JUSTICE 2 COMMITTEE

Tuesday 4 March 2003
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
6th Meeting 2003, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Lord James Douglas-Hamilton (Lothians) (Con)
Donald Gorrie (Central Scotland) (LD)
Dr Sylvia Jackson (Stirling) (Lab)

*attended

WITNESS

Mr Jim Wallace (Deputy First Minister and Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Tuesday 4 March 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:49*]

The Convener (Pauline McNeill): Good morning and welcome to the sixth meeting this year of the Justice 2 Committee. I ask members to switch off mobile phones to prevent disruption of the meeting.

I know that many distinguished guests are in the public gallery, but I particularly welcome Robin Cook MP, Leader of the House of Commons, who has come to see some of the workings of the Parliament today. I welcome all our guests.

I have received apologies from George Lyon. Alasdair Morrison will join us, but he will be late.

Petition

Fishing Industry (Fixed Quota Allocations) (PE365)

The Convener: Item 1 is on petition PE365, which calls on the Scottish Parliament to review fixed quota allocations with a view to ascertaining with whom the property rights to Scotland's fish stocks lie. The petition has also been referred to the Rural Development Committee for its information in view of its inquiry into issues that face the Scottish fishing industry.

Members may well ask why the petition has been referred to the Justice 2 Committee. The answer is that the petitioners ask specifically about property rights in relation to Scotland's fish stocks, which is part of our justice and home affairs remit. I hope that members have had a chance to read the clerk's note—J2/03/06/1—and I invite members to comment on the action that we could take.

Stewart Stevenson (Banff and Buchan) (SNP): Members will know of my close personal interest in fishing matters. I will make a couple of observations. One of the options that the clerk's note gives is to refer the petition back to the Public Petitions Committee. I understand that that is a mechanism by which the petition can remain live for successor committees when the Parliament reconvenes in May. I propose, for reasons that I will come to, that we should take that action. It may also be useful for the committee to write to the minister to ask some questions that arise from the papers that we have in front of us and from developments that are not covered in the papers.

The first substantive paragraph in the letter from the Executive of 11 June 2001 states:

"FQA units … are associated with fishing vessel licences".

That is the important point that leads to some of the difficulties that the petitioner—Iain MacSween, on behalf of the Scottish Fishermen's Organisation—and many others have with quotas. That association with fishing vessel licences is, as far as I am aware, not clearly defined; indeed, no one in the industry thinks that it is clearly defined. As a matter of policy, successive Governments have said that quotas are not tradeable. However, in practice, successive Governments of one complexion or another have allowed vessel licences to be turned back in—decommissioned—by and large in exchange for value, but with the quota remaining the property of the skipper who previously held the fishing vessel licence. Subsequently, that quota can be transferred to other people.

There seems to be a discrepancy in the policy statements. It would be useful to ask the minister—I suspect that we are talking about Ross Finnie rather than Jim Wallace, but it might be useful to copy the letter to them both—to clarify the Scottish Executive's view on the association between fixed quota allocations and fishing vessel licences and to state what has changed since 11 June 2001. That answer will inform our successors in determining how they wish to respond to Iain MacSween's petition.

My second point is that Shetland Islands Council has been buying quota to make available to its vessels. That is a well-established process, although it is currently under legal review, so the minister may not want to comment on it. Nonetheless, we should still put the question on the table. Perhaps after the legal case is concluded the minister will be in a position to inform our successors. That is the way in which I would like the committee to deal with the petition. Other members may have other views.

Bill Aitken (Glasgow) (Con): The issue is a complex and difficult one. We have all been concerned about the impact of recent events on fishing communities. I am unsure whether we can progress the matter, because time is running out and a decision must be made elsewhere before we can proceed usefully in any particular direction.

My view is that the petition should be put on the back burner, pending decisions on outstanding matters. We would then be able to pursue the issue further. Stewart Stevenson has made some good points, but I am a bit dubious about whether the Justice 2 Committee should proceed along the lines that he suggested. I would have thought that the Rural Development Committee should deal with the matter. However, I am anxious for the petition not to fall between two stools.

Stewart Stevenson: When I attend the Rural Development Committee meeting this afternoon, I might invite the convener to suggest to the committee that the petition should remain open.

The Convener: The Rural Development Committee and the Justice 2 Committee could consider the petition from their different points of view. Perhaps Stewart Stevenson can assist us and explain why the petitioners are keen to establish with whom the property rights to Scottish fishing stocks lie. How would resolving that question assist the petitioners?

Stewart Stevenson: As members will be aware, a £50 million support package for the fishing industry is on the table; £40 million of that is for decommissioning, which is mainly targeted at the white-fish fleet. Parliament will debate the matter tomorrow. Decommissioning would substantially reduce the fishing fleet, but it will not decommission the quota amount, which will be unchanged. The fishermen fear that, if it is legal for quota ownership to be transferred to foreign nationals, Spanish, Danish and other foreign vessels will, when the fishing stocks recover, fish what our fishermen regard as our fish. Obviously, I concur with that view. Iain MacSween is using the petition to keep the issue in play.

The Convener: I want to assist the petitioner in taking the matter further. I think that members' views are that we should keep the petition on hold in some way so that a successor committee, or successor committees, can take up the matter. The suggestion is that we refer the petition back to the Public Petitions Committee, which would allow the petition to be held in abeyance so that the successor petitions committee can determine where the petition should go. Do members agree that we should take that course of action?

Members *indicated agreement*.

The Convener: That is noted.

Crown Office and Procurator Fiscal Service

The Convener: Item 2 is on our inquiry into the Crown Office and Procurator Fiscal Service. Members will be aware that, after almost two years of examination, we have completed our inquiry. To tidy up a matter for the record, Bill Aitken will give us quick verbal report of the second visit that he and I made to the Hamilton office. We wanted to satisfy ourselves that the problems that had concerned us during our first visit, in June 2002, had been resolved.

11:00

Bill Aitken: Members will recall that our concerns about the Hamilton office arose from the two reports on the Chhokar murder inquiry and from the fact that, following our previous visit, we were not satisfied that appropriate action had been taken to deal with the difficulties that had occurred because of the Chhokar case. However, it should be noted that the Hamilton office suffered because two deputes were assigned full time to a long, complex inquiry into the Larkhall gas explosion, for which indictments have been served. There should now be more slack in the Hamilton system.

Our second visit to the Hamilton office was reassuring. We had a long session with the newly appointed area procurator fiscal, James Brisbane. He apologised for his evangelical approach, but we found it encouraging to see that he had his eye firmly on the ball and had taken steps to remedy the difficulties. It was pleasing that other members of staff with whom we spoke shared his enthusiasm and it was particularly interesting that the depute who deals with High Court matters was enthusiastic and positive about how things were being pursued in Hamilton.

The Hamilton office is particularly busy, as it serves an extensive geographical area that has a substantial population. The office also has more than its fair share of High Court business, given that numerous arrests for drugs offences are made in its jurisdiction, which extends a long way down the M74. The office deals with a substantial amount of high-level crime, which takes more time to prosecute than simple summary matters do. The use of ad hoc deputes has declined sharply since our previous visit, which indicates that progress has been made.

Our visit was positive, despite the time constraints. We went on a Wednesday morning and it was unfortunate that parliamentary business, which was to have been non-urgent, became urgent after our visit had been arranged. Our view is that a further visit to the Hamilton office might be made, because the inquiry will be on-going and our successor committee might want to ensure that everything is proceeding along the required lines.

The Convener: I concur with Bill Aitken's view. Members have a written report of the visit, which provides detailed information. We did not speak to as many fiscals as we would have liked to, but our general impression was that things had markedly changed. As Bill Aitken said, we had been concerned about the use of ad hoc deputes, particularly in the summary team. However, steps have been taken to ensure that that no longer happens.

I was also pleased to hear that there is a positive approach to the recruitment of new fiscals, not only in Hamilton, but around the country. For example, the service wants fiscals from different types of background and it wants mature lawyers. A mix of people are becoming fiscals, which will benefit the system.

We noted the high number of promotions in the Hamilton office, which was to the credit of those who were promoted. We were pleased for those individuals, but we did not want a recurrence of the situation that we found on our previous visit, when vacancies had been unfilled for too long. However, we were assured that a board would shortly fill the current vacancies.

Our successor committee has been invited to return to the Hamilton office and it can consider whether it wants to do so. Our general impression was that things had changed for the better there. It is also worth noting that Hamilton is running the pilot youth court scheme. We spoke to the fiscal who is developing the scheme. As members will know, Hamilton was chosen to run the pilot scheme for electronic tagging. It is to the Hamilton office's credit that it was also chosen to run the youth court pilot.

Scott Barrie (Dunfermline West) (Lab): Paragraph 12 of your report of the Hamilton visit states:

"At the time of the visit there were 3 vacant depute fiscal posts."

You also indicate that it was hoped that the first replacement would start on Monday 10 March. Was there any indication that the other two vacant posts would be filled quickly? Paragraph 14 of the report says that the Hamilton office has acknowledged that, until it has a full complement of fiscals, it cannot undertake its proposed further development. Filling the two vacant posts seems to be a key part of the development, so I do not want recruitment to be held up in any way.

The Convener: That was the point that we made. The recruitment system in the service

requires that a board be organised first of all—that is how recruitment is done. We did not spend a lot of time on the issue during our inquiry, but perhaps it is worth exploring whether there are enough boards and whether vacancies are being filled quickly enough. That is one reason for another visit—to see whether Hamilton has achieved a full staffing complement. Given the history of problems in the office due to promotions, we do not want to see constant vacancies. However, we have made that concern known and I am sure that it will be taken up.

Subordinate Legislation

General Commissioners of Income Tax (Expenses) (Scotland) Regulations 2003 (Draft)

The Convener: I welcome Jim Wallace, the Deputy First Minister and Minister for Justice, and his officials. Members have a background note on the affirmative instrument that is next on the agenda. I invite the minister to speak to motion S1M-3930.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): I will explain the background before I go into the detail of the regulations.

The general commissioners of income tax—who are unpaid lay volunteers—expressed concerns about their potential liability for costs and expenses in relation to legal proceedings that might arise from the execution of their duties. In response, the United Kingdom Government agreed to insert immunity and indemnity provisions into the Taxes Management Act 1970 and provisions were made for that in the Access to Justice Act 1999. Those provisions have now been commenced and cross-regulations made in respect of England, Wales and Northern Ireland.

However, before similar arrangements could be made in Scotland, it was necessary to seek executive devolution of the power to commence the provisions and to make associated regulations. The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2003 has been considered by the Scottish Parliament and by Westminster. It was approved by the Privy Council on 27 February and came into force on 28 February. The way is therefore clear for the Scottish ministers to commence the immunity and indemnity provisions in Scotland and, subject to commencement, to make the regulations that are before the committee today.

A commencement order that is not subject to parliamentary procedure has now been made, and will come into force on 31 March. However, the associated regulations that are before the committee today are subject to affirmative resolution and had to be laid in draft last month in order to ensure that they will come into force before Parliament is dissolved. It is desirable to have the regulations made soon after the new provisions are in place, not least because similar regulations have been in place for some time in the rest of the UK.

Once the immunity and indemnity provisions have commenced, the Taxes Management Act 1970 will provide a general rule that an order to

pay expenses cannot be made against a general commissioner in any proceedings in respect of an act, or omission in execution or purported execution, of his or her duty. Exceptions to that general rule are made for proceedings in which a general commissioner is being tried for an offence, or appealing against a conviction, or where it is proven that he or she has acted in bad faith. The act will also permit a court, in proceedings in which an order to pay expenses cannot be made against a general commissioner, instead to make an order against the Scottish ministers.

The regulations set out how the amount of any payment by the Scottish ministers is determined and the circumstances in which an order for payment can be made. Regulation 4 provides that if an order is made, it shall provide compensation for expenses that are reasonably incurred by the person concerned. Regulation 5 precludes the making of an order against a public authority. To put the matter in context, I must say that I am not aware of an order for expenses ever having been made against a general commissioner. Nevertheless, the new provisions will contribute to removing the risk, however remote, of any such liability. I therefore invite the committee to approve the regulations.

The Convener: You have just answered the question I was about to ask—this is a precaution.

Stewart Stevenson: I get the firm impression that this is a bit of tidying-up that relates to history. Since the regulations derive from the 1970 act, they clearly precede the resumption of the Scottish Parliament by many years. Does the instrument relate to all the commissioners' work? In other words, does it concern the income tax system in general, rather than being restricted to that part of it which falls within the purview of the Scottish Parliament?

Mr Wallace: Mr Stevenson is correct. Although the instrument relates to the 1970 legislation, an amendment was made to the 1970 legislation by the Access to Justice Act 1999. The power to commence the provisions in the 1999 act lies primarily with the Lord Chancellor. However, given that the Scottish ministers appoint the general commissioners in Scotland, it was decided to seek executive devolution of the commencement function. The role of the commissioners is as a tribunal that hears appeals against decisions that are made by the Inland Revenue on a variety of tax-related matters. Therefore, their role goes well beyond decisions that relate purely to the tax-varying powers of the Scottish Parliament.

Stewart Stevenson: The minister will know that I have no objection at all to ministers in this Parliament taking on additional powers. However, in this case, it appears that the powers that we are taking on are in relation to the misuse of a responsibility that lies not with us but with others. The Scottish ministers' responsibilities related purely to the appointment of the individuals, but the exercise of those individuals' functions is over an area that is absolutely nothing to do with the Scottish Parliament. It is curious that we should pick up the tab for matters that are related to income tax, but which are not the responsibility of the Scottish Parliament.

Mr Wallace: Indeed, the Scottish Parliament does not have powers relating to taxation other than the powers of variation. However, the matter is not strictly to do with income tax; rather, it is to do with the manner in which the commissioners who are appointed by the Scottish ministers perform their duties as a tribunal. In that respect, therefore, there is a difference. On that basis, we seek to commence the provisions to bring us into line with other parts of the UK.

Stewart Stevenson: In other words, you hold that the matter relates to what is very broadly a part of our justice system, and to a court that is interpreting and administering law in general—as indeed the civil and criminal courts more usually do.

Mr Wallace: I use the word "tribunal" rather than "court". You used the phrase "pick up the tab". No tab has ever been picked up, as far as we are aware, but there might always be a first time.

The Convener: That gave us a helpful understanding of the matter. The commissioners are appointed by you—

Mr Wallace: They are appointed by the Scottish ministers.

The Convener: In effect, their decisions are the cause of legal proceedings for which expenses will be paid—

Mr Wallace: Expenses will be paid for legal proceedings due to poor performance other than acting in bad faith or anything that might lead to criminal conviction.

Bill Aitken: I await with bated breath the impact of the legislation.

Mr Wallace: I hope that the regulations will never be put to the test. However, the request came from the general commissioners themselves, who felt that they needed the additional protection.

The Convener: Thank you.

Motion moved,

That the Justice 2 Committee, in consideration of the draft General Commissioners of Income Tax (Expenses) (Scotland) Regulations 2003, recommends that the Regulations be approved.—[*Mr Jim Wallace.*]

Motion agreed to.

Regulation of Investigatory Powers (Prescription of Offices and Positions) (Scotland) Amendment (No 2) Order 2003 (SSI 2003/50)

The Convener: Let us move on to item 4. I refer members to the letter from the Deputy Minister for Justice, Hugh Henry. The order was considered by the committee on 18 February, and several points were raised. Supplementary information was supplied by the Executive on one of those points, regarding the level of officers who will have the power. The agenda item allows members to return to the order and to satisfy themselves that the letter contains the answer that they were looking for. Before we begin, however, I point out that the Minister for Justice is not here to speak to the order.

11:15

Stewart Stevenson: As helpful as the Deputy Minister for Justice's letter undoubtedly is in relation to the discussion that we had, it does not—unless I have failed to read it properly—address the point that I raised with the deputy minister in that discussion. My point was that the order, as I read it, will allow an inspector to renew an authorisation. As I said previously, I have no objection to that, but the minister appeared to think that that was not the policy intention. The letter does not address the discrepancy between the wording of the order and the policy intention on renewals.

I do not wish to oppose or prevent the progression of the order, but I am uncertain about the issue of inspectors. The order appears to permit inspectors, when they have granted an authorisation as a matter of urgency or emergency, to renew the authorisation. That is contrary to the deputy minister's stated policy aim that such authorisations should take place at the normal level.

The Convener: Members will recall that, at the previous meeting, we dealt with two affirmative instruments and one negative instrument, all of which relate to the Regulation of Investigatory Powers (Scotland) Act 2000. I wrote to Hugh Henry on the committee's behalf on a matter that related to the negative instrument.

Stewart Stevenson: Perhaps I am confused.

The Convener: The matter is confusing. The committee and the report from the Subordinate Legislation Committee, which is where the issue began, raised the specific point about which officers of lower rank are covered by the order that we are considering. The letter that we have received from the deputy minister clarifies that point. If there are other points about the two affirmative instruments we can, for tidiness, write to the Executive about them.

The whole matter is pretty confusing. We dealt with the original legislation in 2000 and three years later we were asked to agree to two codes of practice, which were introduced as two instruments that were subject to the affirmative procedure and one that was subject to negative procedure. Members will recall that we have dealt with other instruments that relate to the 2000 act. It is confusing for Parliament for so many instruments to appear in relation to important legislation. Therefore, I have asked for a note to be prepared for Parliament so that when it votes on the instruments members are clear about from where the instruments derive, and whether they are subject to the affirmative or negative procedure. Such a note is not normally prepared, but I have asked for one.

If Stewart Stevenson feels that there is a need to clarify points further, I will be happy to write to the Executive.

Stewart Stevenson: I am content with the order and I do not feel compelled to push the matter. However, at the previous meeting, we were left in a somewhat unsatisfactory state because the minister could not persuade himself that I was wrong—I think that that is the correct way of describing the situation. My interpretation of the order appeared to be at odds with the policy objective. In any event, I am content and I do not feel the need to push the matter. In the interests of not confusing the minister or members any further, I am happy to let the matter lie.

Bill Aitken: It would be eminently sensible to have a note—such as that which the convener suggested—when the instruments go before Parliament; the matter has not been dealt with terribly happily. Although I am satisfied that there is absolutely no intention of malfeasance on the part of the Executive—far from it—there are lessons to be learned about making such matters clearer.

The Convener: We have learned lessons about the committee's requirements in dealing with complicated instruments that are produced a long time after the original legislation. In such cases, we require more discussion and explanatory notes, although I hope that we will put that right in this case. When Parliament votes on the instruments, it should have a note from the committee that makes the instruments easier to understand.

Judicial Appointments

The Convener: Item 5 on the agenda is on judicial appointments. Members have a note from the clerk on the matter and will recall that, in our forward planning, we wanted to discuss the subject and perhaps carry out an inquiry, but because of our busy agenda, we were not able to do so. We are now picking up the subject. The Minister for Justice is here to speak to us. I ask him to make his opening statement—over to you, minister.

Mr Wallace: I am pleased to have the opportunity to talk about the matter and I welcome the committee's interest in exploring it. I believe that the formation of the independent Judicial Appointments Board for Scotland to advise the First Minister and me on the appointment of Scotland's judges, sheriffs principal and sheriffs was one of the Executive's early successes. I had long held the view that the time was right to change the arrangements for appointing people to those key public judicial offices. I am pleased to say that there was ministerial agreement on the importance of early action on that and that the decision to create the board was made within two years of the Parliament's establishment.

I saw an independent board as being able to deliver three main objectives: first, there would be a system that ensures the appointment to the bench of the best candidates; secondly, there would be a system that is truly independent of undue influence from the Executive; and thirdly, there would be a system that society at large sees as fair and independent.

After setting the objectives, our next consideration was to choose the make-up of the membership to deliver on those objectives. My view was that there should be substantial involvement of people from outside the legal profession, and that the chairman of the board should be a lay person. As a result, the board has five lay members, including chairman Sir Neil McIntosh, who has a distinguished record of public service in a number of fields. Five members have legal backgrounds, including representation from the judiciary and both branches of the legal profession. An important consideration is that the legally qualified members of the board must be satisfied about the legal ability of any candidate.

Before the board was established, voices were raised against the proposal that there should be a lay chairman and it was argued that legal representation should comprise the majority. Those concerns have proved to be totally unfounded; board members have worked well together and the diversity of their backgrounds has been a strength, rather than a weakness. Those are not my views; they are the chairman's. I am sure that he would readily corroborate that if members chose to take evidence from him directly. I always believed that the combination of legal and lay membership was the right approach if Parliament and the public were to be persuaded that the board properly represented the community. That is why we held fast against opposition to our suggestion about the composition of the board. I believe that the results have proved us to have been right.

The board is wholly independent. My department provides secretarial support, but beyond that the board meets without any input from officials or ministers. The sole exception is when the board asks for an official to attend to provide advice on a particular piece of business. The committee can have confidence that the board makes decisions in its own way. All vacancies for posts are advertised publicly by the board, which then considers applications and draws up a shortlist for interview. Referee reports are called for and shortlisted candidates have the opportunity to make a presentation as part of the interview process.

Although I stress the board's independence, ministers have issued guidance on matters such as openness and fairness of proceedings and—this is important—the board has been asked to widen the search for possible candidates. The aim is to ensure that the judiciary is as representative as possible of the community that it serves. I know that the board takes those responsibilities seriously, but it is perhaps a little early to look for positive results on them. However, the board is attending to those matters and I look forward to the results that it will produce in due course.

The board has got off to a good start, beginning from scratch and with a clean sheet in a sensitive and important area of public life. The board's approach to the task has been commendable and its determination to produce a fair and open system of appointments has been apparent from the outset.

As politicians, we can have confidence in the new institution and in the recommendations that it will deliver. The board was set up administratively in the first instance, but we have given a commitment to put it on a statutory basis. That will happen after there has been a bit more experience of operating administratively, so that there exists the ability, and there has been the time, to get the statutory provisions right. In the meantime, I am sure that the chairman and members of the board would agree that operating under a non-statutory framework has not hampered their work in any way.

I was also invited to comment on the disclosure by the judiciary of membership of the freemasons

or other societies. My views on that were conveyed in my private secretary's letter to the committee on 27 November; they have not changed much, if at all. As I see it, all judges and sheriffs take a solemn oath on taking office that they will do right towards all manner of people without fear or without favour. I believe that members of our judiciary take those responsibilities seriously, and would not be deflected from their course because someone who appeared before them was or was not a member of any particular club or society.

I do not feel able to say much more on the subject today because, as the committee might be aware, a case is currently before the High Court relating to membership of the Speculative Society of Edinburgh. That case also touches on freemasonry. Their lordships have heard all the arguments and have retired to consider their decision. We should wait to see what the judges have to say before revisiting the subject. However, I would be happy to answer the committee's questions on anything that I have said.

The Convener: Have you noticed any changes in the appointment system since the new board came into being? For instance, can you tell at this stage whether we are going to get judges and sheriffs from the variety of backgrounds that you wished?

Mr Wallace: No. As I said, it is early. So far, the board has made only three recommendations that have been carried through—two judges and one sheriff principal. When one is dealing with judges and sheriff principals, the pool is still quite small because of time lags. For judges, we are looking at a pool of people who were called to the bar in the late 1970s and perhaps early 1980s. As one who was called at that time, I know that those people are fairly standard examples of what judges have been. It will take some time for changes to happen.

Within the past few days, the First Minister has received recommendations from the board for the next batch of shrieval appointments. I cannot comment on that at the moment. As you are aware, statute requires the First Minister to consult the Lord President and to make recommendations to Her Majesty the Queen. I hope that the announcement of those appointments will be made in the course of this month, once the procedures have been gone through. It is too early, and it would be improper, to speculate when the statutory procedures have still to be carried out.

The hope and expectation must be that with shrieval appointments now, and with appointments for part-time sheriffs in the future—that is the board's next piece of work—the people who are eligible for consideration will come from a much wider pool than is perhaps the case at the moment for the more senior judicial appointments.

The Convener: What is the difference in the new system that will effect that change? What precisely will bring about that change?

Mr Wallace: Part of it is the old but important adage that not only should justice be done, it should be seen to be done. There was a perception under the old system that it was—one might say literally—very much an old-boys' system. The fact is that we have got away from that. Now, people are examined on a range of qualities. The board takes references and it interviews. The legal members of the board have to be satisfied—this is an absolute requirement—that appointments reflect merit and legal ability. That must be the overriding requirement. However, a range of other qualities make a good judge.

If the process can be carried out, in particular by bringing on to the board people who have some expertise in personnel, people who might otherwise never have thought of applying can be drawn in. I hope that there will be confidence that it is worth people applying, because the system is open and fair. In that way, a wider pool of people will be encouraged—

11:30

The Convener: That is what I am trying to get at. What would a future applicant think was fair about the system? Is the board expected to have objective criteria and does it have to publish them? Is there more transparency and how is that judged? You talked about merit. Presumably, people would argue that appointments were made on merit under the old system.

Mr Wallace: Absolutely.

The Convener: I am trying to get to the nub of the issue. Why would you have any more confidence that the present panel of people will bring about change? In what way is the system more objective?

Mr Wallace: There was no panel of people before, and no system—there were conversations and soundings.

The Convener: I understand that, but I am trying to get you to say what it is about the panel that will bring about change. It has been suggested to me that nothing has changed. Representations have been made to me that the system is still an old-boys' network and that, although there is the perception of a panel, nobody knows how decisions are made.

Mr Wallace: I am not sure on what basis anyone could have made that allegation. The system is fundamentally different.

The Convener: You used the word "perception", and I am using the same word.

Mr Wallace: I am not sure how, on the basis of three appointments, anyone could say that nothing has changed. We may have to wait and see the shrieval appointments. There might then be more evidence on which to base such a judgment. It is difficult to say that nothing much has changed. The system is light years away from what went before. Other than the First Minister consulting the Lord President and making a recommendation to the Queen, which must take place under the Scotland Act 1998, there is no direct Executive involvement in the work of the board.

The Convener: I will conclude on this point. You made the fair point that there have been only three appointments, but I am sure that other members will ask you questions on that. I would like you to summarise for the committee what it is about the system that has the potential to bring in people from different backgrounds—for example, more women and more ethnic minorities. What is it about the system, other than perception, that will afford the chance to bring about that change? There must be something else.

Mr Wallace: There are two key points. First, the board has been asked to consider how it could encourage a wider pool of applicants from which to select. Although these are early days, I hope that the board will examine the experience in other countries. Much has been done in Ontario, using a similar system, to spread the net. I hope that the board will be proactive in devising ways through its own procedures to widen the range of people who might be appointed.

Secondly, the fact that the board exists, and that it will be seen to be operating in a fair, impartial and open manner, will encourage people who perhaps never thought that they stood an earthly chance of being considered to put forward their names. There will be confidence in the system. Perhaps in the past people who had the ability—ability is an absolute requirement—felt that they would never be considered. The system will encourage people to come forward, in particular people from a wider range of backgrounds than has been the case up until now.

Bill Aitken: Obviously, we agree that it is too early to make a definitive judgment on the success or otherwise of the new system. While some of us might have thought that the old system worked perfectly well, there was unanimous parliamentary agreement that the new system would be a much more transparent way of dealing with matters and, as such, it has to be applauded.

The net is being spread quite wide. However, to use Stewart Stevenson's fishing terms, its mesh size is fairly big, and those who are in a position to apply for judicial appointments are there by virtue of the fact that they have to be members of the Faculty of Advocates or, with respect to appointments as sheriffs, that they have been serving solicitors for a prescribed number of years. Inevitably, the successful candidates will emerge from a fairly narrow section of society. It is not really an old-boys'—or young-girls' for that matter—network. Rather, the field will be narrow because of people's occupations and experience.

I have a further point relating to conflict of interest, with reference to the legal members of the board, four of whom could seek a judicial appointment. I take it that, if that were to happen—if a sheriff principal applied to become a High Court judge or if a sheriff applied to be a sheriff principal—those members would not sit on the board.

Mr Wallace: It would be wholly inappropriate for them to sit on the board under those circumstances. I can give an assurance that they would not be eligible to sit on the board in that situation.

Appointments will, of course, be made from people who are in the legal profession. For some time, the higher judicial appointments will reflect the composition of entrants to the profession some 20 years previously. It is encouraging that the pattern of entrants to the profession—both advocates and solicitors—has changed considerably over that time. In fact, at one time recently more women than men were being admitted as solicitors. It is a matter of time before the pool might become more mixed—although I would rather not get too carried away with meshes and nets and so on.

Bill Aitken: Basically, we are all shooting at the same goal—we want to get the best people to do the job.

Mr Wallace: Absolutely. That must be the most important thing.

Bill Aitken: And that is irrespective of gender, race or whatever. I presume that you are satisfied that the new board will achieve that.

Mr Wallace: I am indeed. Ability is the most important criterion, which is why I said that the legal members of the board would assess the level of legal qualification and merit.

Mr Duncan Hamilton (Highlands and Islands) (SNP): The establishment of the Judicial Appointments Board for Scotland represents a huge, and very welcome, change to the system. I would be interested to hear about the interrelationship between the new board and the Executive. As the minister said, the board makes recommendations to the First Minister under the Scotland Act 1998. Can the Deputy First Minister

envisage any circumstances in which the First Minister would refuse to accept the board's recommendations?

Mr Wallace: The circumstances would be very exceptional. The Scotland Act 1998 is constructed in such a way that we have no choice in the matter. The First Minister is required, first, to consult the Lord President of the Court of Session and, secondly, to make the recommendations to the Queen. If we had tried to import anything to make the recommendations of the board binding on the First Minister, that would have fallen foul of the 1998 act. The board's role is advisory, but such exceptional circumstances have not applied to the three appointments that have been made to date.

Mr Hamilton: Looking at things the other way round, I presume that you would think it unacceptable for any Executive to prescribe a policy base for appointment. It would be inappropriate for the Executive to say to the Judicial Appointments Board that it wanted to impose quotas or set targets.

Mr Wallace: I think that that would be inappropriate, although I would draw a distinction between that and encouraging the board to find ways to attract a wider range of people and to get better representation. It might be difficult to have strict quotas.

There may be circumstances affecting particular judicial appointments. We may be told that the bench requires someone with particular expertise in commercial law, for example. I do not think that it would necessarily be unreasonable for the Executive to flag up that requirement if the Lord President felt that that was an area in which the bench needed strengthening. It would be for the board to make its recommendations, but I would hope that that would be seen as a sensible approach.

Mr Hamilton: That is interesting. That means that the board is not simply considering the individual merits of the candidates; it also has the capacity to look at the broad spectrum of those who are on the bench.

Mr Wallace: No—that is not what I said. If the Lord President said that what he and the bench needed to fill a vacancy and to strengthen the bench was someone with expertise in the field of commercial law—this is a purely hypothetical example—I do not think that it would be unreasonable for the board to bear that in mind when it was advertising and pursuing the relevant procedures.

Mr Hamilton: I turn to the petition on freemasonry that the committee has been dealing with. You said that there is a limit to what you can say on something that is still a matter for the courts, but I have issues to raise on the subject. We received—as, I assume, you did—evidence from Mr Minogue and Mr Burns, containing five examples of alleged malpractice and in which freemasonry is alleged to have had an impact. Some of the examples strike me as fairly weak, and I can see a degree of paranoia. One example, however, that is worth pursuing is the question of a potential breach of the European convention on human rights. Have you had time to reflect on that?

Mr Wallace: I am aware of the substantial material that was sent by Mr Minogue, the petitioner, which arrived with officials in the justice department yesterday. I have not had an opportunity to read it, and my officials have not had an opportunity to analyse it. I am therefore not quite sure about what the ECHR point was.

Mr Hamilton: It related to a social security case and to the failure of the tribunal concerned to consider whether freemasonry constituted a breach of the principle of a fair trial. It was found that that question ought to have been considered. The failure to consider the matter, rather than any substantive statement, constituted a breach of the ECHR. The minister may not have had the chance to look at the material, but I presume that he will have a chance at a later stage. That might be useful to the committee when it replies to the petition.

Mr Wallace: I will take a note of that and somebody can deal with the matter. That would be far more helpful to the committee than my hazarding an opinion now.

Mr Hamilton: Apart from those examples, there is a general principle on which I would be interested to hear the minister's view. The committee's paper on judicial appointments states:

"The system in England and Wales also requires that all new applicants for posts in the judiciary must indicate whether they are Freemasons. Serving members have also been asked to declare, on a voluntary basis, their links with freemasonry. However, there is no 'register' of membership and the information held in the Lord Chancellors Department is not open to public inspection."

Quite separately from the question whether there is merit in any of the allegations, will the minister say whether, as a matter of policy, he is content that the absence of a similar requirement in Scotland is satisfactory?

Mr Wallace: The Judicial Appointments Board advertises appointments. The board is aware of the issues around freemasonry and the judiciary, and I understand that it took the view that it would not ask that question and that a declaration would not be required. Judges and sheriffs all have to take an oath

"to act without fear or favour".

I do not believe that there is any substantial body of evidence on this subject. In raising the issue and making his presentation in a proactive way, I think that Mr Minogue is almost unique. I am not aware of any other evidence of widespread concern—I do not think that the committee has had any other evidence. Mr Robbie the Pict has, of course, raised an issue around the Speculative Society before the High Court. We await with interest what that court says.

11:45

Mr Hamilton: Are you sending out the message today that there is no fundamental problem with the way in which the system is perceived and that you are not aware that membership of the freemasons, the Speculative Society or anything else is substantially prejudicial?

Mr Wallace: What I am saying is that we must consider the judgment of the High Court when it is given. However, I do not believe that any huge body of opinion alleges that the judges act in breach of their judicial oath.

Stewart Stevenson: Given the advisory nature of the Judicial Appointments Board, and given the fact that the social, sexual and general mix of those who currently hold such appointments reflects society as a whole only to a limited extent, are there circumstances under which ministers would be prepared to reject the advisory board's recommendations? For example, if ministers felt that insufficient progress was being made over time—it would have to be over a relatively substantial period of time because of the nature of the filtration of candidates who are suitable for appointment—might ministers be prepared to reject the recommendations because of the lack of progress?

Mr Wallace: At present, that question is too hypothetical. It is too early to answer that. In his question, Stewart Stevenson accepted that progress would need to be made over a considerable period of time. If, after a considerable period, the constitution of the bench was not much different from what it was in 1999, there might be a case for a future Administration to reconsider the situation to see whether the objectives and aspirations behind the setting up of the Judicial Appointments Board had been met. I very much hope that such a situation will not arise, but that is not to say that, if some future Administration felt that nothing had changed, it would not want to review the efficacy of what had been put in place.

Stewart Stevenson: Have you therefore indicated to the board that failure to follow the broad objectives of changing the composition of the judiciary over time might lead to ministers rejecting a recommendation?

Mr Wallace: I have certainly not couched any objectives in terms of a threat that says, "Get this right or else." As I said in my opening remarks, we have asked the board to aim to ensure that our judiciary is as representative as possible of the community that it serves. Indeed, in March 2001, I delivered a speech on our proposals for the board, in which I stated:

> "The Judicial Appointments Board will be expected to have regard to how representative the Bench is of Scottish society and how to encourage applications from under-represented groups. It is not my role to specify exactly how the Board should undertake its remit, but it will be expected to seek out more qualified women and members of ethnic minorities to serve on the Bench. However, having stressed the importance of diversity let me be quite clear that the over-riding consideration is that all appointments to the Bench must be made on merit."

That is the context in which any guidance has been given. We have not operated on the basis that we will take action if the board does not get it right within five years.

Stewart Stevenson: If the board had a couple of candidates who were of equal merit from the point of view of their ability to do the job but did not make appointments that would help to shift the balance in favour of those parts of society—such as women—that are currently under-represented, might there be an occasion on which a future minister could reject the board's recommendation?

Mr Wallace: It would not be appropriate for me to say what a future Administration might do. It may well be that if, for example, there were five vacancies, the board might find 10 people whom it believed to be suitably qualified. In such a situation, there would be an element of ministerial discretion in the choice that was made. The important point is that all the candidates would have been passed and deemed to be eligible by the board.

Mr Hamilton: I am still slightly confused. On the one hand, the Judicial Appointments Board is an independent body, which the minister said must be seen to be fair and independent and must be seen to get the best candidates. On the other hand, the board is to consider what is the right composition of the bench—whatever that is, but I presume that it is the best composition. There is a nod in the direction of the result that the Executive would like to see, but there is to be no sanction if that result does not come through. It strikes me that either the board is an independent body that makes decisions using an entirely transparent process—it seeks, in the same way as any other company or organisation, to find the best candidates with the required competencies—or it is driven by other motives, such as the wish to have the best mix. I am still confused as to where exactly that balance lies.

Mr Wallace: As I said in my answer to the convener and in the extract that I quoted from the

speech, the board is to have regard to how it might encourage applications from under-represented groups. As I said to the convener, I believe that there are people who have the ability and the legal qualifications to be appointed on merit but who may not have felt encouraged to apply and who in some way may have felt discouraged from applying. I do not think that the two things are in any way inconsistent. It is for the board to work out how it will do this, but the board is specifically to seek out more qualified people, particularly women and people from ethnic minority communities. The board will not dilute the quality or merit of appointees but will try to ensure that those who have the merit and ability are brought into consideration for appointment.

Mr Hamilton: I understand that, but do you accept that even to make that statement and to direct that that be a factor—I think that you said that the board "should" look towards those kinds of areas—is to impinge on the independence of that body?

Mr Wallace: No. At the end of the day, it is up to the board to make recommendations on the basis of the references that it takes up and of its interviewing and evaluating of the candidates that appear before it. The board's independence is not compromised by encouraging it to ensure that those from whom we must choose are from a wider trawl—to return to the fishing metaphor—than has been the case up to now.

I draw members' attention to the part of the board's web page that sets out the board's principles. It says:

"The Board is committed to the principles of appointment on merit and to the well-informed choice of individuals who, through their abilities, experience and qualities, match the requirements of the post. Successful candidates will be those who appear to be best qualified, regardless of gender, ethnic background, marital status, sexual orientation, political affiliation, religion or disability, except where the disability prevents the fulfilment of the physical requirements of the office and reasonable adjustment cannot be made."

The approach is to try to ensure that people do not feel inhibited from coming forward. That is the negative way of putting it. In fact, such people should feel positively encouraged to come forward if they believe that they are of the necessary calibre, which is undoubtedly a sine qua non for appointment. I fear, and am almost certain, that we may hitherto have excluded potential applicants because the bench was not seen as something that was for them.

The Convener: For the minister's benefit, let me clarify where we are with the petition on membership of freemasonry. The committee has decided that it does not wish to proceed any further with the petition but we have invited the petitioner to provide evidence of where he thinks there is a problem. That is why we still have a weighty document that, in fairness, we have not had a proper chance to consider.

Mr Wallace: In some respects, we are in the committee's hands. I understand that the document was submitted to the committee and copied to my department yesterday. As I said to Duncan Hamilton, there are issues on which I would not want to give an off-the-cuff view. I am prepared to give a considered response if the committee asks me to. I do not know what the time scale is for the decision in the Robbie the Pict case, but that might be of relevance.

The Convener: I wanted to place on record the fact that we have still to consider the information further. We might come back to you on that matter.

Did you say earlier that the decision not to ask judges and sheriffs to declare membership of the freemasons or of a similar organisation was a decision of the Judicial Appointments Board?

Mr Wallace: In relation to new applicants, yes. It put out the advert.

The Convener: Do you think that any harm would be caused by requiring judges and sheriffs to declare membership of organisations such as the freemasons? Is it your view that it would harm the process or that it simply would not add anything to it?

Mr Wallace: I am not sure that it would harm the process but, again, that would be a matter on which it would be worth finding out what the High Court thinks. The case was quite fully argued before the High Court and I think that it would be premature to jump to conclusions ahead of hearing the conclusions of the High Court. There might be a problem about where the line should be drawn. What is a relevant organisation and what is not?

The Convener: As you point out, at the moment, the new board is operating on a non-statutory basis but there is the possibility of primary legislation to enshrine it in law. Presumably, there should be some appraisal done of the decisions of the board before primary legislation is introduced. What do you see happening in that regard?

Mr Wallace: We would want there to be an evaluation when the board has been allowed to perform for a reasonable time period and has made more recommendations on appointments. Of course, that will be a matter for the Administration that is formed after the election. However, the indication is that although the board's non-statutory basis is not hampering it, it would be better in the longer term if it were put on a statutory footing. I expect that, as with any

legislation, there will be an opportunity for consultation, which will undoubtedly involve an evaluation of the system in terms of the recommendations and the process that is followed.

The Convener: Are you saying that, at some point in the future—say, in 25 years' time—there will be some evaluation?

Mr Wallace: I would not wish to set a time scale.

The Convener: I am not trying to work out a time scale; I am trying to understand the process. Would primary legislation follow such an evaluation?

Mr Wallace: Ultimately, I would expect the board to be put on a statutory footing.

The Convener: But there are no immediate plans for that.

Mr Wallace: There are no such plans. It would be improper of me to have such plans and would result in another BBC story about how we have coalition deals done and dusted already.

The Convener: I do not think that any parliamentary committee would be happy with being faced with legislation before a proper evaluation process had been conducted.

Mr Wallace: I agree with you. The workings of our Parliament would ensure that a proper evaluation process was conducted.

Mr Alasdair Morrison (Western Isles) (Lab): When we last discussed the issue of freemasonry, I asked a question that I want to ask again. Do we have a list of the types of organisations that we should be concerned about? Freemasonry has been referred to a lot, but people have also used phrases such as "that type of organisation". Do we have such a list? Are the organisations cultural, sporting and linguistic groups and so on?

Mr Wallace: I do not have such a list.

The Convener: Thanks for discussing the judicial appointments system with us. We have all learned something this morning. It is up to the committee to take the matter further.

For the record, I state that, after this meeting, we will talk to the minister informally about the petition on asbestos that has been referred to us.

Meeting closed at 12:00.

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