JUSTICE COMMITTEE

Tuesday 11 March 2008

Session 3

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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JUSTICE COMMITTEE
7th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)
Margaret Smith (Edinburgh West) (LD)
*John Wilson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
Marlyn Glen (North East Scotland) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Sheriff Robert Dickson (Sheriffs Association)
Sheriff Michael Fletcher (Sheriffs Association)
Rt Hon Lord Hamilton (Lord President and Lord Justice General)
Hon Lord Hodge
Richard Keen QC (Faculty of Advocates)
Sir Neil McIntosh (Judicial Appointments Board for Scotland)
Rt Hon Lord Osborne
Rt Hon Lord Reed
Michael Scanlan (Judicial Appointments Board for Scotland)
George Way (Law Society of Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 11 March 2008

[THE CONVENER *opened the meeting at 10:03*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones. We have an apology from Margaret Smith MSP, who is indisposed.

Members are asked to agree that item 4, which is consideration of the written evidence that the committee has received in response to the call for evidence at stage 1 of the Judiciary and Courts (Scotland) Bill, and item 5, which is consideration of the community policing inquiry approach paper that has been carried forward from last week's meeting, should be taken in private.

Members *indicated agreement*.

Judiciary and Courts (Scotland) Bill: Stage 1

10:03

The Convener: This is the first of the committee's scheduled oral evidence-taking sessions on the bill. I welcome the right hon Lord Hamilton, Lord President of the Court of Session, who is accompanied by the hon Lord Hodge and by Mr Michael Anderson.

This is a unique occasion—having gone through the various books, we cannot find any precedent for a Lord President addressing a parliamentary committee. On that basis, Lord President, you are particularly welcome. In your own words, this particular legislation is of "considerable constitutional significance" and it places

"the relationship of the judiciary with the Scottish Government, and indeed with the parliament itself, on a"

completely different

"footing",

which is to be welcomed. We are grateful to you and to Lord Hodge for appearing before us today. You have given us a very full submission, so we will move directly to questions.

I will open the questioning by dealing with the role of the Lord President as envisaged in the bill. It goes without saying that the bill would place considerable power and responsibility in the Lord President's hands, as head of the Scottish judiciary—they would be in overall charge of the administration of the courts in Scotland. The Lord President's judicial function is vital to the law of Scotland. How do you envisage dividing your time between the administrative functions and the judicial ones, particularly that of presiding over the appeal court?

Rt Hon Lord Hamilton (Lord President and Lord Justice General): It is plain that, as you say, the bill envisages the Lord President being involved in a wider range of responsibilities than has been the case hitherto, but it should be borne in mind that, prior to the introduction of the bill, the Lord President already had a range of administrative responsibilities in his work. Those responsibilities have been discharged in part personally and in part by delegating responsibilities to other judges. For example, we have an administrative judge in the court and several other types of judge who deal with particular types of business. I regard it as of the first importance that the senior judge in Scotland should be seen plainly as performing a judicial function. Therefore, I regard sitting on the most important cases as a prerequisite to the fulfilment of my position as Lord President in the Court of

Session, and Lord Justice General in the High Court of Justiciary.

I am not sure that I can put a percentage on the degree to which I will be involved in sitting in court compared with the degree to which I will be involved in dealing with administrative matters, but I have information about the Irish system, which is to an extent the model for the proposals in the bill. The Irish experience suggests that the work with the Scottish Court Service will take maybe two days a month. The amount of work is not expected to be large, although there will be other, wider, responsibilities that will take more time, such as that on the unification of the court structure, which will require me to co-ordinate matters with the sheriffs principal. However, I envisage that certainly the majority—and probably a substantial majority—of my time will be spent sitting in court, deciding cases, rather than administering.

The Convener: As you are acutely aware, the number of appeals is growing and they seem to be becoming more complex and involved. You will understand that we need to be totally satisfied that one job holder can carry out those tasks with no detriment to the judicial function.

Lord Hamilton: Yes—I recognise that. In so far as I will be drawn into administrative matters, the changes will involve further responsibility for other senior judges in the court, but that will of course not be new. We already sit in a variety of combinations and with experienced and senior judges presiding who are neither the Lord President nor the Lord Justice Clerk. We have a wealth of talent available to discharge the important business of the court, even though I am not involved personally.

The Convener: I turn to the conflict of interest that could arise between your role as the head of the judiciary and your role as the head of the Scottish Court Service and how that could be overcome. How will you deliver judicial obligations in relation to court business when you must balance that with delivering value for money?

Lord Hamilton: I do not see those roles as being in conflict in any sense. I see the purpose of the proposed basis for the Scottish Court Service as being to provide those who ultimately deliver justice in the courts—as judges deciding cases or presiding over sheriff court trials or the like—with influence over the back-up services that are a necessary element in the performance of that duty. I can well understand that it is necessary to get value for money in the performance of that back-up service, but I do not see any conflict existing between the need to be accountable for the due performance of that service and the need to be properly judicial in relation to the functioning of the judges.

The Convener: Thank you—that was clear. We pass now to judicial independence.

Bill Butler (Glasgow Anniesland) (Lab): The Scottish Government is already bound by constitutional convention guarantees of the independence of the judiciary. In your view, what will creating a statutory guarantee of judicial independence add to the existing arrangements?

Lord Hamilton: It has been recognised internationally that it is important for the guarantee of continued judicial independence to be firmly established in the constitutional structure of each jurisdiction that it concerns. As is the case in England and Wales, for which the Constitutional Reform Act 2005 contains a similar provision, it is of value as a signal, if nothing more, to have a recognition in legislation of the importance of judicial independence. That is not an empty provision. The bill includes the obligation on a range of persons to

"have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions."

Although I do not envisage that I shall require to sit on any case that is deciding a legal issue turning upon the construction of those provisions, the existence of them in what I regard essentially as a constitutional document is of importance, in my view, and it sends the right message.

We live in pleasant times. Times may not always be pleasant, however. There may arise circumstances in which there could be a conflict between the judiciary and other arms of government. It is important in legislation of the kind that we are discussing that the matter should be put firmly in the way that it has been put.

Bill Butler: That provision may be viewed from the outside as being symbolic at this time, but you are saying that, in future times, it could be more than symbolic.

Lord Hamilton: It could. There is a need to find support for the institutions. In difficult financial times, it could be important for the courts to be able to say to the other organs of government that, to maintain a proper judicial system in a democratic society, they require funding of a certain minimum level to discharge that responsibility. It is in that provision that you have the responsibility of providing that for us.

Bill Butler: Do you see your involvement in the strategic management of the Scottish Court Service drawing the office of Lord President more directly into the work of government?

Lord Hamilton: Government has various aspects. I regard the judiciary as an arm of government, in a sense. The bill might seem to draw us closer towards executive government

than has been the case hitherto, but putting a judicial majority on the Scottish Court Service moves the system back more closely to the judicial arm of government rather than with the executive arm of government. One will be involved to a greater extent in an arm of government, but I do not view that as being an executive arm of government.

Stuart McMillan (West of Scotland) (SNP): Section 2 provides for your

"laying before the Scottish Parliament written representations"

on a range of issues, but the bill does not say anywhere that you may come before the Parliament to be accountable for your actions. How do you anticipate being fully accountable to Parliament for your actions?

10:15

Lord Hamilton: The matter may arise specifically in relation to my position as the head, or rather the chair, of the corporate body that is to be the Scottish Court Service. I do not see any responsibility to Parliament under the bill other than in that regard. Section 2 is indeed concerned with the position of the Lord President as head of the judiciary, but the functions that are being discharged there are essentially those relating to purely judicial matters, rather than matters relating to the Scottish Court Service.

I would like to say something about the Scottish Court Service. As committee members know, under the Scotland Act 1998, the Scottish Parliament does not have an existing power to compel any judge to appear before it. To secure such a power, the Scotland Act 1998 would require to be amended or some other Westminster-based mechanism would have to be used to derogate from the existing provision. However, a question arises. Is any change needed? I do not think that any change is needed or that making a change would be appropriate. Other arrangements are in place for making the corporate body account for its actions and performance to Parliament, including its need to provide an annual report to the Scottish ministers, a copy of which is to be laid before Parliament. In addition, the chief executive is, of course, a compellable witness before the Parliament and could be required to go to it to give an account of the service's actions annually or at any other time.

As I have mentioned, I already have a range of administrative functions, and I do not think that anyone has suggested that it would be appropriate for the Parliament to have a compellable power to make me attend it. I have also explored the position in the Republic of Ireland, where there is a similar system to that which the bill proposes. There, none of the judges is compellable before the Irish Parliament, although the chief executive of the service is a compellable person and would be presented to it. I understand that in England and Wales, senior judges are from time to time invited to give evidence before Parliament as a matter of practice. They often accede to such invitations, although they do not always do so. Without the existence of a provision in the legislation that meant that there would be a compellable requirement on me to attend Parliament, I could assist by being invited to attend it from time to time to explain the Scottish Court Service's performance. I would not regard that as a routine matter. Routine matters are for the chief executive to explain. I hope that things would be done by way of invitations and my responses to them.

The Convener: Lord Hodge, you have knowledge of other jurisdictions. Do you wish to add anything to what the Lord President has said?

Hon Lord Hodge: In recent years, the English and Welsh judiciary has responded to invitations to appear before the United Kingdom Parliament, particularly since the enactment of the Constitutional Reform Act 2005. The Lord Chief Justice, the Master of the Rolls and the presidents of the various divisions of the High Court have done so. The form is that they are invited to go before the Parliament, and they quite often do so. However, that judiciary has recently published material that expresses concerns about the frequency of invitations to give evidence, and it has suggested that appearances before parliamentary committees should be relatively rare and significant events. That chimes with what the Lord President has said. The chief executive of the Scottish Court Service would be available to answer detailed questions about normal day-to-day management, but if serious concerns about the operation of the service existed, an invitation could be extended to the Lord President or a judicial member of the board to deal with those concerns before a committee.

The Convener: We now turn to training, which will, of course, come under the Lord President's aegis.

Stuart McMillan: Petition PE997, which calls for all sheriffs who deal with child custody cases to be given appropriate training, is currently before the Parliament's Justice Committee. Should members of the judiciary who deal with child custody cases be required to attend relevant training?

Lord Hamilton: Currently, the Judicial Studies Committee operates effectively under a judge of the Court of Session, and other judicial persons are involved in training. I have had no direct involvement in the matter and no specific involvement as to the extent to which there has

been reluctance on the part of judicial office-holders to attend training courses.

I regard judicial training, including judicial training in relation to children and other important aspects, as not only an entitlement but an obligation. That is to say, judges should be entitled to the opportunity of being properly trained, within judicial time, in the areas in which they must discharge responsibilities and, as a corollary to that, judges should be obliged to make use of such opportunities, so that they are best placed to deal with sensitive issues.

Stuart McMillan: Should external agencies, such as Scottish Women's Aid or Victim Support Scotland, provide training to sheriffs?

Lord Hamilton: My knowledge of the matter might not be detailed, but I know that a variety of persons come to address judges and sheriffs as they undertake the range of courses that are held by the Judicial Studies Committee. I would have thought that the best arrangement is for training to be under the aegis of the Judicial Studies Committee, which would invite people who have appropriate experience and expertise in other fields to give judges and sheriffs the benefit of their experience.

The Convener: I am well aware that the judiciary is not entirely detached from what goes on, but I take it that there are opportunities for judges and sheriffs to attend lectures, conferences and other discussion groups in which outside agencies participate to a significant degree.

Lord Hamilton: Yes, subject to the demands of judicial time. I am keen to ensure that the judges for whom I have responsibility are as well informed of the outside world as is possible. However, they must still do their judging.

Nigel Don (North East Scotland) (SNP): Good morning, Lord President, and thank you for coming. The significance of what we are doing is not lost on us. You said that there is a duty on judges to be trained and that you will facilitate training. Should the duty on judges to be trained be included in the bill as a legislative requirement, or should we leave the matter to you? Should the matter be considered from another angle, by which I mean should failure or reluctance to attend training be a ground for removing an unfit judge from office?

Lord Hamilton: As you are aware, training appears in the bill among the range of responsibilities that are imposed on the Lord President. Section 2(2)(d) charges me with

"making and maintaining appropriate arrangements for"—

among other things—

"training".

It is a question of finding the right way of securing the objective. On the whole, my experience has been that the best way of securing due performance of the responsibilities that you have in mind is by giving appropriate encouragement to judicial office-holders to attend training on such matters.

There are dangers in using the stick too much, rather than the carrot. A judicial office-holder will be much better able to receive useful training if he or she has been encouraged to the view that it is a good thing for him or her to attend, rather than being marched to the appropriate place by two policemen. I am disposed to the view that it would be better to leave it to me to put in place the appropriate arrangements. If necessary, those arrangements could include matters that verged on compulsion, but I hope that it would not come to that. I certainly hope that it would not come to a situation whereby a judge was so delinquent in relation to attendance at training and the like that it would be necessary to consider his or her removal from office.

The Convener: We now come to the general question of vacancies and appointments.

John Wilson (Central Scotland) (SNP): Good morning, gentlemen. The bill sets out the procedures to be followed in relation to the appointment of the Lord President and the Lord Justice Clerk. Do you have any views on those provisions?

Lord Hamilton: I am quite content with the provisions in the present bill. In particular, I am content with the arrangements for the body charged with making recommendations for nominees for the posts of Lord President and Lord Justice Clerk. There is a qualification to that. At one stage, I expressed the view, to which I still adhere, that there could be an advantage in having either a judicial majority or a provision whereby if the board was split evenly the senior judicial members would have a casting vote. I cannot recall whether that is in the bill.

The Convener: That is in your submission.

Paul Martin (Glasgow Springburn) (Lab): The Judicial Appointments Board will be composed of judicial members appointed by the Lord President and legal members and lay members who will be appointed by the Scottish ministers. Are you content with those arrangements?

Lord Hamilton: I am content with the judicial members being appointed by the Lord President, as you might suppose. There might be questions about whether the legal members should be appointed by the Scottish ministers. I certainly think that the lay members require to be appointed by the Scottish ministers. There might be views—although they do not involve me directly—that the

professional bodies might properly have a say at least, if not an appointment power, in relation to the professional members of the board.

Paul Martin: Why would you differentiate between legal members and lay members? Is there not an equal concern about lay members being appointed by ministers? Is there any reason to differentiate between the two groups?

Lord Hamilton: It is perfectly proper that the lay members, representing the community at large, as it were, should be appointed by the Scottish ministers, representing the community at large. The legal professional members might be better appointed by their respective bodies, which might be in a position to identify more readily who among them are best able to discharge the functions in question.

Paul Martin: You have advised that you are satisfied with the powers that you will have in relation to appointments. What process would you follow in appointing individuals? How would you assess them?

10:30

Lord Hamilton: I would assess them from my knowledge of them as individuals, ordinarily. Certainly so far as judges of the Court of Session are concerned, our community is sufficiently small that I know personally all the other judges of the Court of Session and I am in a position to judge who I think is appropriate to fill any particular post. That has been the case in relation to a number of matters and it may well be the case at some point in relation to appointing judicial members from the Court of Session to the Judicial Appointments Board for Scotland. I would consult the Sheriffs Association in relation to the appointment of sheriffs to the board. Indeed, I would probably consult more widely on that.

Paul Martin: You would have significant personal power, though, that would not have objective scrutiny of any kind, other than your ability to consult.

Lord Hamilton: That is so. I suppose that that is true of any of these appointments. At the end of the day, one has to impose a measure of trust in relation to these particular matters, which I hope will be well founded.

Paul Martin: Lord Gill is carrying out a two-year review that will be completed this time next year. I am wondering how the work of Lord Gill's review will fit with the bill and whether parts of the review will be made redundant as a result of the bill being passed.

Lord Hamilton: I do not envisage any part of Lord Gill's review being redundant. With this bill, we must proceed on the basis that the structures and arrangements will be as they exist currently. We may require to make adjustments in due course if legislation is passed in the furtherance of any recommendations that are made by the Gill review. For example, sheriffs principal have an important function in the bill as we have it. An idea has been floated—I do not know whether it is more than that—in which a question arises as to the future of the office of sheriff principal. I do not know what the outcome of the Gill review will be, but I would envisage that if—it is a large if—sheriffs principal were no longer to perform the functions that they have traditionally performed, some other officer would require to be put in place to perform an equivalent function under the legislation with which we are concerned.

I do not see that the bill in any way disposes of matters that would otherwise be dealt with by the Gill review, but the eventual act might require to be looked at again in the light of any legislation arising from the Gill review.

Paul Martin: Finally, part of Lord Gill's review is to consider civil justice reform. Would the bill give you powers to go ahead with civil justice reforms without reference to the Parliament?

Lord Hamilton: The bill touches on certain civil justice reforms that we have envisaged for the Court of Session, for example the question of a quorum for the inner house. We have had the benefit of some work that was done by a retired judge, Lord Penrose, on proposals for making more efficient the inner house, which performs the appellate function of the Court of Session. Those proposals include having a single judge, rather than three judges, preside over procedural hearings. At the moment, all business of the inner house has to be done by three judges. We want the situation that is envisaged in the bill, which is that by appropriate court order we can provide for a quorum of one for incidental matters, leaving quorums of three, or sometimes more, for more substantial matters.

John Wilson: On that question, Lord Hamilton, you have predicted what some of Lord Gill's recommendations might be. We envisage the bill being enacted before Lord Gill's recommendations come before the committee. What impact would that have on changing the judiciary system? How easy will it be for the act to be amended?

Lord Hamilton: The focus of the Gill review is different from that of the reforms that are envisaged in the bill. The reforms in the bill relate largely to the structure of the courts—the way in which they relate to one another and the deployment of judges to particular functions in the general court system. I suspect that the Gill reforms are more likely to be concerned with provisions that do not relate to court structures, although they may touch on them. I do not believe

and have not heard it suggested that the provisions in the bill would impede any of the likely Gill reforms. However, it might be necessary to make some adaptations, depending on what the Gill review recommends.

The Convener: I have a question for Lord Hodge. In his submission, the Lord President commented on the board's constitution. Would you like to add to those comments?

Lord Hodge: In the responses to the original consultation paper and to the draft bill, the position was that the judges council would seek to include greater judicial representation. For example, when an appointment to the Court of Session bench was being made, two Court of Session judges would be represented, and when a sheriff's appointment was being made, two sheriffs would be included on the panel. The idea was that the people who knew intimately what the job involved should be present to study candidates for the position. My recollection is that the Lord President supported the judges council's view.

The Convener: If the committee and the Scottish Government were to see merit in the suggestion, would the obvious conclusion be for one of the two appointed judges to be a specialist in criminal work and the other to be a specialist in civil work?

Lord Hodge: I do not know. Although I was a civil practitioner, the bulk of my three years on the bench has been spent on criminal work, so I do not know into which category I must put myself. Fairly quickly, one gets a wide range of experience in the job.

The Convener: Your versatility is well known.

Lord Hamilton: I agree with Lord Hodge. At Court of Session level, judges are required to turn their hand to all manner of business, both criminal and civil. I see no advantage in each of the two judges being related to one particular area of business. The most important criterion is that they should be able to identify the qualities that are required in appointees.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I move on to judicial appointments. I am sure that you know the bill page by page and line by line. Section 12, which is concerned with selection criteria, states:

"Selection must be solely on merit."

The Judicial Appointments Board must also be

"satisfied that the individual is of good character."

The explanatory notes that accompany the bill make clear that section 12(2)

"is intended to prevent selection on other grounds (e.g. seniority)".

What will you do to ensure that, as well as complying with the bill when it is enacted, you encourage diversity in judicial appointments?

Lord Hamilton: There are two aspects to consider. I recognise the need in our society for there to be as much diversity as possible among those who hold important public posts. However, one has to bear in mind the fact that one is appointing people to judicial positions from a pool of those who are experienced in particular fields of legal activity. For example, in relation to gender diversity, there was a predominance of men over women in advocates' practices in the past. Very few women were called to the bar when I was, although some very distinguished women, such as Lady Cosgrove, were called to the bar at about the same time.

As the years have moved forward, the numbers of women relative to men have increased substantially. As time goes on, I expect there to be a greater proportion of women on the benches, both in the sheriff court and the Court of Session, than there has been hitherto. We have moved quite some distance forward. For example, in relation to another aspect, I had the opportunity last year to recommend to the Scottish ministers who might be appointed as Queen's counsel. Of those whom I recommended, the proportion of women was greater than the proportion of men.

It is a question of encouragement. The board should be encouraged, by way of advertisement or otherwise, to encourage as many persons as possible from all walks of life—provided of course that they have the requisite legal qualifications—to come forward so that there is a large, diverse pool from which a selection on merit can be made. We cannot select simply on the basis of diversity, for example because somebody is a woman or of west African origin. Ultimately, we have to select on the basis of merit.

Cathie Craigie: Do you see the board being proactive in encouraging such people to come forward?

Lord Hamilton: I am sure that the board requires to be proactive in a number of ways. One has had some difficulties, even among the traditional type of candidate, in encouraging people to come forward as candidates for appointment, particularly to the Court of Session bench. In such circumstances, the board should require to be proactive. I require to be proactive. In recent times, I have taken steps to encourage my fellow judges to encourage people whom they thought should be encouraged to come forward. Those are all important steps.

Cathie Craigie: Let us move on. Section 20 extends eligibility for appointment as a judge of the Court of Session to solicitors who have held rights

of audience for not less than five years in either the Court of Session or the High Court of Justiciary. Would such appointees have enough experience if they had experience of pleading only in civil cases or only in criminal cases?

Lord Hamilton: That section 20 provision probably endeavours to correlate with the position in relation to members of the Faculty of Advocates. When appointing judges from the Faculty of Advocates, appointees have never been required to have a balanced practice and to have spent half their time doing criminal business and half doing civil business. Indeed, quite a large number of appointed judges have limited experience in one field or the other—they tend to have done largely civil work in their practice, perhaps combined with a few years as an advocate depute in the criminal courts. Those people, having been appointed as judges, have taken to criminal court business like ducks to water. Indeed, when I was appointed, which is a long time ago now, I had little criminal experience. My experience in criminal business was essentially as an advocate depute for three years. I found the experience of sitting in criminal trials and directing juries—I hope accurately and in language that they could understand—to be one of the most challenging and satisfying jobs that a judge does.

10:45

The Convener: We turn to the perhaps vexed issue of judicial conduct and complaints. Our questioning will be led by Nigel Don.

Nigel Don: The bill provides that the Lord President may establish a judicial conduct scheme and administer disciplinary sanctions. You have commented on the matter at some length, and it is clear that you regard those steps as reasonable. Will you quantify the current volume of complaints and comment on their nature? Also, will you outline the present arrangements for complaints handling?

Lord Hamilton: I am not sure that I am in a position to give a quantification. If the committee would like further information on that, no doubt it can be provided in writing at a later date.

The Convener: That would be helpful.

Lord Hamilton: My experience hitherto has only been in relation to complaints about Court of Session judges. I have had no direct involvement—only very indirect involvement—in complaints about sheriffs, which ordinarily are dealt with by the sheriffs principal.

There have been very few complaints in relation to Court of Session judges, but there have been some. Ordinarily, I ask the people in my private office to vet and analyse complaints. If there is potentially some substance to a complaint and it is not obviously frivolous or vexatious, I ask the judge in question to comment on the matter. I then take a view on whether it is appropriate for me to take a course of action.

Hitherto, I have not had a conflict of evidence, as it were, or a conflict of fact that required to be resolved. If there is to be a system that involves formal complaints being made, I imagine that it will be necessary to set up a scheme of the type that is mentioned in the bill. Hitherto, my position has been that I form a view, and if my view is that something requires to be done, I deal with the judge in question.

Nigel Don: You suggest that your private office cuts out the vexatious and frivolous complaints. I suspect that that is the large majority, if our experience as MSPs is anything to go by. Such complaints come from those who have lost a case and want somebody else to shout at and something to kick. However, I am conscious, as you will be, that we live in an increasingly open society in which people expect to see our leading figures account for what they do. Let me be clear: I do not think that there is any suggestion that you should account for judgments; that is properly your own area. However, it has been suggested that we need to be able to account for procedure, which is what the bill is about.

Should we take the bill as we find it and introduce a reviewer of procedure, with all that that would bring—including, no doubt, a considerably larger number of complaints—or should we stick with the current system, where you and your colleagues review what is going on? If we take the latter option and retain your current system, how would it be open to challenge on procedure?

Lord Hamilton: Decisions are open to legal challenge on procedure anyway. If, for example, a judge disputed a decision made by the Lord President, he or she would be in a position to challenge it in the Court of Session by way of judicial review if it was contended that the decision was procedurally inept. The same would be true, I think, of a complainant: they would be legally entitled to challenge the matter. It might be a difficult course to follow, but it would be open for a person to do that.

Nigel Don: A judge in the position that you have suggested would no doubt know how to take the matter to the Court of Session for judicial review, but the average man or woman in the street would not want to take that route and would perceive more risks than opportunities in it. Is there scope for procedural review by some other institution, even the Scottish Parliament? Could we simply refer a complainant's case to you and expect a reply?

Lord Hamilton: I believe that there have been occasions on which members of Parliament and members of the Scottish Parliament have made representations to the Lord President on behalf of constituents. I suppose that it would be possible for such representations to be made on matters of procedure as well as on the merits of the original matter that was complained of. I do not see any need for a legislative structure for that state of affairs; the possibility exists at present.

Nigel Don: Am I entitled to conclude that you are not in favour of introducing the judicial complaints reviewer as envisaged in the bill?

Lord Hamilton: It is unnecessary. It is a question of confidence and trust. One can reasonably suppose that we will be able to cope with matters adequately if they are dealt with in accordance with the rules that I envisage laying down in relation to any structure, or, indeed, if no rules as such are laid down in legislation or subordinate legislation but one deals with them as they are dealt with at the moment.

Nigel Don: It is not clear to me whether you envisage setting down a code of conduct. The bill says that you may, but would you feel obliged to do so?

Lord Hamilton: Steps are being taken in that direction at the moment through a body that I took the initiative in setting up, called the Judicial Council for Scotland, which embraces judges at all levels, from a lord of appeal in ordinary down to a justice of the peace. One item on which it is working is a code of judicial guidance. Guidance is probably the right word, because one is endeavouring to give assistance and encouragement to perform in particular ways. It is not a penal code of misconduct, as it were. It does not prescribe what judges must not do; it encourages them to do or suggests that they do certain things. I hope that it will become available and be made use of throughout the judiciary in Scotland in early course.

Nigel Don: Thank you, Lord President. I am happy to hear that you are taking the carrot approach rather than the stick approach, because it is a good way to run the country. However, I am slightly concerned that there are people who want a stick with which to beat you, us and anybody else and, therefore, that the code will not satisfy everybody.

The Convener: On that topic, Lord President, it would be helpful if you could let us have the figures. There is concern that we may put in force some convoluted procedure that the actual number of complaints made may show to be unnecessary.

We now turn to questions on the removal of judges, which is perhaps an extension of the previous topic.

John Wilson: I note that the Lord President's written submission indicates that he is content with the structure that is proposed for removal. However, section 33(1) of the bill states:

"The First Minister … may, in such other circumstances as the First Minister thinks fit,"

initiate proceedings to remove a judge from office. Do you consider it appropriate that the First Minister may initiate such proceedings?

Lord Hamilton: That reflects the law at the moment—the Scotland Act 1998 allows the First Minister, in relation to judges of the Court of Session, to take steps to constitute a tribunal at his initiative. As a matter of constitutional law, I do not have any serious difficulty with that state of affairs. A First Minister would take that particular course of action only in exceptional circumstances. It would simply be a question of setting up the tribunal, which would, in due course, consider the merits, or lack of merits, of the application.

John Wilson: We are talking about the independence of the judiciary, which we are trying to enshrine in the bill. Could the political pressure that might be applied by the First Minister affect the independence of the judiciary? You have indicated that the tribunal would take a view and make a recommendation on whether the First Minister was right, but there could be political pressure on a tribunal to take a course of action with which the judiciary—including you—might not be content.

Lord Hamilton: Again, it is a question of balance, and of how much trust each arm of government places in the other. I do not think that we have had a situation in which any First Minister—or indeed any Prime Minister, or any other member of the Westminster Government—has taken any steps along that particular course. Although there might be public pressure of a variety of kinds—because of the unpopularity of particular judgments, or even a series of judgments—I think that a person in the position of First Minister would be sufficiently strong to resist inappropriate pressures to initiate an investigation unless it was clearly called for.

John Wilson: The proposed tribunal, which you have mentioned, to investigate and report on whether a person is unfit to hold judicial office is to include two judicial members, a solicitor or advocate and a lay member. Is that balance appropriate?

Lord Hamilton: I do not have any difficulty with it. It is appropriate to reflect the relevant interests.

The Convener: There is a final, and perhaps less controversial, question from Bill Butler.

Bill Butler: Lord Hamilton, you will be aware that the Law Society of Scotland has expressed concern about your new role in designating where sheriff courts are to be situated. In particular, it was concerned that courts could be relocated without adequate consultation with court users. What is your response to that concern?

Lord Hamilton: I recognise that quite delicate issues are raised, not only by members of the legal profession but by others, such as local councillors, in relation to any proposal to close down a sheriff court. I acknowledge that such proposals are sensitive and that due consultation with all those who have an appropriate interest in the matter is necessary before decisions are taken. I would expect to consult quite widely in that regard.

The Convener: In relation to your submission, I do not have any other questions that would be appropriate at this stage. Would you like to add anything, Lord Hodge?

Lord Hodge: I have nothing to add, thank you.

The Convener: Do you wish to add anything, Lord President?

11:00

Lord Hamilton: I will say something about the appointment of temporary judges. There is a proposal that the appointment of temporary judges should be taken, under the statute, into the aegis of the Judicial Appointments Board for Scotland. There are two aspects to that. First, there is the question of what we are really looking for in a temporary judge. In one sense, a temporary judge is somebody who is required for an immediate purpose, such as covering for sickness or otherwise being deployed as a judge for a specific, temporary purpose, and there is a continued need for that. I have recently appointed—rather, ministers, with my encouragement, have appointed—two temporary judges for the period when Lord Gill is involved in the Stockline inquiry. There is a need to do that.

The second aspect concerns temporary judges who effectively are part-time judges in the Court of Session—they are rather like part-time sheriffs. I see some legal advantage in my being able, at least at this stage, to appoint such part-time judges, rather than the Judicial Appointments Board doing so, largely because it is quite difficult to encourage people, particularly busy practitioners, to apply for the posts of part-time or temporary judges of the Court of Session. There is a hurdle in that. Under the proposed regime, an application form must be filled out and presented, and the applicant must go through a series of interviews and so on. That is a much greater hurdle than a member of the senior judiciary going to someone and saying, "We really need you. Are you prepared to do this?"

In the long term, I would like to ensure that people who get to a certain level of their practice—say, soon after they become Queen's counsel—are prepared to take on board the possibility of doing part-time judicial work as part of their contribution to the community. It is a bit like what recorders do south of the border. That would mean a trend of people taking up judicial office on a part-time basis, as well as pursuing their practice as advocates or the like. They might eventually become permanent judges in due course. In order to set that trend in place, I require to be able to go and tap on people's shoulders, rather than have people filling out application forms and going through the Judicial Appointments Board.

The Convener: To an extent, we have anticipated you, because later in the morning members of the Judicial Appointments Board will appear before us to give evidence. We will canvass them on that matter.

Thank you very much indeed, Lord President, Lord Hodge and Mr Anderson. This has been a useful and valuable evidence session. You will appreciate that the committee takes the bill extremely seriously, recognising the potential impact that it will have on the law of Scotland. The fact that you have given so willingly of your time to answer our questions so clearly has been of invaluable assistance, and we are obliged to you.

Lord Hamilton: It is a pleasure.

11:03

Meeting suspended.

11:04

On resuming—

The Convener: I welcome the second panel: the right hon Lord Osborne; the hon Lord Reed; Sheriff Robert Dickson, president of the Sheriffs Association; and Sheriff Michael Fletcher, vice-president of the Sheriffs Association. We will, in accordance with previous practice, proceed directly to questions. The first question is from Bill Butler, on consultation.

Bill Butler: Good morning, gentlemen. You will be aware that a number of sheriffs, judges and professional organisations criticised the scope and nature of the original consultation exercise, suggesting that matters of such significance should have been the subject of a more detailed and independent inquiry. Are you satisfied that

adequate time has now been allocated to the consultation process and that the judiciary has had sufficient opportunity to contribute?

Rt Hon Lord Osborne: Good morning, ladies and gentlemen. I would answer that question in the affirmative. Certainly, when the document "Strengthening Judicial Independence in a Modern Scotland" was published there was concern about some of the proposals. However, since then, speaking for the judges in the Court of Session at any rate, we have had a full opportunity to discuss matters, particularly with officials of the justice department and with officials and the chief executive of the Scottish Court Service. We found the discussions with those officials beneficial indeed.

Sheriff Robert Dickson (Sheriffs Association): Sheriffs are content with the amount of time that they have had for consultation and with the assistance that they received from officials, who were helpful in explaining matters to us and who listened carefully to our points, many of which were accepted for the bill because of our explanation of the practical points that we felt would arise. We are satisfied therefore that ample time has been given for consultation and that people have had ample opportunity to express views.

The Convener: That point having been cleared up, we can go on to judicial independence.

Bill Butler: In response to the original consultation exercise, a number of judicial office-holders referred to recent failures on the part of the executive to preserve judicial independence. Do you consider that there is a threat to judicial independence? If so, what form does that threat take? Will creating a statutory guarantee of judicial independence add anything to the existing constitutional guarantees of judicial independence?

Lord Osborne: From time to time, judicial decisions evoke considerable controversy and persons in a position of political responsibility sometimes express views about the merits of those decisions in trenchant terms. I suppose it is not a comfortable experience to have a judicial decision criticised in that way. It is therefore necessary or desirable that there should be a level of discretion and moderation in the criticism of judicial decisions. If a decision is made that is legally wrong, there is an opportunity under normal conditions for the interested parties to initiate an appeal against that decision. I suggest that that is the way in which a wrong decision should be put right, rather than there being an acrimonious public debate about the matter—I regard that as a potential threat to judicial independence. However, apart from that, I believe that the political community by and large respects the fact that the judiciary has a function to perform and that it should be allowed to get on with it in accordance with existing structures.

Bill Butler: What do you think of the proposal to create a statutory guarantee of judicial independence? Do you see that as being anything more than symbolic?

Lord Osborne: Yes. I would regard the kind of law that would be created by section 1 of the bill as not justiciable law—as I think Lord Hamilton said in his remarks to you, it is doubtful whether anyone would ever initiate litigation against another party to try to enforce what is laid down in section 1—but it is my view that one of the purposes of statute law is to declare publicly something that ought to be recognised publicly. That has been done in other jurisdictions. It was done in England in section 3 of the Constitutional Reform Act 2005. It is entirely appropriate that it be done here.

Sheriff Dickson: I agree with Lord Osborne. The importance of having section 1 as part of statute is that it is a clear declaration of what the vast majority of people—certainly those in authority—know and recognise. It is important to make that declaration so that people can have regard to it, lest any doubt ever arise in the minds of people who perhaps do not understand the importance of having an independent judiciary. The Parliament would be affirming that it recognises and supports that principle and that it intends to implement it.

Rt Hon Lord Reed: I agree with Sheriff Dickson. Although it seems unlikely that section 1 would be the subject of a judicial decision, it is an important statement of principle at a time when a relatively new set of institutions—the Parliament and the Executive—are, for the first time, trying to define in legislation the boundaries and relationships between the different institutions of government in Scotland.

Sheriff Michael Fletcher (Sheriffs Association): I agree entirely. The public in general must understand the importance of the principle of judicial independence in this country. It is important to underline that at a time when changes are being made. Section 1 is therefore much more important than it might otherwise have seemed.

The Convener: That resolves the issue. We now turn to questions on the Judicial Appointments Board for Scotland.

Cathie Craigie: Good morning, gentlemen. Thank you for the Sheriffs Association submission and for your time this morning. Do you believe that your members are content with the assertion of the Lord President that chapter 1 of part 2 of the bill will enable him to speak on behalf of the whole

of the judiciary and thereby help the judiciary to play a full and co-ordinated role in the development of proposals for improving the administration of justice?

Lord Osborne: As I see it, chapter 1 of part 2 of the bill and, in particular, what is set out in section 2 concerning the responsibilities of the Lord President, would be a valuable innovation. At present, as I understand it, there is not a unified judiciary in Scotland. There is a sheriff court system that is divided into sheriffdoms, which are presided over by sheriffs principal. Each sheriff principal has a high degree of independence in his sheriffdom and has no responsibilities towards the Lord President, who is seen, at least informally, as the head of the judiciary. The creation of a unified judiciary is important, because it would declare in formal and substantial terms what is to be expected and who should speak on behalf of the judiciary. Section 2 of the bill would achieve that. It is important that some office-holder is able to speak on behalf of the whole judiciary.

Sheriff Dickson: That is a good summary of the position. The Lord President has always consulted the Sheriffs Association on matters that concern us. When he is speaking on behalf of the judiciary, I have no doubt whatever that he will continue to ask the views of the Sheriffs Association council and of sheriffs on matters that affect us directly. As the Lord President said, he has created the Judicial Council for Scotland, which has in its membership sheriffs, judges and other parts of what will become a united judiciary. That body, of which I have the privilege of being a member, can exchange views and inform the Lord President of concerns or matters that affect the bodies that are involved in it. I have total faith in the Lord President representing the judiciary as its head, as envisaged in the bill.

11:15

Cathie Craigie: Are you clear that each sheriff principal will still be responsible for the smooth running and administration of their sheriffdom?

Sheriff Dickson: My understanding is that the Lord President will be the head of the judiciary and that it will be for him to delegate to whomever he chooses responsibility for particular matters. He may decide to delegate to sheriff principals responsibility for administration of the sheriff courts, subject to his overall control, but that will be a matter for him.

Cathie Craigie: So the bill does not state that the sheriff principals must have that responsibility—it could be anyone.

Sheriff Dickson: As I understand it, the power will be given to the Lord President and it will be for him, as he will do, to pass certain responsibilities to the sheriff principals in accordance with the bill.

The Convener: The responsibility will be delegated from the Lord President to other individuals.

Sheriff Dickson: Yes—it will be delegated.

Lord Reed: I might be able to assist. The responsibility that will be given to the Lord President in that regard, by section 2(2)(a), will be to make and maintain

"arrangements for securing the efficient disposal of business in the Scottish courts".

Under proposed new section 15(1) of the Sheriff Courts (Scotland) Act 1971—which will be inserted by section 44(2) of the bill—the sheriff principal will be

"responsible for securing the efficient disposal of business".

There is a difference in wording. The Lord President must make the overall arrangements, but the duty of securing that business is disposed of efficiently is not his duty, but that of the sheriff principal.

The Convener: That is very helpful.

Cathie Craigie: Yes, thank you. We can check that with the minister when he comes.

Lord Osborne: I add that, under section 55, the sheriff principal will acquire responsibilities for securing the efficient disposal of business in the justice of the peace courts. That is an innovation, because hitherto those courts have been independent of the sheriffs.

Cathie Craigie: The Judicial Appointments Board will be composed of judicial members, who will be appointed by the Lord President, and legal members and lay members, who will be appointed by the Scottish ministers. The Sheriffs Association submission mentions concerns among your members that there will not be a legal majority on the board. Will you expand on that?

Sheriff Dickson: The feeling among many sheriffs is that, as the Lord President said, knowledge of the talents and experience that a person seeking judicial office requires often comes from experience of the work and of what happens as a sheriff or judicial officer. Our feeling is that the number of judicial members on the board is inadequate and that it would be better to follow the example that prevails in England and Wales and Ireland, where there is not necessarily a majority of judicial and legal members, but at least a larger proportion of them. We welcome the Lord President's suggestion that another judge and another sheriff should be added to the board. The judicial members would still not outnumber the other members, but there would be enough judicial

members on the board to reflect the particular points that one acquires only from judicial experience.

Nigel Don: Do you concur with the idea—it is merely an idea—that it would be appropriate for the make-up of the board at a particular time to reflect the appointment that was being made? For example, there might be two judges when the board was appointing a judge, but two sheriffs and only one judge when it was appointing a sheriff. Is that consistent with what you said?

Sheriff Dickson: I would have thought that that was sensible, but the person who can give you the most ideas in relation to that is Sir Neil McIntosh. I understand that you will hear from him later. We had a chance to hear him last weekend at a conference in Peebles and he has a deep experience as chairman of the board. The points that he put to the sheriffs were well received.

Lord Osborne: I agree with what Lord Hamilton said. When someone is contemplating making an appointment—as a judge or as anything else—it is important that they know exactly what the job entails. It is that basic point that persuades me that it would be desirable to have more judicial participation in the Judicial Appointments Board. I do not know whether things could be arranged so that different members were brought in in relation to different appointments. That is a technical matter. However, I agree with what the Lord President said.

The Convener: If you had the power to change the Judicial Appointments Board in any way you wished, what changes in practices and procedure would you introduce?

Lord Osborne: I say with some deference that there are certain concerns among members of the judiciary about the operation of the Judicial Appointments Board. Perhaps it is right that I mention those. One of them—it is perhaps the principal one—relates to the manner in which the board informs itself about candidates. No doubt Sir Neil McIntosh will confirm or deny this, but my understanding is that the board has set its face against making inquiries about how the individual candidate has performed his professional or judicial responsibilities before his appointment arises.

For example, as I understand it, if a sheriff seeks appointment to a more senior judicial office, the board does not inquire of others how that sheriff has performed in his job hitherto. It strikes me and a lot of other people with whom I have had contact that that is not a happy approach, because the board is blinkered to sources of information that one would have thought were highly valuable.

There is also some concern about the length of time that the business of judicial appointments takes. I do not for a moment wish to suggest that that is wholly the responsibility of the board, because the board performs its functions on request. When it has performed them, the rest is in the hands of ministers. However, by way of example, a judge of the Court of Session is now expected to give nine months' notice of retirement. That strikes many of us as rather extraordinary. Even if such notice is given, an appointment may not be made seamlessly, so that there is no interruption in the provision of judicial services. Those are matters of some concern.

Paul Martin: I want to pursue the issue of the assessment of candidates. Whom do you expect the board to approach when it is assessing the performance of sheriffs and other candidates for judicial positions?

Lord Osborne: That will be a matter for the board's discretion. It could make inquiries of those who have had professional contact with a sheriff or legal practitioner who is seeking appointment. I would also like it to look more widely for appropriate sources of information on how applicants have done their job prior to seeking appointment.

Paul Martin: Would the views of an applicant's colleagues on their effectiveness and performance be objective? Could the board conduct an effective appointments process without seeking the opinions of colleagues, who would, no doubt, have different views on the applicant's performance?

Lord Osborne: One would like to think that any legal practitioner, judge or sheriff who was the recipient of inquiries from the board would give a responsible answer that was their best assessment of the performance of the individual concerned, and that any personal considerations would be left outside the camp.

Paul Martin: Do you agree that such a process would not be objective, and that it could be subjective?

Lord Osborne: It is possible that inquiries of the kind that I have described might produce misleading information. If that were to happen from time to time, it would be a relatively small price to pay for the benefit of having a wider source of information than the board currently has. One consequence of the way in which it seems to operate at the moment is that a great deal of emphasis is placed on the results of an interview or interviews. As we all know, some people perform well at interviews and others perform less well. The ability to interview well is not necessarily a guide to ability to do the job that is under consideration.

Lord Reed: I will give an example that would strike most judges as slightly surprising. If a part-time judicial officer or sheriff applies for a

permanent appointment, the sheriff principal who has been responsible for the management and discipline of that part-time office-holder is not consulted. As a consequence, the part-time office-holder may be given a permanent appointment at a time when there are outstanding complaints against him that have never been brought to the attention of the Judicial Appointments Board. That is not a satisfactory situation.

Sir Neil McIntosh will be able to explain the issue much better than I can, but I think that two factors, in particular, have inhibited the board from making checks of the kind that I have described. The first is the informality of many existing arrangements for discipline and management. The second is the fact that such arrangements exist much more clearly for some candidates—for example, people who work in the Procurator Fiscal Service—than for others, such as members of the bar. Unfortunately, the best—ensuring that there is a level playing field and that transparent checks are carried out on people—has possibly been the enemy of the good. I hope that, if we have clearer and more formalised arrangements for the discipline and management of sheriffs and, indeed, all judicial office-holders, that will make it easier for the appointments board to make sensible checks with those who have management responsibilities for candidates.

11:30

Sheriff Fletcher: As I understand the position, the candidates produce the referees. They put forward a number of referees, and they will obviously put forward the names of those whom they think will help them. Many practitioners who apply for positions put forward sheriffs as their referees—I have given references for a number of people. However, I suspect that if someone thinks that there is a difficulty with their performance, they will not choose obvious referees—they will not choose a sheriff as a referee if they are not performing well or if they have done something dishonourable that might be reported. It would be even more unusual for the board not to check references by consulting people who obviously have a connection with the candidate, but who have not been chosen as referees.

Sheriff Dickson: My understanding is that the English and Welsh board makes its own inquiries and then weighs in the balance the information that it receives. It seems strange to me that the current board would not be prepared to, or would not feel able to, consult the Law Society of Scotland or the Faculty of Advocates about candidates, for example. Something that is not immediately apparent from the references will not necessarily be made apparent in an interview if those who are conducting that interview do not know which aspects require to be investigated.

The Convener: Obviously, we will pursue that matter later.

We now turn to judicial appointments, on which Stuart McMillan will lead the questioning. If the senators concur with the views that the Lord President expressed, there will be no real need to address the issues that we raise, but please do not feel inhibited about contributing—if that is not a contradiction in terms.

Stuart McMillan: Good morning, gentlemen. The bill provides that selections for judicial appointments must be based "solely on merit" and that the board must have regard to

"the need to encourage diversity in the range of individuals available for selection".

We heard what the Lord President said. What can be done to encourage a more diverse judiciary while appointing only the best candidates?

Lord Osborne: There is no magic wand that can be waved. It would clearly be wrong to appoint candidates who did not possess the appropriate legal qualifications and experience but were members of an ethnic minority or were female, for example. It is right that the provisions in section 12 of the bill, which relate to an individual's merit and good character, directly replicate what is said in section 63 of the Constitutional Reform Act 2005, but section 14 is also entirely proper. One hopes that if, for example, two candidates appeared to the board to possess equal merit, section 14 would come into effect and the board would consider the need for diversity. I think that everyone accepts that diversity is needed.

Sheriff Dickson: As the Lord President said, it is important for the board to ensure that, provided that they have the necessary qualifications, anybody of whatever background or position must feel free to offer themselves as a candidate to the board. It is for the board to ensure that all avenues are explored and that anybody who wishes to put themselves forward feels free to do so and knows about any vacancy. My understanding is that now that vacancies are advertised in the press, as well as in legal journals, there is no reason why any prospective candidate, provided that they have the necessary qualifications, should not know about a vacancy and feel free to apply to the board. They would then be treated with equal and careful consideration so that an appointment was made solely on merit, as section 12 requires.

Stuart McMillan: The bill extends eligibility for appointment as a judge of the Court of Session to solicitors who have held rights of audience for five years in either the Court of Session or the High Court of Justiciary. Do you consider that a solicitor

with experience of pleading only in civil matters is qualified to preside over criminal cases or vice versa?

Lord Osborne: I have to admit that, in the discussions about the matter that we had with officials, those who represented the judiciary suggested that it would be better if experience in both courts was sought. However, as Lord Hamilton said this morning, the fact is that over many years, practitioners from the Faculty of Advocates have been appointed to the office of judge who might have had very little experience of criminal law prior to appointment. On the whole, those appointments have been successful and people have quickly acquired the facility to deal with criminal business. With that background, it is difficult to resist the provision.

Sheriff Dickson: It is a matter for the Court of Session. If I had an opinion, it would be to agree with the views expressed by the Lord President and Lord Osborne. However, the provision does not affect sheriffs directly.

The Convener: Thank you. We now turn to the somewhat vexed issue of judicial conduct and complaints.

Nigel Don: We are back on the subject about which you heard me speak to the Lord President. I do not want to rake over it particularly, but I am interested in your views. I understood the Lord President to say that he was happy with the current system. I am not trying to put words into his mouth, but I got the impression that he was not looking for another reviewer. What are your feelings about that, gentlemen?

Lord Osborne: There are two issues to consider. In chapter 4 of part 2, it is proposed that there should be formal rules for the investigation of complaints. Although most judges hope never to be the subject of a complaint, it happens from time to time.

We understand from officials in the justice department that under the present informal arrangements, members of the public complain in various ways to various individuals. There is some ignorance or uncertainty about how to go about making a complaint and to whom a complaint should be made. Therefore, one might think that there is some merit in an arrangement under which those matters are made clear.

Section 27 provides that the Lord President should be given certain formal powers, where complaints are held to be justified, to issue

"(a) formal advice,

(b) a formal warning, or

(c) a reprimand."

At the moment, if the Lord President considers that a complaint is justified, he will no doubt take the course that seems fit, but section 27 makes clear what he may do. Members will gather from what I have just said that I am not profoundly opposed to those provisions.

The proposals under section 28 and the following sections are separate, although related. It is proposed that a judicial complaints reviewer be appointed—someone in the nature of an ombudsperson, who would supervise or review the carrying out of functions by the Lord President. Members of the Court of Session regard those provisions as unnecessary and likely to generate significant public expenditure. It is a sorry day if one cannot trust the Lord President to operate complaints procedures correctly.

Sheriff Dickson: I agree completely with Lord Osborne—that covers the situation.

Nigel Don: Are we right to conclude, Lord Osborne, that you would like a provision in the bill that formalises the point of entry for complaints, or should we ask the Lord President—and, if necessary, the Cabinet Secretary for Justice—to formalise that, so that there is a system outside the statute that is known to all concerned?

Lord Osborne: There would be merit in providing some clarity on how members of the public who wish to complain can do so. There might also be some merit, as I have said, in the provisions under section 27 that make clear what the Lord President can do. I have no difficulty with any of that—my concerns are, as I explained, about the complaints reviewer.

Sheriff Fletcher: I agree with that. When the committee receives statistics about the number of complaints, members will find that the number of justified complaints—by which I mean complaints about the conduct of a judge or a sheriff, rather than complaints about judgments—is very small. The procedure that Lord Osborne suggested might create some more complaints, because people who have not hitherto complained because they did not know how to do so might decide to complain once they knew how to do it. However, the number would still be very small, and the creation of an elaborate system to deal with such a small number might not be cost effective.

The Convener: That is why we have asked the Lord President for those figures.

Cathie Craigie: Lord Osborne might have already answered my question, but if I had a complaint about how Sheriff Fletcher or Sheriff Dickson, for example, had handled a case, how would I go about making it?

Lord Osborne: My information is derived from Mr David Stewart, who was an official in the

Justice Department, but I understand that many people write to or communicate with the department about such complaints. I do not know whether people complain to the Lord President or the sheriff principal in any area to the same extent but, apparently, complaints are often made to the department.

Sheriff Fletcher: Complaints are also made to the sheriff clerk of the court where the sheriff is sitting. When such a letter is brought to the sheriff, the advice is to send it to the equivalent of Mr Stewart, so that they can decide whether it is justified. A number of people write to the sheriff clerk, and the complaints filter through to the appropriate official in the department.

11:45

Paul Martin: While I appreciate the points that have been made by the panel, is there not an issue here about moving with the modern era, in which people have the opportunity to contact ombudsmen? The police authorities have moved in that direction, and complaints about MSPs are referred to the Scottish Parliamentary Standards Commissioner. I appreciate and respect the Lord President's role, but people want to see some independent objectivity attached to the handling of complaints. Is that not a feature of the modern era? Does the bill not provide an opportunity to take us in that direction?

Lord Osborne: If you, as one of the legislators, think that that is appropriate, no doubt it will happen. I thought that it was right to make the point that the complaints reviewer's responsibility would simply be in relation to the handling of the investigation, to determine whether it has been carried out in accordance with the rules. It is procedural surveillance, as it were. I come back to my earlier point that it is a sorry day if you cannot trust the Lord President of the Court of Session to observe the rules that he is obliged to make.

Paul Martin: If the Scottish Public Services Ombudsman were to examine the role of a local authority in a complaint, she would consider whether the local council had carried out its procedures correctly. Would the proposal in the bill not emulate that approach?

Lord Osborne: I see the force of what you say. With all respect, there is a difference between a local authority and the head of the judiciary. The head of the judiciary is a pre-eminent lawyer and would have responsibility for the creation of the rules. It is almost inconceivable that he would allow some illegitimate departure from the rules to occur.

Sheriff Fletcher: I agree with Lord Osborne, but one also has to take into account the nature of the review. It is quite likely that the person who asks for such a review or who considers that such a review should take place is unlikely to be satisfied with a review simply of who is considering the procedure, particularly when it is a procedure that has been set up by the Lord President himself. They would be much more likely to want to try to overturn the decision that has been made than to find out whether the procedure has been properly followed. You would still have a dissatisfied customer, as it were.

The Convener: Paul Martin will deal with removals.

Paul Martin: What is the panel's view on section 33, which allows for the removal from office of a judge by the First Minister?

Lord Osborne: With respect, it is not quite correct to say that the removal is by the First Minister. There is a procedure for removal, which the First Minister, under section 33(1)(b), would be entitled to initiate, but that is a direct reflection of what appears in section 95(9) of the Scotland Act 1998, which deals with the appointment and removal of judges. It involves the use of a tribunal constituted by the First Minister to investigate and report on whether a judge of the Court of Session or the chairman of the Scottish Land Court is unfit for office for various reasons.

The provision under section 95(9) of the 1998 act is such that, currently, the First Minister is entitled to initiate such procedures in relation to Court of Session judges and the chairman of the Scottish Land Court. The position of sheriffs is, of course, different. To the extent that the bill makes similar provision, it is not a change. The 1998 act is the background to this, so far as judges are concerned.

Lord Reed: Removal is by Her Majesty the Queen on the recommendation of the First Minister, who can make such a recommendation only if there has first been a vote in the Scottish Parliament to that effect.

The Convener: I think that what Mr Martin was trying to get from you is whether you are content that the First Minister, whether under existing legislation or the bill, has the power to initiate a removal.

Lord Osborne: Under the 1998 act, that is a fact of life with which we must live.

John Wilson: In considering the bill, the committee must examine existing legislation and decide what we would like any future legislation to contain. The intention of Mr Martin's question was to draw out that issue in relation to the First Minister's role.

Part 1 of the bill deals with judicial independence, and I referred earlier to protecting judicial independence. Irrespective of what is in

the 1998 act, we are trying to pull together for the bill something that builds on what we see as the independence of the judiciary. We must decide whether conflicts exist that would allow the First Minister, in whatever capacity or at whatever time, to influence unduly the process of removing judges from the bench. The committee is trying to examine that in relation to the bill. If the 1998 act needs to be amended, we can deal with that at a later date.

Lord Osborne raised the issue of possible conflicts between the 1998 act and what the bill proposes, which means that we must be careful about what we do. There is no point in our going through the legislative process only to find that certain parts of the legislation that we seek to implement may bring us into conflict with the 1998 act.

Lord Osborne: I entirely understand your point about judicial independence. Decisions on the appointment of judges are ultimately made by the Crown on the basis of the recommendation, in the case of the Lord President and the Lord Justice Clerk, of the Prime Minister of the United Kingdom. The appointment of other judges in Scotland is on the basis of the recommendation of the First Minister. Therefore, the business of appointment involves a minister. Judicial independence plainly ought to be accorded to the judge while in office. However, I believe Lord Hamilton confirmed that, if a situation were to arise that persuaded the First Minister that a judge was unfit to continue in office, it would be strange if the First Minister could do nothing about it. The ultimate decision is not for the First Minister, but he can initiate an inquiry into a judge's fitness for office. Personally, I do not have a problem with that and I do not believe that Lord Hamilton does.

The Convener: Do you have a view, Sheriff Dickson?

Sheriff Dickson: No. However, as I think that you are aware, sheriffs have strong views on section 38, which will replace the current approach under the Sheriff Courts (Scotland) Act 1971. Is this an appropriate time to comment on that?

The Convener: We have your submission and the point has been firmly noted. Do you want to amplify what you wrote? We know that your organisation has strong views.

Sheriff Dickson: I quote a letter on the Scotland Bill that my predecessor received from the then Secretary of State for Scotland, Donald Dewar, who of course later became First Minister. In the context of Stewart v Secretary of State for Scotland, he wrote:

"It was made very clear by the House of Lords in their recent decision in Stewart v Secretary of State that they considered that the guarantee of judicial independence of Sheriffs rested on the fact that before any Sheriff could be dismissed it was necessary to have a report from the Lord President and the Lord Justice Clerk. There is no proposal to amend that and standing the clear statements in that case I think it is inconceivable that any legislature would attempt to tamper with that guarantee."

The Sheriffs Association has carefully retained that letter from the Scottish Office, which is signed by Donald Dewar.

On that basis, we are concerned that a change is proposed. We have faith that the Lord President and the Lord Justice Clerk have been able to deal with the matter, when required, and we would like that method to be retained in cases in which a sheriff's fitness for office must be considered.

The Convener: You have made the point firmly. For information, will you say how often such a difficulty has arisen in modern times?

Sheriff Dickson: I am aware of only two occasions: one in the 1970s and the one that led to the case to which Donald Dewar referred in his letter.

Paul Martin: What are the witnesses' views on the balance of membership of the tribunal that would consider the removal of judges and sheriffs?

Lord Osborne: I think that the tribunal that is proposed in relation to judges would be constituted differently from the tribunal that is proposed in relation to sheriffs. I do not think that judges of the Court of Session have a problem with the membership of the tribunal that would relate to Court of Session judges.

The Convener: Sheriff Dickson, I take it that the view that you just expressed applies in this context.

Sheriff Dickson: The view that I expressed applies, but we must accept that in a modern society there might be concerns about ensuring the availability of the public's view. The principal safeguard would be the presence of two judicial members, one of whom would be a sheriff and the most senior of whom would chair the tribunal. We are satisfied by that.

The Convener: That brings us to the final question.

John Wilson: The bill will establish the Scottish Court Service as a body corporate of 13 members, chaired by the Lord President and with a majority of judicial members. To what extent might the proposed governance arrangements increase the judiciary's involvement in administrative work at the expense of judicial work? Will Sheriff Dickson or Sheriff Fletcher expand on the comments about the Scottish Court Service in their written submission?

12:00

Lord Osborne: Judges of the Court of Session are happy with the governing body of the Scottish Court Service as proposed in the bill. I do not believe that we see the proposal as imposing an unnecessary administrative burden on judges. The Scottish Court Service is quite a large organisation, and the nuts and bolts of administration would remain the responsibility of the service's staff. As I see it, the important point about the proposal is that it would afford different members of the judiciary an opportunity to examine the body's priorities and ensure that it is sensitive towards the legitimate needs of the different members of the judiciary.

In the past—I am talking about the relatively distant past, not the term of office of the present chief executive—there were examples of the SCS acting in a way that the judiciary did not consider to be sensitive towards their legitimate needs. Things are changing, and we regard the proposal as a positive step forward to ensure much greater co-operation between SCS staff and the judiciary.

When we investigated the matter, a number of us went to the Republic of Ireland and met members of the Courts Service and the judiciary there. We were much impressed by what had been achieved by the independent Courts Service, which was established under the Courts Service Act 1998.

We do not see the proposal as imposing an unreasonable burden on members of the Scottish Court Service; we think that great benefits are likely to emanate from it.

Sheriff Dickson: We have concerns about the wording of section 57(2), which deals with what the SCS must do in carrying out the functions that are listed in section 57(1). It indicates that

"the SCS must—

(a) take account, in particular, of the needs of members of the public and those involved in proceedings in the Scottish courts, and

(b) so far as practicable and appropriate, co-operate and co-ordinate activity with any other person having functions in relation to the administration of justice."

However, there is no mention of what used to be part of the mission statement of the Scottish Court Service: to provide support to the judiciary in the exercise of their judicial functions. Paragraph (a) of section 57(2) should contain a mandatory provision first to require the SCS to provide support to the judiciary in the exercise of their judicial functions. It could then go on to refer to taking account

"of the needs of members of the public"

and so on. We are not detracting from those things, but we do not feel that there is sufficient—or, indeed, any—emphasis on the Scottish Court Service's primary responsibility to support the judiciary in the exercise of their judicial functions.

The Convener: There being no further questions from the committee, I thank the witnesses. We are acutely conscious that we have probably denuded the Scottish courts this morning, but we are grateful indeed to the sheriffs and senators for answering our questions so clearly and concisely. That is welcome, and we are much obliged.

I suspend the meeting until 12.10 pm to allow the witnesses to change over.

12:04

Meeting suspended.

12:11

On resuming—

The Convener: I welcome our third panel of witnesses. From the Law Society of Scotland, we have Alan McCreadie, who is the deputy director of law reform, and George Way, who is from the council of the society. From the Faculty of Advocates, we have Richard Keen, who is the dean; Bruce McKain, who is the director of public affairs; and Carole Ferguson-Walker, who I see is not with us at the moment. Are we to assume that Ms Ferguson-Walker is joining us, Mr Keen?

Richard Keen QC (Faculty of Advocates): She will join us in a moment. She has gone to check a simple point to which I should have known the answer.

The Convener: We look forward to seeing her.

At this point, we would usually proceed directly to questions. However, I believe that there has been a misunderstanding involving the Faculty of Advocates, which, in the event, has not submitted any written evidence. Mr Keen, I ask you to make a brief statement to the committee. The faculty might then make a written submission, which would allow us to examine its comments at a more leisurely pace than this morning's proceedings will permit.

Richard Keen: I am obliged to the committee not only for inviting us to give evidence, but for allowing me to say a few words about the bill and certain issues that it raises. We produced a response document to the consultation paper and the original draft bill, and I am sorry that the committee has not received our further written response.

At the outset, I want to highlight four points about the structure that is set out in the bill, the first of which concerns the constitution of the

Judicial Appointments Board for Scotland as set out in schedule 1. As others have pointed out, under those provisions, the Lord President will appoint judicial members and the Scottish ministers will appoint legal and lay members. That means that Scottish ministers will make the majority of appointments, which raises the question of how the division between the judiciary and Parliament will be maintained.

With regard to paragraph 3(2) of schedule 1, which defines the legal members as

"one advocate practising … in Scotland and … one solicitor practising … in Scotland",

how will Scottish ministers inform themselves of an advocate's suitability for appointment to the board? Of course, procedures and mechanisms can be put in place, but it might be more appropriate for the legal members and, in particular, the legal member who is an advocate practising in Scotland, to be appointed by the Lord President.

12:15

I remind members of the committee that the Faculty of Advocates is part of the College of Justice, which was constituted in 1532. We are subject to the jurisdiction of the Lord President in all matters of practice and admission. It would be sensible, for historical and practical reasons, for the appointment of the advocate to be at the behest of the Lord President, rather than the Scottish ministers. Perhaps the appointment could be made on the recommendation or advice of the dean of the faculty. That might also be the case with respect to the legal member who is to be appointed from the solicitor branch of the profession. The Lord President could exercise the same function on the advice of the president of the Law Society of Scotland. However, I do not seek to speak for my colleagues from the solicitor branch—I merely make the point in passing.

I have a real constitutional concern about a majority of members being appointed by the Scottish ministers. I am also concerned about the practical issue of determining the suitability of an appointment. Both questions could be addressed by having the Lord President exercise his powers to appoint an advocate to the board, just as he would appoint the judicial members.

That was my first point, which I hope that I have put relatively briefly.

My second point concerns section 1, which is of course one of the most fundamental sections. Reference is made to the guarantee of independence of the judiciary being upheld by the First Minister, the Lord Advocate and the Scottish ministers. When Lord Hope, the lord of appeal in ordinary, responded to the original consultation document, he suggested that the Scottish Parliament be included in that list. It was not immediately clear to me why it was not included. It seems to me that if we expect the First Minister, the Lord Advocate and the Scottish ministers to uphold the continued independence of the judiciary, we might equally expect the Scottish Parliament to do likewise. I make that point with regard to section 1, because it is fundamental. We have fundamental statutory provisions, such as in the act of union and the bill of rights, which might seem to state the obvious but, in fact, act as a bulwark against oppression in difficult times, as the Lord President suggested.

My third point concerns the issue of diversity in relation to judicial appointments. Diversity is important, but it is critical at the point of entry, not the point of exit. We cannot have diversity in our appointments to the bench if we do not have a suitable level of diversity at the time of entry into our professions. That is where we must address that fundamental issue. Over the past few years, the faculty has attempted to do that by going out, particularly into the state school sector, to educate and to bring to the attention of many pupils the opportunity of taking up a career at the bar. We do that in the hope that, by encouraging a far more diverse entry into the profession, we can ultimately achieve the sensible objective of having proper diversity based on merit in our appointments to the bench. That takes time, but the process has been on-going for many years now. I note that a greater number of women than men are currently coming into the bar, but that is only one step. We need to see greater social diversity as well. If we achieve that, greater diversity will occur naturally in our appointments to the bench.

My fourth, short point is that we had already observed that allowing a solicitor advocate who was qualified only in respect of the High Court or the civil procedure of the Court of Session to be available for appointment might not be an appropriate step. I have concerns about the period of five years full stop, but this might not be the time to review that.

I do not disagree with what the Lord President said, but I point out that the period of devilling and training for an advocate is longer, more intense and wider ranging than that for a solicitor advocate, which accounts for something. However, it appears to me that that could be dealt with at the stage of appointment. If the bounds for qualification are lowered, so be it, but at the end of the day the Judicial Appointments Board will have to appoint on merit, and if somebody has no qualification and experience in the civil or criminal field, that must go to the merit of their appointment. That may be a proper and effective means of dealing with that issue in due course.

Convener, I am most obliged for your allowing me to say those few words, which were perhaps not as brief as they might have been. I will rest there, if I may.

The Convener: You extended the period by two minutes. We will go straight to questioning.

Bill Butler: Good morning, gentlemen and lady. In response to earlier consultation, the Law Society stated that matters of such far-reaching and constitutional importance should be the subject of a more detailed and independent inquiry by a royal commission. Are you now satisfied that adequate time has been allocated to the consultation process?

George Way (Law Society of Scotland): Thank you, sir. The Law Society is satisfied with the process that has taken place, particularly the extensive consultation between senators of the College of Justice and the Law Society. We were extremely impressed by the way in which those who gathered information from us used it. We have seen significant improvements in the bill, not least the addition of lay input to the proposed constitution of the board to govern the SCS. We are satisfied that the process was extended appropriately.

Bill Butler: I am grateful.

The Faculty of Advocates, in its response to the draft bill, supported the proposals to create a statutory guarantee of judicial independence, which it described as "uncontroversial". Do you consider that there is a threat to judicial independence? If so, what form does that threat take? Is the bill likely to be effective in guaranteeing judicial independence, notwithstanding the comment that Mr Keen just made about including the Scottish Parliament in the bill's provisions on that issue?

Richard Keen: I take up the point that the Lord President made, which is that in times of calm one can perhaps regard such a provision on judicial independence as unnecessary or redundant. Although we have lived for many years through periods of calm, we can never make that assumption. It seems to me that there is considerable merit in expressing in a bill of this kind that fundamental pillar of our constitutional position, in order that when difficulties arise we can have regard to the bill and point to it as the touchstone of judicial independence, rather than having to seek it perhaps in constitutional writers going back centuries.

People will tell you that Montesquieu identified the importance of distinguishing between the executive, the legislature and the judiciary, which is all very well. However, I think that most of us would take greater comfort from knowing that the Scottish Parliament had seen fit to enshrine that critically important constitutional principle in one of its own acts at its own hand. I do not see any immediate dangers to the independence of the judiciary, but I see the importance of expressly maintaining our belief in that independence.

Bill Butler: Is the provision in the bill likely to be effective in guaranteeing that independence? Or will it be merely symbolic in times of calm?

Richard Keen: It seems to me that it will be effective so long as we maintain the integrity of the judiciary. If our courts were traduced, or reduced, no law could stand or be maintained. However, so long as we understand that we will have an independent judiciary, we will have the means of ensuring the enforcement of that right. I concur with the Lord President that it is highly unlikely that any individual will find themselves litigating in order to seek a declarator that the right exists. However, the mere fact that it is enshrined in the bill will, if nothing else, act as a reminder to those who might otherwise wish to depart from the critically important issue of judicial independence.

Bill Butler: I am obliged.

Cathie Craigie: I have a quick question for the Law Society.

Part 1 of the bill states that the First Minister, the Lord Advocate and the Scottish ministers

"must uphold the continued independence of the judiciary".

Richard Keen suggested that the Scottish Parliament should be given that responsibility as well. What do you think about that?

George Way: I certainly would not demur from the comment of the learned dean that everybody should be enjoined to uphold the independence of the judiciary. The society had taken it that those individuals were listed because they have power to influence the organisation of the courts on a day-to-day basis, and that the bill is directed towards organisational matters. If the Parliament were minded to make such a declaration, it would certainly be much appreciated by the profession.

The Convener: We turn to the role of the head of the Scottish judiciary, on which you may or may not have a view. If you do not have anything to say in that respect, do not be inhibited from saying so.

John Wilson: The bill gives the Lord President responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts. He will have that responsibility in addition to his responsibilities as head of the judiciary. Are the two roles compatible?

Richard Keen: In my opinion, they are compatible. Historically, they have been seen to be compatible. For many centuries, the Lord President had responsibility for the disposal of

business within the supreme court. Indeed, shortly before my arrival in the faculty, I was reminded that the late Lord President Clyde was wont to inspect the state of the roof in the Court of Session himself rather than bring in contractors. That is the extent to which he took seriously his responsibilities in that regard.

Returning to the issue more directly, I do not believe that there is any conflict or that the proposal would derogate from the standing of the Lord President. It seems sensible that he should have the responsibility. The idea mirrors recent constitutional changes in England and Wales, where the Lord Chief Justice acquired from the former Department for Constitutional Affairs a large number of staff who now report directly to him. We are seeing in England and Wales an attempt to copy that which already exists in Scotland.

George Way: We have no contrary view on the matter.

John Wilson: Are there sufficient checks and balances to ensure the accountability of the Lord President? Feel free to answer in whatever way you wish, Mr Keen.

Richard Keen: The safest answer might be no comment, but in reality I believe that there are sufficient checks and balances.

One has to be conscious not only of the express checks and balances, but of those that, as it were, lie beneath the radar. The Lord President does not operate alone. He operates in conjunction with the Lord Justice Clerk and the other senators of the College of Justice. The supreme court judiciary in Scotland is genuinely a college, and the Lord President is therefore subject to the influence of his colleagues. That unwritten check is important.

It seems to me that, if you are trying to extend the checks on the Lord President, there is a danger of going too far and intruding into the necessary separation between Parliament and the judiciary. The checks and balances are sufficient at the present time.

George Way: Again, I agree entirely with the dean of faculty.

John Wilson: Mr Keen, you said that there are unwritten checks and balances through the college. In the interests of modern government and modern legislation, should we try to incorporate those into the bill so that it is clear how they operate?

12:30

Richard Keen: I believe that that would be extremely difficult. The Lord President is subject to the views and the persuasion of his fellow members of the college as senators, but it would be very difficult to try to formulate that into an obligatory process. The fact is that the Lord President is part of the College of Justice; he is influenced by the views of his colleagues, but one cannot make him subject to the views of his colleagues. After all, he is the Lord President and the Lord Justice General.

The Convener: Are you content with that, John?

John Wilson: Yes.

The Convener: Mr Keen, your original submission indicated that you favoured a Judicial Appointments Board that is administratively independent of the Government. Are you satisfied that what is now proposed in the bill meets that demand?

Richard Keen: Paragraph 1 of schedule 1 goes a long way to meeting that demand. We consider that it is important to have a board that is not a servant of the Crown. Of course, its membership is important, too. One has to remember that the hand that rocks the cradle often determines the outcome. As I mentioned previously, I therefore have a concern about the scope of the power of the Scottish ministers to appoint to the board.

The Convener: We will come to that. I will return to Mr Way in a moment.

Are you content with the proposed composition of the board?

Richard Keen: As it is presently composed, I would adopt the suggestion that was made initially, I believe, by the Lord President: in the context of an appointment of a senator of the College of Justice, it would be appropriate for there to be two senators on the board. I do not see how that would be a problem. With regard to the appointment of a sheriff, there should be two sheriffs on the board. That would result, if there was one additional judicial appointment, in the balance of the board altering slightly because, as I understand it, there are currently five lay members, including the chair, and five other members—three judicial members and two legal members. It appears to me that it would be appropriate for there to be four judicial members for each appointment and two legal members. I appreciate that that would leave the lay members in a minority, in a sense, but they are still there to make a significant contribution. I favour the suggestion that there should be an additional judicial member and that the member should alternate depending on the nature of the appointment that is being considered.

The Convener: Finally, you heard the question that I posed to Lord Osborne and his colleagues. If you could make any changes to the operation and practices of the board, what would those be?

Richard Keen: I would mention two matters, the first of which—confidentiality—is related to the second point that I will make. Maintaining absolute confidentiality is always a problem if one consults widely on such appointments, but when there appears to be an absence of confidentiality, there will be reluctance on the part of suitable candidates to apply. No senior counsel in practice would wish it to be known that he had applied to the board and had been turned down. I imagine that that would not be a career plus. There may be perfectly legitimate reasons—he may be too young and it may be too soon—but the fact that others might know of his application would be a disincentive to application by an individual.

The second and related point, which may seem contradictory, is that the board should consider consulting a little more widely than it does. I find it a little odd that I am regularly asked, in my capacity as dean of faculty, to complete reports to the Judicial Appointments Commission in England and Wales when members of faculty have applied for judicial appointments in England and Wales, but that I am not asked to do that when they have applied for an appointment in Scotland. I am asked to complete reports by the board in England and Wales because it wants to know, for example, whether an applicant has been the subject of complaint or disciplinary proceedings, or is otherwise considered by the faculty—which is, after all, his professional body—to be unsuitable for that appointment. It seems to me that the board might give that consideration, but I would defer to it in determining those matters.

Cathie Craigie: A previous panel of witnesses raised the issue of balancing confidentiality with the most up-to-date information on an applicant and said that they had received no requests for information about people who applied for judicial appointment and who worked in their area. Could an annual or biannual report be done on potential applicants to find out how well they are doing their jobs and how many boxes they can tick? Could that be a way of preserving confidentiality and getting the most up-to-date information?

Richard Keen: It could be in the case of sheriffs, but it would be difficult in the case of members of the faculty, because they are all independent, self-employed individuals. I do not think that they would be terribly pleased with the idea of my ticking boxes about them each year; I wonder whether that would be a practicable solution. On the other hand—

Cathie Craigie: How do you balance the confidentiality issue?

Richard Keen: I appreciate that it is difficult. That is why I said finally that I would defer to the board on the matter, because it probably has better insight into such problems than I have.

If you had an application from a sheriff for an appointment to the supreme court bench, you might go to the sheriff principal and ask him for a view on all the sheriffs in his sheriffdom. That would not be an insurmountable problem and, in that way, you would not disclose who the individual applicant was, but you would get insight into current or potential problems with the applicant.

The Convener: We turn to Mr Way. Are you reasonably content that the bill as proposed will deliver a sufficiently independent Judicial Appointments Board?

George Way: The society has concerns, as raised in its submission, about questions of oversight. At this stage, I will address the issue of the constitution of the board. The society's position is that the judiciary is not necessarily the touchstone of knowledge about persons who are suitable for the bench, whereas the profession is in daily contact with the judiciary. It is our view that there are three stakeholders—the judiciary; the professional representatives, be they advocates or solicitors; and the public. Those constituencies should be represented equally and, with great respect for the Lord President, we do not accept the argument that knowledge of the judiciary is a speciality. In fact, practitioners see many more judges in action on a daily basis than judges do.

A point arises from what the learned dean said about confidentiality. The society's position is that section 16(6) should be amended to make it a statutory offence to breach confidentiality. It might well be that if the board is minded to take wider soundings, there would be greater protection of confidentiality if, instead of the present position—which is that the aggrieved individual has to initiate proceedings and thereby out and expose themselves to potentially even more ridicule—it might be of assistance if there were a statutory offence, as is the position in three statutes that we list in our submission. Otherwise, the society thinks that the existing board has done much to improve diversity. Although the selection process is long-winded, grave matters sometimes take grave time and weighty measures require weighty consideration. We have no specific proposals for changing current procedures.

We have a concern about the removal of members. We refer in our submission to the present legislation, which says that a judge may be removed if they have been convicted of "any offence". We take the view that that is not proportionate and that subtle legislation should be capable of defining the situation with more accuracy. We do not suggest how it should be redefined, but simply to say that "any offence" could lead to removal—it could be parking on the

zigzag lines leading to a manned level crossing—is very wide.

The Convener: You are quite content with the composition of the board.

George Way: We are content with the composition of the board as it stands.

The Convener: You do not see any radical procedural changes that would help.

George Way: The only matter on which we will comment is the one that Mrs Craigie has raised about diversity. The society believes that recruitment will not in itself, and can never, deal wholly with diversity when the post of judge or sheriff is fairly rigid in how it operates. To get true diversity, the board will have to consider ways of recruiting without the present system, which is a pool. At the moment, if someone has a disabled wife they must do a trawl of all sheriff posts that may be available within a two-year period. They have no way of ascertaining which posts are available and where they may be asked to sit. We do not offer a solution to that problem, but it is a practical issue that affects how diversity will operate. If someone's personal circumstances are difficult, they have no way of communicating that fact to the board. It is not appropriate for them to say that they could be a sheriff, but only in the central district. That is where the main mischief of recruitment lies. The matter is not in the hands of the board, which at the moment is asked, for practical and pragmatic reasons, to recruit by creating a pool. We need to address the end use of sheriffs, not just the recruitment process.

The Convener: That is an interesting point. John Wilson has a question about judicial appointments.

John Wilson: I noted Mr Keen's comments on the extension of eligibility for appointment as a judge in the Court of Session to solicitors with rights of audience for five years in either the Court of Session or the High Court of Justiciary. Do you consider that a solicitor with experience of pleading only in civil matters is qualified to preside over criminal cases, and vice versa? I am particularly interested in hearing Mr Way's views on the issue.

George Way: Would you like me to respond first?

John Wilson: Mr Keen may want to expand on his earlier comments.

Richard Keen: As the faculty made clear in its original response, we have reservations about a solicitor advocate who has qualified only in criminal cases being available for appointment. The Lord President was right to make the point that, although many advocates practise primarily in criminal or civil law, they are still eligible for appointment to the bench. The scope of the training that a member of the faculty receives is radically different from the training that is undertaken by a solicitor advocate. A member of the faculty undergoes a nine-month period of devilling, with intensive tuition, training and examination in civil and criminal procedure and law. That is an essential foundation for qualification for the supreme court bench, because on appointment someone who has qualified only in criminal law may find themselves sitting in a civil case.

A qualification in both civil and criminal law should be required. The period of five years strikes me as too short, although it may apply across the board and, in practice, qualification for longer will probably be required. As I mentioned, there are two ways of dealing with the issue. One is to require, as is presently the case under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, that a solicitor advocate should be qualified in both civil and criminal law before he is eligible for appointment; the other is to note that the issue will be considered with the merits of his application when he appears before the board. I prefer the former approach.

George Way: To some extent, the learned dean elides the way in which solicitor advocates—or solicitors with extended rights of audience in the supreme courts and the High Court of Justiciary—developed. To be eligible for the current training programme, a person must be a solicitor of some standing. It is always invidious to argue ad hominem, but I had a reasonable background in criminal law before I started to specialise in civil practice. The way in which the solicitor advocate profession operates almost invites people to take one route, because the solicitor advocate training course is a course in criminal law. Although the work of solicitor advocates is diverse, the structure of the profession does not lend itself to people applying to practise both criminal and civil law, because they will get work in an area only if they have a reputation in it.

The dean is right to say that the practical position will be that we will rely on the board to look at what people have done. The legislation is permissive—it lets solicitor advocates get to the table, but it does not guarantee them admission to the dinner party.

12:45

The Convener: We now come to the vexed question of complaints.

Nigel Don: First, I will return to an earlier point. The bill does not impose a duty on the Parliament because the Parliament cannot impose a duty on

itself. I respectfully suggest that such a duty would have to go in the Scotland Act 1998.

I want to pick up on judicial discipline, a possible judicial conduct scheme and a possible judicial complaints reviewer. The witnesses will have heard our earlier discussions. I do not want to repeat them, but I wonder whether this panel of witnesses has any views.

Richard Keen: I am inclined to adopt the views expressed by the Lord President and Lord Osborne. I would find it difficult to give a more informed opinion on the particular issues because I have no insight into the number of complaints made about the judiciary or into the manner in which they are disposed of. However, any system must be able to distinguish between the wheat and the chaff. Otherwise, it will be overwhelmed.

Nigel Don: I will come to Mr Way in half a moment. If you had a client who felt dissatisfied and you felt that the complaint had substance, what would be the point of entry for the complaint? Where should the complaint be lodged?

Richard Keen: The appropriate point of entry would be a letter to the Lord President's office. He has overall charge of the conduct of the judiciary. If the complaint had to do with procedure, the complainant might write to the principal clerk of session, but that would be unusual.

George Way: The difficulty is that none of us has appropriate statistics. In the view of the Law Society of Scotland, section 26 should require the Lord President to make rules. Instead of saying that the Lord President "may" make rules, the section should oblige him to make rules. Some of those rules should be discretionary and some should be mandatory.

The Law Society suggests that there should be mandatory rules on the procedures for making the complaint, on the steps to be taken by the complainant before the complaint is investigated, and on how to obtain information relating to complaints. All those matters could be resolved by the Lord President, but we feel that the public and the judiciary have a right to know the procedures that will apply to them. That may be overkill if we are talking about only two complaints, but if the procedure is clearer and more transparent, more complaints will inevitably be made. If people do not know where the public service unit is in the airport, they will perhaps simply put up with a broken bag, but if there is a big sign saying, "Complain about your broken bag here," people will go to it.

A question of proportion arises; a sense of balance is required when considering the resources. However, we feel that simple rules should be mandatory from the outset.

Nigel Don: Once those rules have been established, should there be a kind of ombudsperson to inspect the Lord President's procedures?

George Way: The provision is in the bill. Our concern is purely practical. The Law Society has seen that the ombudsman who looked into the way in which we regulated our complaints did not meet the public's needs. That system is now being swept away and replaced by an elaborate and expensive commission.

The judiciary is unique in this respect. On this side of the table we accept that, although we have duties to the court, we are primarily providing a service. The learned dean is, of course, an advocate and therefore has slightly higher duties to the court. Nevertheless, we have a public service face.

The judiciary has to be careful about how far it allows the complaints system to proliferate and elongate. There has to be an end to the process. If there were opposition to a reviewer, we do not think that the objective of bringing complaints to an end would be achieved. It is desirable to have an end, so perhaps we should trust the Lord President in that matter.

The Convener: That is reasonably clear. We will move to the question of the removal of judges. I ask the witnesses to give brief answers.

Bill Butler: Do you consider it appropriate that the First Minister may initiate proceedings for the removal from office of a judge?

Richard Keen: Constitutionally, that right ultimately has to exist. I will not elaborate on that because the Lord President addressed the matter, but I accept it.

Bill Butler: I just wanted to get the Faculty of Advocates on record.

Do you consider it appropriate, Mr Way?

George Way: Yes.

Bill Butler: Thank you—that puts the Law Society of Scotland on record.

The proposed tribunal to investigate and report on whether a person is unfit to hold judicial office is to include two judicial members, a solicitor or advocate and a lay member. Do you consider that balance to be appropriate?

Richard Keen: Yes. In that area, some lay representation is of course important, but we have to bear it in mind that we are dealing with the status of the judiciary more widely, and it should be determined in that fashion. There is some input from the legal profession in general—from the Law Society of Scotland and from the Faculty of Advocates—because issues of professional

practice and perception might arise in the context of a tribunal's deliberations.

George Way: I do not demur from that at all—we agree that the constitution is satisfactory.

The Convener: There are a couple of brief final questions on the proposed operation of the Scottish Court Service.

Stuart McMillan: The bill establishes the SCS as a body corporate of 13 members chaired by the Lord President and with a majority of judicial members. Will the proposed governance arrangements for the SCS increase the judiciary's involvement in administrative work at the expense of judicial work?

Richard Keen: I do not believe that that would be the case. As I mentioned earlier, the Lord President has always taken responsibility for those matters, but has been able to delegate. Provided that sufficient resources are available to the Scottish Court Service, the operation of the service will not take away from the provision of judicial services.

If I had any comment to make about the proposals in schedule 3 to the bill, it would concern paragraphs 3(1) and (2). There is an element of giving and taking away in that part of the schedule. It says:

"It is for the Lord President to appoint the members of the SCS"

and that:

"The Lord President may appoint a person to be a member only if the person has been nominated, or otherwise selected for appointment, in accordance with such procedure as the Scottish Ministers may by regulations prescribe".

That is, in a sense, handing it over on the one hand and taking it back with the other.

It seems that subparagraph (2) might require a little attention—you might want to contemplate what the regulations would prescribe. We would not want the Scottish ministers to nominate one person and tell the Lord President that it was now up to him. We could perhaps examine the way in which that is formulated a little more carefully. Beyond that, I am content with the constitution of the Scottish Court Service and I do not believe that it will derogate from the provision of judicial services and judicial time.

George Way: The Law Society of Scotland has no concerns over the constitution of the board. The only point we make is that, in the policy paper, the appointment of the three lay members is more greatly explained—they are to provide expertise from other areas. We question why that cannot be expressly explained in the bill.

We have one other concern to do with the chief executive of the SCS. We believe that he has to be in or out: either he is the chief executive, in which case he should not be a member of the board—he should not be a voting member—or he is a member of the board, in which case he should not be a member of the SCS. His appointment should be separate. That issue needs to be addressed with regard to good corporate governance. We do not see the solution; just now he or she is the servant of twa maisters.

The Convener: You have to some extent anticipated us on that. John Wilson has a question.

John Wilson: There is an issue that I want to examine further with Mr Keen. In your opening statement, you mentioned the panel that should be drawn up to appoint judges and the number of judicial members who should be involved in that process. You seemed to be content with the composition of the panel that would be set up to consider the removal of a judge from post. Will you clarify why the arrangements for the appointment of a judge should differ from those for the removal of a judge?

Richard Keen: There are two distinct bodies with distinct constitutions. That is understandable.

With regard to appointment, it seems to me that there is a case to be made for moving away from the requirement of paragraph 4 of schedule 1, which states:

"The number of lay members is to be equal to the total number of judicial and legal members."

There is a case for saying that the number of judicial and legal members, taken together, should exceed the number of lay members.

Mr Way asked why, given that there are three constituencies involved, the lay members, the legal profession members and the judicial members should not be equally represented. I would not go that far, but I endorse the suggestion of the Lord President, Lord Osborne and Sheriff Dickson that, with the appointment of a senator, there should be two senators on the appointments board and that, with the appointment of a sheriff, there should be two sheriffs on it. That would mean that it would no longer be the case that the number of lay members would equal the number of judicial and legal members taken together, but it seems to me that that would be a proper reflection of the distinct interests that must be represented for those purposes.

The Convener: Thank you very much for your attendance. You can let us have a written submission, if you will.

Richard Keen: I am obliged to the committee for hearing us this morning.

12:57

Meeting suspended.

12:58

On resuming—

The Convener: We come to our final panel in what has been a fairly lengthy meeting. To those of us who are involved in local government, the first witness needs no introduction. Sir Neil McIntosh is the chairman of the Judicial Appointments Board for Scotland. He is joined by Michael Scanlan, who is a member of the board.

I am aware that, as you have been sitting in the public gallery, you will have heard a number of points being made to which you will wish to respond. I propose that the committee will ask a series of questions that may enable you to answer those points appropriately. If that does not happen, I will give you the opportunity at the end of questioning to answer the various points that have been made. Bill Butler has the first question.

Bill Butler: Good afternoon, gentlemen. The board has stated that it considers it extremely important that the Government should make it a statutory body. What difference will the board being a statutory body make to its operation?

Sir Neil McIntosh (Judicial Appointments Board for Scotland): The first difference will be that it will be possible for the board to be seen to be independent by those who are affected by its decisions. At the moment, we are a creature of the Government. Making us a statutory body will make a substantial difference to how we are seen. Our view is that the independence of the judiciary begins with the independence of the process for appointing members of the judiciary. That is fundamental.

Secondly, my colleagues and I are conscious of the fact that we have been operating without the final sanction of the Parliament as regards our composition, our remit and the various elements of the backdrop that are dealt with in the bill. In that setting, it is difficult and quite wrong to take any major steps in changing direction or identifying issues. We have therefore worked within our remit, but sought to develop and improve as we have gone along.

13:00

Bill Butler: The bill provides that the Lord President and the Scottish ministers

"may issue guidance to the Board as to the procedures to be followed … in the carrying out of its functions."

Do you support those provisions?

Sir Neil McIntosh: We recognise the backdrop in that respect. Obviously, it is not comfortable to have guidance potentially coming from two sources. However, the bill requires consultation to be carried out with the board on any guidance, which is important. Further, by definition, guidance is not instruction and therefore the board, given its independence, might take a different view. The board feels that it could be argued that, in democratic terms, just as the bill is being scrutinised by the committee, before guidance is issued, it should be scrutinised through a committee process in which any issues would be considered.

Cathie Craigie: The Government will determine the level of resources that will be available to the board to spend, and the board will be staffed by Government civil servants, with guidance to be issued by the Scottish ministers. Are you satisfied that that situation is consistent with the provision that

"the Board is not to be subject to the direction or control of any member of"

the Scottish Government?

Sir Neil McIntosh: The short answer is yes, because the independence of the board members will ensure that the board is not subject to such direction. In our written submission to the committee, we expressed our view that no civil servant should be involved in the selection of board members. The aim is to create a difference and distinction at that stage. Although, technically, our staff work within civil service conditions, they are separate. We have made it clear that the staff and the board should not be co-located with any Government department, because perception is as important as reality. I am reassured that the ultimate statement of the board's independent status—that no one can instruct us—provides a safeguard.

Cathie Craigie: I should probably know the answer to this, but is the appointment process for board members in any way governed by the Commissioner for Public Appointments in Scotland?

Sir Neil McIntosh: That is a good point. At present, the answer is no but, under the bill, we will be subject to that process. However, civil servants will be excluded from the appointment process, whereas they are a standard part of other such processes—the bill specifically covers that issue to protect the situation. There is room for discussion and debate about what the measure ultimately means, but it seems perfectly reasonable to apply to the board the broad principles on public appointments that apply to any other body.

John Wilson: In response to the consultation paper and the draft bill, you observed that no provision had been included on what should happen when ministers are not minded to accept a recommendation from the board. Are you satisfied with the bill's provisions on what will happen if the relevant minister decides not to accept the board's recommendation?

Sir Neil McIntosh: The bill provides that no minister will recommend for appointment anyone who has not appeared as a candidate recommended by the board. That is a protection. In our earlier response, we felt that, although it is proper for the First Minister to have an opportunity to refer back to the board and to consider matters, any reason to shift from the board's recommendation should be declared by the First Minister. That should not be a secret process—it should be known why there has been a departure. As far as I can see, our suggestion is covered in the bill, with the exception of the part about a declaration of reasons, either to the Parliament or in public.

John Wilson: You are saying that you would like a provision in the bill that would put an onus on the First Minister, or any minister, in rejecting a recommendation from the board to give the reasons for that rejection so that that becomes a matter of public record.

Sir Neil McIntosh: I stress the point that the First Minister can come back to the board first of all and raise the issue. If the board felt that the First Minister's position was reasonable, we would declare in our annual report that a change had come back to the board and we would state the reasons why we concurred with it. If we did not concur, and even if the First Minister did not have a duty to make a statement, we would report that the situation had arisen. However, it would be better if there were a requirement that, at the very least, Parliament should be informed of the reasons behind a decision being made that was contrary to the board's recommendation.

John Wilson: Are you intimating that any rejection of the board's recommendations would be the subject of a paragraph or whatever in the board's annual report?

Sir Neil McIntosh: The board would report the rejection of one of its recommendations in its annual report as a matter of course.

Michael Scanlan (Judicial Appointments Board for Scotland): I see the opportunity for a stand-off developing, if a matter comes back to the board and the board disagrees with the disagreement of the minister and recommends the initial person again. I wonder how long the process could go on for. I would have thought that a mechanism could be introduced to resolve the situation if the board were not of a mind to change its earlier recommendation.

The Convener: One would hope that there would be no disagreement in the first instance, but I see the point that you are making.

Cathie Craigie: I agree that there could be a stand-off, and I expect that it could last for a long time. There is a precedent for that.

If there were a stand-off, what would be the role of the Commissioner for Public Appointments? If you made a nomination for the minister to consider that he or she rejected, would the commissioner have a role to play?

Sir Neil McIntosh: I do not think so. I could not say absolutely, but I really do not think that the regulations would give the Commissioner for Public Appointments any role in relation to decisions about suitability; her office is more concerned with process. However, this is a process issue.

I understand that, south of the border, if a recommendation is referred back to the Judicial Appointments Commission, which then repeats its recommendation after having considered the matter, the recommendation must be accepted. The situation is different here, where there is a blank in that respect.

Nigel Don: Sir Neil, you will have heard the discussion about whether lawyers who become qualified to be a judge in five years will have the appropriate experience. You will also have heard comments from the Faculty of Advocates about the issue being to do with the merits of the case. What is your view?

Sir Neil McIntosh: Five years of good experience might be better than 10 years of poor experience. There is a range of issues to be considered. Part of the board's task is to get to the roots of the relevance of the candidate's experience, the way in which it has been applied by them and how that impacts on their suitability for appointment. As a lay member, I am not in a position to comment on whether five years is the right length of time. The only thing that I will say is that the longer the period of required experience before a candidate can apply, the more adversely that will impact on the diversity objectives, for the simple reason that, for example, female candidates are still coming into the pool and acquiring that experience. Therefore, it is desirable that the length of time be set at the minimum that is consistent with the credibility of the candidate.

Michael Scanlan: Of course, it is not just about having five years' experience as a solicitor advocate; it is also about what happened previously. If I remember rightly, a solicitor cannot commence training to become a solicitor advocate

until they have five years under their belt practising as a solicitor in the relevant courts in the first instance. We are talking about a law degree, a diploma, in-office training and then 10 years as a solicitor, of which five would be in the superior courts—criminal, civil or both. It is really not as simple as the dean of faculty makes out.

Nigel Don: So, in fact, we are talking about someone who will, at the very least, be in their thirties.

Michael Scanlan: Absolutely. We are talking about somebody who will have under their belt 10 years of at-the-coalface experience in the courts. One hears rumours that some people become solicitor advocates as a badging exercise for their firms, but a solicitor is hardly likely to want to become a solicitor advocate unless they have hard experience of litigation in the Court of Session as an instructing solicitor or of practice in the High Court as a criminal practitioner.

Nigel Don: We will move on. It is clear to me from reading the bill that increasing diversity is a secondary duty—it is an encouragement—and that the primary duty is to appoint on merit. I am sure that you heard the earlier discussions about that. Do you have anything to add?

Sir Neil McIntosh: I will touch on that briefly, because it is broader than the Judicial Appointments Board's role, but it is critical. The first point is to ensure that those who can apply are encouraged to do so and that there is no barrier to people coming forward and presenting themselves.

The second point relates to the processes that we operate. It is the case that appointment must be made on merit. There is a debate to be had about the meaning of merit, of course, because it is not defined, but that is a wider issue. The board takes the view that appointment on merit does not solely mean that candidates must be able to demonstrate that they have all the experience that is required to carry out the role for which they are applying. First, there is the question of transferable skills. If candidates have experience in one field and can demonstrate real achievement in it, it should be possible for them to apply that to another field. Secondly, they should be able to demonstrate potential even if they have all the necessary experience. That is one of the principles that we apply. A good example is that a number of female candidates have come from the field of family law, in which there are—or have been, traditionally—more opportunities for them. If they can excel in that field, there is no reason why they should not be able to apply the same principle and approach to criminal, civil or commercial law.

That takes me to the next point, which is about training and development. We do not present the final article, and nor should we, because we present those who are able to develop within the post. That means that there must be an opportunity to add skills, develop abilities, appraise performance and assist in that respect.

Michael Scanlan: As the committee will have seen from our written submission, a working party has been set up to consider diversity.

Interestingly enough, I happened to ask some time ago—because my wife, who is a solicitor, mentioned it—whether thought had ever been given to job sharing on the bench. I mentioned it to an English counterpart and, out of nowhere, the next thing that I heard on Radio 4 in the morning was that the Judicial Appointments Commission in England was thinking about job sharing for women on the bench. There is no reason at all why it should not be done. As I understand it, in England and Wales, women are coming in at a fairly senior level as full-time judges but working much shorter hours—three months out of four, for example.

We should be considering all sorts of things. I am sure that we will, at the end of the day.

Sir Neil McIntosh: It is also about the structure of the judiciary. We advertise primarily for all-Scotland positions; floating and part-time sheriffs constitute the great bulk of the work that we carry out. In each case, the requirement is that the postholder must be able to travel and respond throughout Scotland. My understanding is that, in reality, many of those positions are fixed and the postholders do not travel to a substantial degree. However, I suspect that, if we advertise that requirement, it militates against female candidates with family responsibilities who might be interested in a particular post in a particular area but who would be required to commit themselves to be out and about throughout Scotland.

Once a statutory board and its remit have been established, it will be important to engage in discussions with all the other agencies involved to examine not only how we advertise and recruit but the nature of the jobs and how they can facilitate diversity.

13:15

Cathie Craigie: I was going to make that point. A previous witness, from the Law Society of Scotland, made the point that someone with a caring responsibility at home—whatever that might be—might not be able to apply. Can you take such matters into account in making your decisions? Does the situation need to be changed?

Although section 12(2) says that selection must be based solely on merit, paragraph 56 of the

policy memorandum, which talks about diversity, states that the bill

"places the Board under a duty to encourage diversity."

Do you have ideas about how you can do that, and do you have the power to implement them just now?

Sir Neil McIntosh: We do not have the power. We respond to requests to fill vacancies that are determined by the present structure. However, we have the right to challenge that and a duty to pursue such matters.

Over the past six years, 23 per cent of applicants, 22 per cent of those who have got through to the interview stage and 21 per cent of those who have been appointed have been female, which demonstrates that the process enables female candidates with ability to hold their own against male candidates. However, the proportion of women in the relevant age group is approaching 38 per cent. Why are only 23 per cent of applications from women if 38 per cent of the relevant age group are women? The important point from the board's point of view is that the working party should carry out research so that we are not making assumptions but are able to find out what issues are affecting the judgments that are being made.

Cathie Craigie: I am encouraged by that. It is not just about women. As, I think, somebody said in the Parliament last week, diversity comes in all different shapes and is quite diverse. It is about social backgrounds, sex, race and that sort of thing.

Sir Neil McIntosh: Absolutely. That is a useful reminder. In respect of ethnic minority candidates, there is also an issue about how young people view the law as a profession and what is happening at school and in colleges. There are also issues to do with candidates from rural communities and city communities, and the balance of skills. It is not just a question of area; it is a question of specialisation and skills. The field is fertile for examination, which I hope will be productive.

The Convener: The final question on the issue will come from Nigel Don.

Nigel Don: It occurs to me that we are increasingly giving rights of audience to barristers, or whatever they are called, from throughout Europe. Are there any implications for appointments to the Scottish bench of those who are not otherwise qualified in Scotland but who may have a large amount of experience here—if that is not contradictory?

Michael Scanlan: The short answer is that I do not know. I suspect that they would not be qualified to do the job because they would not meet the statutory criteria.

Nigel Don: So that is not an issue at present.

Michael Scanlan: It is not an issue at present although, strangely enough, we are receiving applications from people who originally qualified in other jurisdictions and then qualified over here for whatever reason.

The Convener: Most of the people whom Nigel Don is talking about would not have a Scottish practising certificate.

Michael Scanlan: That is correct. We could not entertain the idea of appointing someone who had not been a member of faculty for the appropriate amount of time or who did not have a Scottish practising certificate.

Bill Butler: The board is to be subject to the Freedom of Information (Scotland) Act 2002. What are the implications of that in relation to confidentiality of information?

Sir Neil McIntosh: That is a matter of relative concern to us and it will be difficult to establish until such time as we are able to engage with FOI in practical terms. We recognise that it is proper for any public body to disclose information where possible. Of course, that raises certain issues about candidates' applications, including the personal information contained in those applications, the observations of selection panels and the references provided. Given that an entirely open process would severely hamper our ability to operate, we would seek the proper and practical application of the regulations. I know from people's experience that the information commissioner is sensitive to practical as well as statutory issues, and I am quite sure that we could reach an agreement that recognises all points of view.

John Wilson: The provisions on the removal of board members appear to give the Scottish ministers, in consultation with the chair of the board and the Lord President, discretion over whether a board member should be removed if an offence has been committed. Are the provisions sufficiently clear?

Sir Neil McIntosh: As we make clear in our submission, they could be applied in a draconian way. As with everything else, it is a question not of life as it is, but of life as it might be, and we felt that the issue was certainly material and significant enough to be pointed out.

In practice, I am sure that the provisions will be operated in the way in which they should be. However, because one can never be absolutely certain, it would be better for the bill to contain the protections that it does not have at the moment.

The Convener: I want to sweep up a couple of issues that emerged in previous evidence taking. What are your views on concerns expressed by the Lord President, first, on temporary or part-time judges and, secondly, on the speed with which appointments are made? As Lord Osborne pointed out, a senator is asked to give nine months' notice of retiral, which must be quite difficult for many individuals.

Sir Neil McIntosh: On the first issue, the Lord President quite properly distinguished between temporary appointments, which are used to cover posts in the short term, and part-time appointments. The simple point is that an appointment made by the Judicial Appointments Board is a judicial appointment, and any move to single out one element of the judicial process for different treatment will not stand up to examination.

The situation with part-time judges is exactly the same as that with part-time sheriffs, who also fall within the board's scope. As some of my lay colleagues have observed, anyone who appears before a part-time sheriff should expect to receive justice of the same quality as that given by a full-time sheriff. They are not lower-level positions. There is an argument to be made, therefore, in terms of public confidence and the legislation's fundamental objectives, that part-time judicial appointments should fall within the board's scope.

Michael Scanlan: I absolutely agree.

The Convener: Sir Neil, I said at the beginning of the session that you might want to speak briefly on certain issues that have been raised. You may now have that opportunity.

Sir Neil McIntosh: I take the hint about speaking briefly, convener.

It is only fair that I comment on the important issue of the board's composition and balance. I appreciate that this has been discussed and representations made, not only in the consultation process undertaken by the previous Administration to establish the current board, but in the Scottish Government's current consultation. The issue of a balanced board, however, comes up again and again.

We believe that, with five professional members and five lay members, the board's current composition is balanced and representative. Because there are no sides on the board, there is no question of any particular group—or of any member in any particular group—becoming dominant. Everyone has equal value. Moreover, because we operate by consensus, the board has not had one vote in its six years.

The representation of the five professional members gives us a high-calibre contribution—they are a judge of the Court of Session, a sheriff principal, a past president of the Sheriffs Association, a past president of the Law Society and a past dean of faculty. That is a high-quality professional group. If we set me aside for a moment, the lay members all lead in their professional fields.

The professional members have the right to determine that a candidate does not have the requisite professional experience to be appointed. The lay members will not demur from that. That is a safeguard. Even though the numbers are equal, the professional members cannot be outvoted on issues of professional knowledge and experience and, as chairman, I have no casting vote.

As members will note, of the 17 criteria for appointment, one is professional legal experience. The 16 others are about attitude, approach, background, understanding and the ability to reach decisions, which are all well within the compass of lay members, as well as professional members. Arguably, some lay members have skills and expertise in that respect.

Therefore, the board has addressed the old charge that appointments might be at the hands of the political governing body, because we are independent of that and we are balanced. Equally, the judiciary is not self-perpetuating. A balance exists and the common interest is always in getting the best people and widening opportunity.

The point has been made that the board differs from those in other areas of the UK. That is the case. The board is unique, as are Scottish law and the Scottish Parliament. There is almost a Scottish context to having a balance of lay and professional members. If the board's composition were changed—considering that is perfectly reasonable—the dynamics of the operation would change, so it is important that that is done on the basis of reasoned and considered positions.

Workload is a different question from balance. The board said in a report to Parliament and to the committee that we recognise that legitimate arguments can be made for a capacity to increase membership—for example, to provide extra practical knowledge and the ability to deal with the workload or with conflicts of interest—but on a balanced basis of having one additional lay member for each additional professional member.

Michael Scanlan: Every position has logic. I totally support the board's position on its constitution, but it could equally be argued logically—as George Way did—that for most of our appointments or recommendations, which are for temporary sheriffs, part-time sheriffs and sheriffs, existing sheriffs and judges are not necessarily the best people to determine what constitutes a good judge. Solicitors form a major

conduit for most people who engage in litigation, so there is logic in suggesting that they are better placed by representing the views of their clients and the public generally. I would argue, if I had to—which I do not, because I support the board's position—that we should perhaps have another couple of solicitor members on the board.

Nigel Don: I will pursue the suggestion that when a sheriff is to be appointed, the board should involve an additional sheriff, and when a judge is to be appointed, an additional judge should be involved, to have one other person who is practising who can make the judgment. Does that seem sensible?

Sir Neil McIntosh: It is a matter of balancing the factors. The strength of that argument can be seen. The valid point has been made that those who appear before sheriffs might have more interplay with sheriffs than do those who have a responsibility for them. I understand that standing practice is that no sheriff or sheriff principal will sit in the court of another sheriff while they are performing their duties. That is infra dig—it is not done. Given that, how is knowledge gained? I return to the important point of how we gain information. In its report to Parliament three years ago, the board made it clear that we believed that a substantial gap existed in the knowledge base about those who are in service, because we have no information about how people conduct themselves in part-time shrieval or floating sheriff appointments.

13:30

We have advocated the fundamental argument that there should be a robust, objective and fair process in the interests of all concerned. That takes us towards a process of development within the judiciary and positive appraisal, which is operated by the judiciary, not by the Executive. For tribunal members we receive, along with references, information from reports that is discussed with the individuals—there is nothing secret about that. Our problem is that we are not convinced that there is a basis for objective comment on those within service that would be seen as reasonable. We discussed that with the sheriffs principal. We have put in place arrangements whereby we carry out disclosure checks and reference checks against the information that is publicly available within the records of the faculty and the Law Society in relation to the disciplinary process. We also require candidates to disclose any current activities. There is a whole series of checks. The challenge is getting information on which we can build in a fair and responsible way.

Michael Scanlan: It has been said that the information is available from sheriff clerks. However, the information that we would get would tell us only that temporary sheriff X turned up on time, spent the day on the bench, did a full day's work, got through the business of the court and left on time; it would not tell us anything about the quality of the work that they did. It might be simple enough for the dean of faculty—with a very small faculty—to say positive or negative things about Mr X or Ms Y. However, when I was president of the Law Society of Scotland, we had 11,000 members. It would have been wholly improper for me to have given an opinion on the suitability of one person, simply because I knew them, when there were another 10,999 out there whom I did not know. Sir Neil McIntosh is absolutely right. We would like to get as much information as possible, but that information has to be fair to everybody. It is not right if somebody is put at an unfair advantage because they can produce the goods in relation to the referees that they have, when others, such as those in academia, are not able to produce them.

The Convener: There are no further questions, so I thank our witnesses. I am sorry that this has been such a long meeting, but we have had a lot to get through. Your contribution has been exceptionally valuable. We are much obliged to you.

We come to item 3, which also relates to the Judiciary and Courts (Scotland) Bill. I invite members to agree to delegate to me the responsibility for arranging for the Scottish Parliamentary Corporate Body to pay, under rule 12.4.3, any witness expenses. Is that agreed?

Members *indicated agreement*.

The Convener: Thank you. We agreed earlier to move into private session for the rest of our business.

13:33

Meeting continued in private until 13:37.

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