike Pringle: The order is very positive.

Richard Wilkins: Thanks.

The Convener: Are members content to note the order?

Members *indicated agreement*.

Land Reform (Scotland) Act 2003 (Path Orders) Regulations 2007 (SSI 2007/163)

The Convener: We come now to two negative instruments, the first of which is Scottish statutory instrument 2007/163. I refer members to the note prepared by the clerks and to the note that is attached to the SSI. Are members content to note the regulations?

Members *indicated agreement*.

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2007 (SSI 2007/211)

The Convener: The second negative instrument is SSI 2007/211. Are members content to note the instrument?

Members *indicated agreement*.

Annual Report

12:00

The Convener: Agenda item 4 is the annual report. I invite members to comment on the draft annual report and suggest any changes that they think are needed.

Mrs Mulligan: Under the "Meetings" heading, the report says that 13 meetings were in private, of which

"12 were to consider draft reports."

What was the other one?

Callum Thomson (Clerk): I can come back to you in writing on that. My guess is that it was perhaps to consider the appointment of an adviser. However, I will confirm that in writing. [*Interruption.*] I have been corrected; the correct answer is that the private meeting was for a budget briefing.

The Convener: We always forget about the budget.

Mrs Mulligan: I did not want anyone to think that we met in private just for the sake of it.

Callum Thomson: Yes—it was not just for fun.

The Convener: The report seems such a short one for what has seemed a rather long year. However, it summarises neatly the bills that we scrutinised and the inquiries and everything else that we did.

If members do not want to add to or change anything in the report, are we agreed that we are content with it?

Members *indicated agreement.*

Scottish Criminal Record Office

12:01

The Convener: The next item is the Scottish Criminal Record Office inquiry. This item caused the agenda to be amended. Members will know from their briefing papers that the Executive issued its response to the report of our SCRO inquiry on Friday. As this is the last meeting in the session of the Justice 1 Committee, I thought that it was appropriate to squeeze the item into today's agenda to enable members to put on the record, if they wish to do so, their comments on the Executive's response.

I suppose the key point to note is that almost all our recommendations, which we expect the Executive to act on, were accepted.

Mike Pringle: Yes.

The Convener: That tends to indicate that the inquiry was an important use of our time. We added value to the overall work that was headed by David Mulhern. As we have said at previous meetings, the recommendations are crucial to the future of the service, so we hope that, in future, the Parliament will continue to scrutinise the work that has been done by the committee.

Mike Pringle: Absolutely.

The Convener: Does anyone else wish to comment?

Margaret Mitchell: We could just note the response.

Mike Pringle: It is worth noting.

The Convener: We agree to note the Executive's response and welcome its adoption of all the main recommendations in the committee report. We will say in our legacy paper that we think that such work is important and that it should continue in the future.

That concludes our public business. We now move into private session to consider and sign off our legacy paper for our successor committee.

12:04

Meeting continued in private until 12:25.

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