JUSTICE COMMITTEE

Tuesday 18 March 2008

Session 3

£5.00

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

CONTENTS

Tuesday 18 March 2008

JUSTICE COMMITTEE
8th 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 ALSO ATTENDED:

Fergus Ewing (Minister for Community Safety)
Kenny MacAskill (Cabinet Secretary for Justice)

THE FOLLOWING GAVE EVIDENCE:

Jim Andrews (Victim Support Scotland)
Ken Brown (Public and Commercial Services Union)
Eleanor Emberson (Scottish Court Service)
Susan Gallagher (Victim Support Scotland)
Lord McCluskey
Frank Russell (Victim Support Scotland)
Alastair Sim (Scottish Court Service)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 18 March 2008

[THE CONVENER *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off their mobile phones.

Does the committee agree to take in private item 7, which is consideration of whether to accept into evidence a further written submission on the Judiciary and Courts (Scotland) Bill?

Members *indicated agreement*.

Subordinate Legislation

10:02

The Convener: We have for our consideration 12 Scottish statutory instruments that are subject to the negative resolution procedure.

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2008 (SSI 2008/40)

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No 2) 2008 (SSI 2008/72)

Police Grant (Scotland) Order 2008 (SSI 2008/46)

Advice and Assistance (Scotland) Amendment Regulations 2008 (SSI 2008/47)

Civil Legal Aid (Scotland) Amendment Regulations 2008 (SSI 2008/48)

Adult Support and Protection (Scotland) Act 2007 (Adults with Incapacity) (Consequential Provisions) Order 2008 (SSI 2008/50)

Adults with Incapacity (Accounts and Funds) (Scotland) Regulations 2008 (SSI 2008/51)

Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2008 (SSI 2008/52)

The Convener: The Subordinate Legislation Committee raised no points on the first eight instruments. Is the committee content to note them?

Members *indicated agreement*.

Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Amendment Regulations 2008 (SSI 2008/53)

The Convener: The regulations were drawn to the committee's attention on the ground of failure to follow normal drafting practice—although not to the extent that their validity would be affected. If members have no comments, are we content to note the regulations?

Members *indicated agreement*.

Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Amendment Regulations 2008 (SSI 2008/55)

The Convener: The regulations were drawn to the committee's attention on the ground that they contain a footnote that could affect their operation. I invite comments.

Nigel Don (North East Scotland) (SNP): An explanation may be required—or desirable. Is it within our compass to ask the Government to prepare an explanatory note in which it makes the point that the footnote contains a phrase that is ambiguous—

The Convener: We have that in appendix 2 of annex A to paper J/S3/08/8/10.

Nigel Don: So the explanatory note accompanies the regulations.

The Convener: Yes.

Nigel Don: Forgive me, but that note was written for the committee. I am asking for a note to be made available to the general public. Those who have to fill in the form need that assistance. If the footnote is ambiguous or iffy, the Government should ensure that the form is accompanied by an explanatory note. That is my request.

The Convener: I am quite relaxed about that. We will write to the Government to draw our minor concerns to its attention and to suggest that, in order to prevent any misunderstanding on the part of the general public, a note of explanation should be issued with the regulations.

Nigel Don: That is what I am asking for.

The Convener: Is that agreed?

Members *indicated agreement*.

Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2008 (SSI 2008/56)

Charities References in Documents (Scotland) Amendment Regulations 2008 (SSI 2008/59)

The Convener: The Subordinate Legislation Committee raised no points on these instruments. Is the committee content to note them?

Members *indicated agreement*.

10:07

Meeting suspended.

10:08

On resuming—

Judiciary and Courts (Scotland) Bill: Stage 1

The Convener: Item 2 is the second of the committee's scheduled oral evidence-taking sessions on the Judiciary and Courts (Scotland) Bill. It gives me great pleasure to welcome Lord McCluskey to the committee this morning. Lord McCluskey is a former Solicitor General for Scotland and former Opposition spokesman for Scottish legal affairs. For many years, he was a distinguished judge in the Court of Session and the High Court.

We have read with considerable interest the submission that you made to the committee, Lord McCluskey, and your article in *The Scotsman*. We are very interested to hear what you have to say on the bill this morning. We are exceptionally grateful to you for giving us your time to give evidence.

We will go straight to questions. You have been critical of the scope and nature of the consultation process that lead to the bill. Are you satisfied that adequate time was allocated to that process and that interested parties had sufficient opportunity to contribute to it?

Lord McCluskey: I am reasonably satisfied about that. However, I point out that whereas on a previous occasion a royal commission sat for three years and visited a number of countries, this consultation started out by giving people 99 days in which to respond to the draft bill, among a number of other papers. Ultimately, however, the delay that was apparently caused by the Lord President's illness means that there was probably sufficient time. In fact, when one looks at the bill, the issues that it covers are much narrower than was envisaged in the draft bill. I am reasonably satisfied, however.

The Convener: You questioned the need for the bill on the basis that judicial independence is already protected by common law. The committee heard last week that the provisions are important symbolically as they will define in legislation

"the boundaries and relationships between the different institutions of government in Scotland."—[*Official Report*, *Justice Committee*, 11 March 2008; c 584]

We also heard that they are a necessary safeguard in the event of what was euphemistically described as less pleasant times. What is your response?

Lord McCluskey: Well, they are not necessary and they are not a safeguard. The evidence that

you heard last week was, with respect, naive. The Lord President said:

"We live in pleasant times. Times may not always be pleasant, however."—[*Official Report*, *Justice Committee*, 11 March 2008; c 568.]

Bill Butler then asked whether the Lord President was saying that, in future, the provision could be more than symbolic. The simple answer is that it could never be more than symbolic, because, if an unpleasant Government came to power—that is to say, one that did not respect democratic values, which is what I suppose the Lord President meant by times perhaps not always being so pleasant—do you imagine that it would not behave like the Governments in, say, Zimbabwe, Pakistan or Chile, or, earlier in my lifetime, those of Spain, Portugal, Germany or Greece? If a party came to power that did not respect democratic values, the legislation that we are discussing would not be worth the paper that it is written on. Just as this Parliament can pass the bill a week on Monday and repeal it a week on Tuesday, it can be amended. The word "not" can be inserted, for instance. The provisions are worth nothing at all. My other fear is that the provisions will narrow the scope of judicial independence.

The Convener: That is an interesting point.

You have suggested that giving the Lord President formal status as the head of the Scottish judiciary will add "significantly to the burdens" of that office and will

"transform the Lord President into a super administrator."

You will have heard what Lord Hamilton had to say on the matter last week. Were you reassured by his evidence that he envisages that the majority of his time will be spent doing what Lord Presidents should—to my mind, at least—be doing, which is presiding over the appeal court?

Lord McCluskey: Over my lifetime, the Lord President invariably remained in office as Lord President until he retired. However, latterly, the burden of administration has become such that Lord President Hope and Lord President Rodger, who followed him, departed as quickly as they could to London, in order to write judgments on matters of law rather than administer everything from the colour of the lavatory paper to the frequency with which the windows in Parliament house were cleaned, which are a couple of examples of the kind of thing that they had to regulate.

I advocated publicly—but without success until recently—that a chief administrative judge should be appointed. I have seen examples of that in America, Australia and elsewhere. That has now been done.

Judges are not good administrators. A judge has been an advocate for most of his life. He administers his fee book and his diary and nothing else. He has no staff. He operates through a limited company, Faculty Services. My experience of administration was very small, like that of the Lord President. The burden that is put on the Lord President requires him, therefore, to engage large numbers of civil servants to do his bidding, and I do not approve of that. I do not approve of the growth of the civil service, which has been massive in my time, especially in the Crown Office. When I started in the Crown Office, there were about four civil servants; now, there must be 80.

The Convener: When was the administrative judge appointed?

Lord McCluskey: I do not know. It was not done when I retired in 2004, but, having read the Lord President's evidence, I now understand that there is one. I advocated that for many years—in fact, I did so in my responses in 2006, so it must have been done since then.

The Convener: To some extent, I share your concerns, which is why I questioned the Lord President quite thoroughly last week and discovered, in doing so, that he was content with the situation. It may well be that the appointment of the administrative judge has greatly alleviated the administrative pressure on the Lord President.

Lord McCluskey: It may have done, but it will also have made another judge devote more time to administration, because that is what is happening.

In my time, a number of judges retired early because they went on the bench to do what they had been doing all their lives—to consider the development of the law and its application to particular cases—but found themselves moved more and more towards criminal business. Nowadays, judges spend about three sitting days out of four wearing criminal robes and doing criminal business, either in appeal cases or in trial cases. The amount of time that they spend developing the law is tiny—I would be surprised if it were a quarter. If they are going to be given administration burdens as well—the bill is full of such burdens—I am afraid that that will make people disenchanted. Already we see that sometimes the best people do not apply to go on the bench.

10:15

The Convener: You will have heard the evidence that Lord Hodge, who is a comparatively recent appointment, gave last week. Prior to his appointment, he was principally a civil practitioner. He underlined the point that you have just made

about the bias of criminal work over civil work, but he said that judges are very adaptable and that there was no reason why they should not be able to carry out the dual role of being both a Court of Session judge and a High Court judge.

Lord McCluskey: I accept that, but he was addressing a different point. He said that a person does not have to be a criminal lawyer with criminal experience in order to be a good judge in a criminal case, because the technique is the same. I will use a metaphor. A person may learn to drive in a Ford Escort, but if they win the lottery and get a Bentley, they will still be able to drive it. In a sense, if a person moves into the criminal courts from doing civil work, which involves skills in impartiality, research, listening to arguments and the proper phrasing of words, they will carry their skills with them. I was fortunate. I spent a lot of my career—12 years—in the Crown Office, and much of it working for the defence in the criminal courts. I also did tax, civil and planning work. However, I understand what Lord Hodge was talking about. He did not say that judges are happy to have more administration work or even that they are happy to do criminal work—he said that judges are competent to do such work. I agree with that.

The Convener: I accept that there is a difficulty with the Lord President, which is why I was firm in pursuing the matter with Lord Hamilton last week. However, how much administration work will a lord ordinary have if the bill is passed?

Lord McCluskey: Very little, unless he is made a chief administrative judge or is appointed to a position such as senior lord ordinary. However, it is a serious matter for the Lord President. I think that the recent history of Lords President, from Lord Hope onwards, indicates that the burden of administration is intolerable. I used to have an office next door to Lord Emslie in his latter days as Lord President. He was very upset about the amount of administration that he had to do.

The Convener: I want to turn to the constitution of the Judicial Appointments Board for Scotland. The bill aims to put that board on a statutory basis. You have said:

"The more judges on the Board the better."

What role, if any, should lay people have in relation to judicial appointments?

Lord McCluskey: I can see a role for lay people. The reason why I made that point—I support other judges on this matter—is that, as a judge, I have had to study other judges' opinions. I do not mean only results—I mean their reasoning. Judges look at such opinions in court every day, but lay people do not. How many people here, for example, can honestly say that they have sat down and read a whole 30-page opinion from start to finish? Probably very few—but judges do it all the time. We might do so for the purposes of a case—if sitting as an appeal court judge, for example—or as general scholarship, but as a result we can detect who is able, who is less able, who is hard working, who is less hard working, who is slow, who is quick and who has a spark and who lacks a spark. We can make judgments every day about the people with whom we work in the same building, and we are in a good position to assess their merit.

The Convener: At the initial stage of a shrieval appointment, for example, is the balance struck by the Judicial Appointments Board for Scotland satisfactory, or should it be changed?

Lord McCluskey: To be honest, I know so little about the appointment of sheriffs under the new system that it would be offensive of me to offer you opinions on that as if they had any validity, because I do not think that they do.

I am happy for laymen to be represented, but for other reasons that I have mentioned elsewhere, I do not like the trend towards positive discrimination in such matters, although I do not think that that applies to the composition of the Judicial Appointments Board.

The Convener: We will now move on to judicial appointments.

Bill Butler (Glasgow Anniesland) (Lab): Lord McCluskey, you have just given your view on positive discrimination and you have previously been critical of the provision that will require the Judicial Appointments Board to

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

You have described the idea as "politically correct nonsense". Do you see any merit in the Judicial Appointments Board contributing to the development of a judiciary that more accurately reflects the society that it serves?

Lord McCluskey: I can see merit in the Government, whether through the board or otherwise, taking steps to enable more people to acquire the skills that are needed to be a judge. However, the comparison that I make, which I hope is not too far off the mark, is that if I am going to be operated on by a brain surgeon, I want the brain surgeon to be the best one—I do not want him operating because he is black, Jewish, Catholic or whatever. It is the same with judges—the same kind of expertise is required.

There was massive support for the notion, until the strange events of June 1993. I could give you quotes from the English Judicial Appointments Commission and many others who have said that we must cut out the idea of using diversity to dilute the quality of the judiciary.

Bill Butler: I hesitate to put words in your mouth, but I think that you are saying pretty clearly that you believe in a meritocracy, rather than in positive discrimination or affirmative action, which you feel has a detrimental effect.

Lord McCluskey: Affirmative action has no place in the selection of brain surgeons or High Court judges. It is right to encourage people, whether women or others. My mother went to university with Margaret Kidd, who became the first female Queen's counsel in the United Kingdom, so I know something about the background—my mother was conscious of it. I am anxious that women should be promoted on merit, which is exactly what is happening. If you want to promote Jews, Catholics or Muslims on merit, by all means do so, and by all means let the Government promote the acquisition by people from those unfavoured groups of the skills that they need to get on to the bench. However, to invite them to apply when they have not got those skills is a kind of mockery. The board has neither the membership nor the resources to promote the acquisition of those skills. If that is going to be done, it should be done properly and not by sticking section 14 in the bill.

Bill Butler: Are you saying that affirmative action has a place, but at an initial level, like the affirmative action that was carried out in education in the 1960s and 1970s in the southern states of America?

Lord McCluskey: I am happy with that and I always have been. I have studied the American system for various reasons—I gave the Reith lectures on the American constitution. However, affirmative action does not have much to do with the higher judiciary or, indeed, the shrieval judiciary.

The chairman of the Judicial Appointments Board said that merit is not defined, which it is not. So what does it mean? He explained that it does not necessarily mean that a person has the capacity to do the job, but that there is a kind of belief on the board's part that a person has the capacity to learn how to do the job. I do not want my train driver to be selected on the basis that he might learn how to drive a train or a brain surgeon to be selected on the basis that he might learn how to do the surgery. When people go on the High Court bench, they must be able to do the job then and there, because the work starts on day one—their first case might be a murder case.

Bill Butler: So the Judicial Appointments Board is not a place for apprentices.

Lord McCluskey: Certainly not. By all means let the Government do that work, but do not pretend that it can be done by a board that has neither the resources nor the membership to do it.

Bill Butler: You described the process to appoint the new Lord President in 2005 as "shrouded in secrecy". Do you consider that placing the procedures for appointing the Lord President and Lord Justice Clerk on a statutory footing will improve the transparency of the process?

Lord McCluskey: I do not think that transparency comes into it. What if we were allowed to read the essays that Lord Hamilton and Lord Gill wrote? It was a ludicrous notion that people of their background and experience should write essays saying what they would do if they became Lord President. It was a bit like asking them to write about what they did on their summer holidays.

We have not seen those essays, and we do not know by what process Sir David Edward, who had very little experience of what was happening in Scotland, was selected. We do not know the role of Lord Cullen leading up to the decision. Many questions are being asked behind the scenes. What process was used? It certainly was not transparent.

Bill Butler: In that case, how would you wish such appointments to be made?

Lord McCluskey: It is a difficult matter. We have to trust the ultimate political power, even though that does not always produce the best results. For example, the Prime Minister appoints the Lord Chief Justice of England and Wales on the advice of the Lord Chancellor; and the Prime Minister appoints our Lord President on the advice of the First Minister. We have to trust someone. I am happy to trust our elected leaders. Despite having been 30-odd years in the House of Lords, I am extremely democratic and respectful of democracy, and I trust elected politicians who have reached high office to do the right thing in relation to such matters.

Bill Butler: The bill makes a number of provisions in relation to judicial conduct and complaints. Your response to the introduction of such measures is:

"The existing systems have not been shown to be inadequate."

Do you consider that the existing systems are understood by and offer satisfactory recourse to court users?

Lord McCluskey: I do not know. However, I know that the existing system for High Court judges was introduced by section 95 of the Scotland Act 1998, as I am the author of that section. The Government of the day produced a proposal that a judge could be sacked by a majority vote in this unicameral Parliament. The judges, without my intervention, proposed that that

should be changed to a two-thirds majority. I took the view that even a 90 per cent majority would not do; we had to follow a tried and traditional method, and we have had a tried and traditional method for sheriffs since 1887.

It so happens that, when Sheriff Stewart was dismissed, I presided over the case in the inner house of the Court of Session. The system worked extremely well. There have been only two such cases involving sheriffs in my lifetime. The other one involved a sheriff whose name I forget, who advocated a vote for the referendum in 1979.

Bill Butler: Was it Thomson?

Lord McCluskey: Yes. That was regarded as political, and Bruce Millan effectively had him removed. There have been no other such cases, as far as I am aware.

That approach has never been used as far as the judges in the High Court are concerned. The Lord Advocate of the day, Lord Hardie, said in the House of Lords that he expected that it never would be used. I have the wording here somewhere. It is all in *Hansard*, anyway.

The Convener: I will open up the discussion to other members in a moment, but I wish first to make one or two points about the appointment of judges generally, and specifically the appointment of the Lord President and the Lord Justice Clerk. We have heard your views. Are we not inhibited to some extent by human rights legislation in respect of such appointments being made by the Government, which could cause a difficulty, as there is not the necessary detachment?

Lord McCluskey: The answer is no. The Lord Chancellor was a member of the Cabinet and prior to June 2003, he appointed the judges in England. The matter was considered by a high-powered committee led by Lord Slynn of Hadley, who was the British judge in Luxembourg. That committee came to the conclusion that there was no contravention of the Human Rights Act 1998.

I go to many places around the world, including almost all the signatory countries to the European convention on human rights, where the judges are appointed by those with political power. It has always been so, and it is so in the United States, which has had a Bill of Rights since 1791. Its judges are appointed by the President, subject to the advice and consent of the Senate Judiciary Committee.

The Convener: We believe that complaints are, at the moment, few and far between, although we have asked for further figures. I am anxious not to put words in your mouth, but do you think that, in its provisions regarding complaints, the bill might be using a sledgehammer to crack a nut?

10:30

Lord McCluskey: Your phrase is not entirely original, but in this case I am happy to adopt it.

If everyone who complains about a judge secures a full hearing involving committees and a ridiculous so-called reviewer who reviews the review—I do not know who will review the reviewer—you will have big fleas on the backs of little fleas, little fleas on the backs of other fleas and so on ad infinitum. Of course, you can have such a system, but you will pay the price in bureaucracy, time wasting and giving people opportunities to mock the judicial system.

On the whole, the current system works reasonably well. I can think of several High Court judges in my time who drank too much, who did not do their homework and who did not turn up—I will certainly not name any names, even if invited to do so—and they were successfully dealt with behind the scenes by the Lord President. That is the way the system has to work.

Margaret Smith (Edinburgh West) (LD): You have expressed your fear that the bill will narrow judicial independence. Will you expand on what you mean by that?

Lord McCluskey: I am happy to do so. First of all, the so-called duty in the bill is laid on a very select number of people. However, Donald Trump, whom I have mentioned in a couple of articles that I have written, is not obliged to respect the judiciary's independence—and nor, indeed, am I. I am not a serving judge; I am not concerned with the administration of justice. The bill also ignores eight or nine other ways that I have listed in which judges can be influenced.

For example, within 48 hours of the terrorist incident at Glasgow airport, the Lord Advocate removed those who had been arrested to London for trial. What if the same kind of incident happened at Edinburgh airport and, knowing what happened in the previous incident, the accused—and their lawyers—sought and were granted an interdict against their being removed to the Old Bailey? The First Minister might then go to the Lord President and say, "There's nothing we can do about this case—that would be interference—but in future would you kindly make sure that that daft judge doesn't interfere with transferring these people to England and keeping the trouble away from Scotland?" Such interference could occur.

I have previously listed a good many other cases that highlight this very issue. For example, in the bloody Sunday inquiry, the Prime Minister allegedly gave instructions to the judge in charge. Moreover, as any trade unionist or historian of the constitution knows, judges who were known to be on the right were selected to sit on the trade union cases at the end of the 19th and the beginning of

the 20th century because they would find against the unions. There were also suggestions behind the scenes that Catholics should not sit on abortion cases or that Jews should not sit on immigration cases involving Muslims. As a result, judges can be deselected without contravening the terms of section 1. That said, the duties imposed by section 1 are pitifully small and bear very little relation to the common-law offence of attempting to interfere with the course of justice—which, I have to say, is the real safeguard.

I have one final point. The Lord President said that embedding the principle of judicial independence in constitutional structures was internationally recognised. After studying the issue, I know that that principle is embedded in the written constitutions of most countries in the world. However, given that they include Zimbabwe, Pakistan and Chile, that is no guarantee of judicial independence. Such independence lies not in constitutions and statutes but in the hearts of men, and I would rather it stayed there.

Paul Martin (Glasgow Springburn) (Lab): You have suggested that the bill's provisions with regard to complaints about judicial conduct would make a mockery of the system. Will you elaborate on that comment?

Lord McCluskey: I would not go quite so far as that. Did I say "mockery"? If I did, I was getting carried away.

There is a price to be paid for setting up a body to inquire into little complaints, such as complaints that the judge was late, that the judge apparently had a cold and coughed over the witness, or that the judge appeared to be biased from the start. Appeal courts look into the things that really matter. Nowadays, we can listen to a recording of the trial judge directing the jury to establish whether the emphasis of his words shows a bias, so the appeal court can look into the kind of issue that really matters. For example, I had a well-known party litigant before me who is barred from appearing in the courts except when he is being sued. When he appeared before me, he took the view that I was biased and wrote to everyone in sight, including the First Minister, the Lord President and me. He was a well-known nutter; I could mention his name, but I will not. The matter was simply not pursued.

There has to be some kind of system. The bill envisages one that will filter out the vexatious cases that have no merit. However, that also involves a judgment, so who makes the judgment about whether the person who makes that judgment has made the right judgment? The line has to be drawn somewhere.

Paul Martin: We could argue that that already happens in local government, where the ombudsman reviews the procedures that were followed. Is there an argument for having a filter to ensure that procedures were followed correctly during the judicial process?

Lord McCluskey: That is an argument, but it is not one that I support. As I said before, ultimately, we have to trust someone in the system, whether it is the Lord President, the First Minister, the appeal court, the judge, or whoever. You are saying that you somehow trust the ombudsman. One of my criticisms of ombudsmen, or the human rights commissioner, about which I addressed the committee a few years ago, is that when we consider the intellectual quality and experience of the people who are recruited for that kind of job, we find a much lower-grade type of person than the ones on whom they are sitting in judgment. That is what happens. The salary that was offered to the human rights commissioner was about half of that which was offered to a sheriff, so what kind of person is going to be recruited into that job? The situation is similar with ombudsmen; it tends to be the case that they are sitting in judgment on people who are much better qualified than they are. I am not happy with that. I would rather trust the people. It took me 29 years from being called to the bar to being elevated to the bench and, during that time, I hope that my weaknesses and strengths were properly assessed by my fellows. Ultimately, I deserve to be trusted if, after 29 years, I have not been found out, so to speak.

Nigel Don: Good morning, Lord McCluskey. I want to take you back to your earlier comment to Margaret Smith about the bill narrowing the protection of judges and their independence. As I heard it, you referred to a common-law offence, about which I plead complete ignorance. Will the bill displace the common law and thereby narrow the independence of the judiciary, or will it supplement the common law and, overall, not do it any damage?

Lord McCluskey: First, the bill would not supplement the common law because it would not add anything at all. Secondly, I guess that it would probably not interfere with the common-law offence. However, there is a worry because, under the jurisprudence—the case law—of the European convention on human rights, one of the requirements for most of the provisions is that if they are to be enforced or evaded, there has to be a provision in law. Europe does not very much like the common-law system that obtains in the United Kingdom. The European Court of Justice could say that, as we have chosen to legislate for who has to respect the independence of the judiciary and by what means—it is very limited; section 1(2) says that ministers

"must not seek to influence particular judicial decisions"—

that supplants the common law. Sometimes it will and sometimes it will not, but I guess—and I am confident that I am right—that the bill will not supplant the common law. However, it certainly will not add to it. It is just gesture politics.

Nigel Don: Are you suggesting that a specific provision to preserve the common law might be a useful precaution, on the basis that, as you say, other jurisdictions that do not like the common law might decide that it has been supplanted?

Lord McCluskey: No, there is no need for such a provision to preserve the common law. The crime of murder, and even the crime of rape, is defined by common law at the moment. Most serious crimes and offences are defined by the common law, and it tends to work. Ultimately, the bill would not replace the common law.

Nigel Don: But would that not be a wise precaution? Forgive me for pushing the point, but it is crucial. Whether the common law is displaced is fundamental to our constitution. You will note that we are in the process of revising the common law on rape, for all sorts of substantive reasons. It might well be that the common law on murder is sufficiently particular not to pose a problem. The point that you make is genuine, but another way to look at it might be that the inclusion of some means the exclusion of others. It might be that, under common law, by imposing that duty on a few people, we exclude others.

Lord McCluskey: My guess would be that the courts would hold that the bill does not exclude the common law, but someone such as Donald Trump could make that argument—I choose him as an example of someone who might have an interest in litigation in Scotland without being one of the people who are listed in the bill as those who should not interfere. If he or his agent made an approach to a judge to say, "Come on, you come from that part of the country and you know those sand dunes aren't worth the paper they're written on," that would not be a breach of the bill. If he was charged under common law with attempting to interfere with the course of justice, he could plead that Parliament has created a new offence and the old one does not exist any more. That argument could be used, although I do not think that it would succeed.

The real point is that the provision on judicial independence does not add anything. It is there for the reason that I have explained both in my *Scotsman* article and in my submission, to which the convener referred earlier: the English needed it, so we have slavishly copied them. The Lord President said that provisions of this kind are recognised internationally, but that is not true. It is true in many constitutions, and it is true in the English jurisdictions—the colonies, to which we handed down constitutions in which we included independence of the judiciary—and we now have it in England for the reasons that I explained in my article. However, we have never had a statutory declaration in Scotland. There is no need for us to follow slavishly and plagiarise the English legislation.

The Convener: Lord McCluskey, the committee is obliged to you for taking the time and trouble to give evidence this morning. What you have to say is frequently controversial but always interesting, and it will impact considerably on our consideration of the bill.

10:43

Meeting suspended.

10:46

On resuming—

The Convener: I welcome the second panel. Eleanor Emberson is the chief executive of the Scottish Court Service and Alastair Sim is its director of policy. We will ask a particular series of questions, but if we feel that anything else needs to be teased out, we will certainly ask about it.

Stuart McMillan (West of Scotland) (SNP): The bill will establish the SCS as a body corporate of 13 members, chaired by the Lord President and with a majority of judicial members. What contribution will senior members of the judiciary make to the work of the SCS?

Eleanor Emberson (Scottish Court Service): The purpose of the SCS is to provide all the support arrangements for the courts. A good, effective working relationship between the officials of the court service and the judiciary is essential. Sitting down together and taking an overview of the business of the courts and of the necessary arrangements to support the courts, their development and their plans and strategy seems to me a positive thing to do.

The Convener: Do you have anything to add, Mr Sim?

Alastair Sim (Scottish Court Service): No, I think that that is a fair description. I add only that our experience of working over the past year with a new strategic board that includes judicial representatives has been extremely positive. We have been lucky to have Lord Philip and Sheriff Principal Bowen on our strategic board in an advisory capacity. That has helped us to take decisions that are better by being informed by the judicial perspective and which the judiciary understands better because of the judicial representatives' participation in the decision making.

Stuart McMillan: Are you satisfied that a single office-holder can carry out the dual functions of head of the judiciary and chair of the SCS? How much time will the Lord President be required to devote to his role as chair of the SCS? Before answering, I ask you to bear in mind Lord McCluskey's earlier points regarding the amount of administration that judges currently must undertake.

Eleanor Emberson: I do not envisage that role imposing a much greater burden of administration, but it might involve time being spent in different ways. There would, of course, be the time spent chairing board meetings, as well as a certain amount of time for being briefed for that. Lord McCluskey talked earlier about Lords President having to decide on trivial matters to do with the functioning of business in Parliament house, which is not a good use of judicial time. It strikes me as a much better use of a Lord President's time to chair a board of the Scottish Court Service so that he and all the other members have confidence that that board is delegating, through its officials, all the detailed decisions. I hope that, rather than taking more time, that would be time better spent.

Stuart McMillan: How will the board of the SCS ensure that the views of court users are considered in the running and operation of the courts?

Eleanor Emberson: We spent a lot of time thinking about that. The customers of the Scottish Court Service can be viewed in many different ways. Obviously, they include all those who walk through the doors of the court building, whether for a court case or simply for some administrative matter. However, the service's customers are ultimately all the people of Scotland, many of whom may never need to set foot in a court. People need to know that if they ever end up in the unfortunate situation of needing to enter a court, the system will work well.

After spending some time thinking about the different groups of people who use the courts and how their views could be represented, we came to the view that the best way to represent court users—customers of the service—is for the board to have three independent members who are not part of the legal system and who can, in effect, be the voice of the people of Scotland. The independent members will bring to bear their expertise on how to run the system efficiently. They will not represent particular interest groups because there are potentially many such groups and, once we started down that road, we would need to choose some groups rather than others.

Stuart McMillan: How will people be able to convey their thoughts, opinions and suggestions to the independent members?

Eleanor Emberson: Are you thinking about people who have a particular issue to raise about the way in which court business is done?

Stuart McMillan: Yes. I am thinking about individuals rather than representatives of organisations.

Eleanor Emberson: We already receive feedback from individuals both locally and, occasionally, nationally. Many of our local courts have gained the charter mark, for which they need to show that they have feedback mechanisms to take into account the comments of court users. Such courts need to demonstrate that feedback forms are available in court and that the feedback is used and acted on or, where that is not possible, that an explanation is given to people. People also write to headquarters to complain about particular issues or to draw them to our attention. Sometimes, we cannot do anything about those issues, but often we can choose to act on the feedback. I do not envisage that being any different. Significant issues that are raised will be brought to the attention of the board.

Alastair Sim: We also put a lot of work into a periodic survey of all court users who are passing through the court for any reason on a particular day. That feedback is taken extremely seriously by the management of the Scottish Court Service. If it points up an issue on which people are experiencing a degree of dissatisfaction, we know that we need to address that. I certainly hope that the Scottish Court Service in its new statutory form will continue to use such methods to ensure that we know what court users are thinking and that we have a structure to consider and respond to that.

Stuart McMillan: How regularly does that survey take place?

Alastair Sim: At the moment, the survey takes place annually. It will be up to the new body to consider whether that is the right cycle. I will certainly advise the new Scottish Court Service to ensure that such surveys are carried out reasonably frequently so that we continue to receive an up-to-date snapshot of the experience of court users.

Paul Martin: Could you give us a specific example of feedback on which action has then been taken?

Alastair Sim: The first example that springs to mind is the experience of witnesses in courtrooms who have been waiting to be called. Obviously, it can be frustrating if people are waiting for a while without knowing when their case will be heard. We have done some work to ensure that witnesses are kept better informed about when their case will be heard and are updated when business changes during the day. We can pick up on such elements

and niggles from the court user's perspective and do something to address them.

Eleanor Emberson: If we establish the statutory body that is envisaged in the bill, there is potential for significant issues that come up in the customer survey to be considered by a board whose members include not just officials but members of the judiciary and which is chaired by the Lord President. In that way, the judiciary and officials can consider together issues that are raised about court business.

Paul Martin: If we are realistic, do we think that the Lord President will consider the feedback forms as part of the new board that will be set up? Do you expect the Lord President to go into that kind of detail?

Eleanor Emberson: No, I do not envisage the Lord President considering feedback forms; we make a report of the customer survey and the main issues that were raised in that survey. I would expect the board to look at an annual—or whatever the frequency—customer survey report.

Paul Martin: Do not get me wrong—I am not saying that the board should not consider the feedback; I am just trying to clarify matters. We are trying to lessen as much as possible the administrative burden on the Lord President, but then we are saying, "Actually, he is going to look at these feedback forms."

Eleanor Emberson: No, he would not look at feedback forms; he would look at one report that would cover all the survey results.

Alastair Sim: An important point is that such consideration would not involve the Lord President alone; it would go to all 13 members of the Scottish Court Service corporate body. It might not be the Lord President who takes the lead in the new body, which will try to address the issues. As Eleanor Emberson said, the board members would get a summary of the main points that would be written in such a way that a busy person is able to assimilate them and come to a reasonable view on them.

Nigel Don: Last week, the Sheriffs Association pointed out that that there was no emphasis in section 57 on the Scottish Court Service providing a service for those sheriffs who sit on the bench. You did not draft the bill—or perhaps you did, I am not sure—

Eleanor Emberson: No.

Nigel Don: There seems to be an omission in the bill, which notes a particular need to take into account members of the public and slightly less need to consider those who are in the judicial system but has absolutely no requirement to do anything for judges and sheriffs. Do you regard that as an omission?

Alastair Sim: The logic of that is explained first at section 57(1), which details our core purpose of

"ensuring the provision of, the property, services, officers and other staff required for the purposes of—

(a) the Scottish courts, and

(b) the judiciary of those courts."

That puts our duty to the judiciary absolutely at the statutory centre of what the Scottish Court Service is about. Section 57(2) qualifies that by saying that our duty is not only to the judiciary; we also have a duty to make sure that the administration of justice is co-ordinated with other bodies and that we take account of the needs of court users and the public. The duty to the judiciary is appropriately placed at the centre of our purpose, but it is appropriately conditioned by our wider duties.

Nigel Don: Thank you; that was an entirely satisfactory response.

Section 61 states that

"The SCS may give information or advice"

and that

"The Scottish Ministers must have regard to such information".

Do you have a feeling about where that came from, what it is supposed to provide and whether the duty on the ministers to take notice of advice that "may" be given is appropriate?

Alastair Sim: I think that it is about right. The Scottish Court Service may decide to offer advice—there will be an operationally informed perspective from the Scottish Court Service about what proposals for policy or legislation might work or be drafted in a way that will work. There is a role for the service to give operationally informed advice and we may want to give it in circumstances that we see as desirable.

It is fair that, once such advice is given, there should be a duty on the Scottish ministers to think about it. There is no obligation on them to take the advice that the Scottish Court Service may offer, but it is reasonable that there should be an obligation on them to think about it seriously.

Nigel Don: On what sort of timescale or at what frequency do you envisage such advice being given? Do you visualise formal quarterly reporting or the occasional phone call?

Alastair Sim: I do not see formal advice being given particularly often. We would continue in a process of dialogue with policy makers in the Scottish Government, as we do at the moment. Almost daily, we are in conversation with policy makers in the Scottish Government about how legislation or policy can be made so that it will make sense when it operates in the courts. We offer practitioner-informed administrative advice to

help them to ensure that policy and legislation are delivered in a way that is technically right.

11:00

Nigel Don: I am trying to work out the legal implications of the provision. From last week, we got the message that the judges do not imagine that a lot of this is going to be litigated on. However, suppose I was that Scottish minister. At what point would I have to take what you are telling me as advice that I must have regard to? We would have telephone conversations and face-to-face meetings quite regularly, and I would like to know what advice must be taken into account. Can you see the problem that I am getting at?

Alastair Sim: I do not see it as a problem. There would be few occasions on which the Scottish Court Service might choose formally to escalate something by saying, "We are offering formal advice under section 61, to which you should have regard because we are dealing with a serious situation." I would interpret the provision as meaning that ministers have to have a reasoned reason for not taking our advice. I see the provision as a long stop and I think that our continuing process of discussion with core policy makers in the Scottish Government will be such that matters will never escalate to the stage at which we would be quoting section 61 at people.

Nigel Don: On the accountability of the Scottish Court Service to Parliament, what is your view on the idea that the Lord President should have a degree of accountability to Parliament, in addition to all the other things that we know he is responsible for? Is that the right route by which accountability can be ensured?

Eleanor Emberson: I am the accountable officer for the Scottish Court Service at the moment and I would have that role under the new arrangements as well. I would expect to be the person to answer any questions that this committee or other committees might want to ask about the business of the service. There are strong requirements on me to ensure that everything is done properly, that there is efficient use of public funds, that a best-value approach is taken and so on. If I had any concerns about any of that, it would be for me to draw that to the attention of the board, including the Lord President as chair. There are already procedures that could be followed if my view were overridden. I think that all the safeguards are in place.

Nigel Don: That begs the question of what you see as being the role of the Lord President, as the head of the Scottish Court Service's corporate body, in being accountable to Parliament. Does he have such a role?

Eleanor Emberson: As the Lord President said to you, the situation might arise in which the committee chooses to invite the Lord President to come and give you an account of what has been done. However, I do not think that he is the person who is ultimately answerable for the proper use of public money or the proper handling of business in the service.

Nigel Don: That confirms my feeling that there is an ambiguity here. However, there are plenty of ambiguities around.

Alastair Sim: It is the normal arrangement in public bodies that it is the accountable officer who is accountable to Parliament. Obviously, if there were an issue that was of serious concern to Parliament, the Lord President would accept an invitation to speak to the committee. We are not departing from the normal accountability arrangements.

The Convener: That is a matter that is worthy of some further inquiry.

John Wilson (Central Scotland) (SNP): I would like to tease this out. We have a situation in which we have a Lord President who is the corporate head of the service and a chief executive who is the administrative head. What accountability will you, as the chief executive, have to the Lord President in relation to the Scottish Court Service's operational structures and what accountability should the Lord President have to the Parliament in relation to his role in the service? I am trying to work out the balance. Usually, the chief executive of a body is the accountable officer, but we are setting up a structure in which there is the head of the service and also another person, who reports to the head and who is accountable to the Parliament. The head of the service, the Lord President, may accept, on advice, a request to appear before a parliamentary committee, but he does not have to appear.

Eleanor Emberson: That is true. However, I am unsure what specifically the committee is concerned that it would need the Lord President to answer for in person that it would not be appropriate to ask the accountable officer about.

The Convener: The issue is causing us a problem. I will give an example, although I accept fully that the chances of this happening are remote. Just suppose that there was a massive overspend in the budget that caused political and ministerial concern. Someone would have to appear before a parliamentary committee—the Audit Committee, I presume—so that we could be satisfied on the issue. As I understand the bill, the responsible individual would be the Lord President.

Eleanor Emberson: The responsible individual would be the accountable officer. I would have

failed grossly to deliver on my responsibilities as accountable officer if I allowed the Lord President and the board to overspend the budget massively.

The Convener: We know that that is not going to happen, but you will appreciate that we must legislate for all eventualities.

Eleanor Emberson: Yes, I understand. However, the Parliament's issue would be with me, as the accountable officer. One of two things would have happened: either I would have allowed the board to overspend its budget without protesting or saying that that was inappropriate—in which case, I would have failed as an accountable officer and a whole load of actions could and should be taken against me—or, alternatively, I would have told the board that the overspend was simply not appropriate and that it could not do that and the board would have overruled me. In that case, I would have had to instigate formal procedures to seek written direction from the board that the approach was satisfactory. At that point, if I appeared in front of a committee and explained what had happened, I am sure that it would invite the Lord President to appear. If he chose not to do so, it would be for the Parliament to take a view on whether it was satisfied with the running of the service. There are provisions for the Parliament to indicate that it is not satisfied with that and to make alternative arrangements.

Paul Martin: To clarify, who would have appointed the accountable officer?

Eleanor Emberson: The principal accountable officer, who is the permanent secretary, would have appointed me as the accountable officer.

Paul Martin: So, potentially, the parliamentary committee could ask the permanent secretary to appear before it.

Eleanor Emberson: Indeed it could.

Alastair Sim: The committee has asked about the Lord President's personal accountability in relation to the governance of the Scottish Court Service. One additional point is that it is the Scottish Court Service corporately—which includes all 13 members—that is responsible for governance. Eleanor Emberson would appear on behalf of the body corporate. There is no personal responsibility for the Lord President; there is corporate responsibility for the Scottish Court Service.

John Wilson: That is what I was trying to tease out. I thank Eleanor Emberson for expanding on the action that the Parliament could take to call to account the Scottish Court Service, as a corporate body, if it decided to ignore her advice. Alastair Sim is right that the corporate body has the ultimate decision-making powers.

The chief executive will act under that body and deliver as it instructs. However, who would ultimately be responsible if there was a dispute about expenditure—if, for example, the corporate body had decided to spend more money in particular areas of the court service than had been budgeted for? Using the Lord President as the head of the corporate body raises an accountability issue that we as parliamentarians need to tease out. We could call the chief executive before us, but that person would simply be acting under instruction from the corporate body. Permanent secretaries could appear before the Parliament, but if a corporate body of 13 members made a decision that was contrary to its financial or other workings, how would we call it to account?

Eleanor Emberson: The Parliament would be able to invite the Lord President to appear before it. In such a dire situation, it is hard to believe that he would not accept that invitation, but if he chose not to do so, parliamentarians could summon non-judicial members of the corporate body and the principal accountable officer. In the end, if MSPs were not satisfied and the Parliament had, in effect, lost confidence in the corporate body's ability to run the service, the bill contains provisions to take away that ability.

Alastair Sim: I would add that it has been a principle in the United Kingdom and Ireland for a long time—admittedly in relation to judicial rather than administrative matters—that the judiciary is not compellable before the Parliament. It would be quite a major step to suggest departing from that principle.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The committee has been given evidence that questions the point of the bill. If the bill is enacted, how will the public and all those who are involved in Scottish court proceedings benefit? What changes will the bill make to the way in which the Scottish Court Service operates?

Eleanor Emberson: We will have a board on which the judiciary and people who represent a range of other interests sit down together, which will allow us to agree changes, modernisations and ways of doing business that have both judicial and official buy-in. Sometimes, it can be difficult to modernise in the court service. What the bill will enable is a body that will have the powers that are needed to make decisions to improve the service. I do not have anything specific in mind but, for instance, the civil courts review is running at the moment. When recommendations emerge from that and changes must be made, we will have all the right people around the table to be able to drive those changes through.

Cathie Craigie: Leaving aside the board, what changes will a member of the public see?

Eleanor Emberson: That would depend on the decisions that the board took.

Cathie Craigie: So there would be no immediate benefit. Are you suggesting that there is currently a weak management team that is not prepared to take decisions, but that we could have a board that would be prepared to take decisions?

Eleanor Emberson: I certainly do not think that the management team is weak. A number of difficult decisions have had to be taken. However, at the moment, the management team takes decisions about the administration of business that are, in effect, driven by ministers—we are talking about a ministerial agency. If we want to think about how to change the running of court business, the judiciary must co-operate and be part of the process. At the moment, no group consisting of the judiciary and officials exists, although we are starting to move in that direction, as we have already brought on to our board a judge and a sheriff principal. The judiciary and its support people need to move in the same direction to achieve the things that we want to achieve and make things better for the person who walks through the courtroom door. Such people will not feel a difference on day one, but they should feel a difference over time.

11:15

Margaret Smith: On the basis of what we have heard already I want to return to the subject of accountability. I served for a short time on the Audit Committee and my understanding is that if there was a problem with the finances of the Scottish Court Service, the accountable officer—which is you, Ms Emberson—would be called in front of that committee. If you had done everything in your power to avoid an overspend, and the situation had reached a point at which you had to refer it back up the management line, the principal accountable officer would be the head of the civil service, Sir John Elvidge, who could be asked to come before the Audit Committee to discuss those matters.

In fact, there is a role not only for the Audit Committee but for Audit Scotland, which could take steps—such as section 22 reports—to come to terms with the financial difficulties that were facing the service, and put in hit squads and all sorts of other things to deal with that particular issue. I see that you are nodding, so it seems that you agree.

Eleanor Emberson: Yes, that is all correct.

Margaret Smith: I am less concerned about financial accountability, because there is a process in place—it might be of interest to the committee to request views on that from the Auditor General and our colleagues on the Audit Committee—than I am about non-financial issues. How would you deal with those? Would that level of accountability involve the Justice Committee rather than the Audit Committee? If so, we have to give that some thought.

Eleanor Emberson: The duties of an accountable officer are drawn quite widely. They are not simply about not overspending the budget or about observing financial propriety; they cover best value, the performance of the service and the achievement of targets, objectives and things like that. I am not best qualified to say whether the Justice Committee or the Audit Committee should hold me to account, as accountable officer, for those performance aspects, but it is clear in the guidance to accountable officers that those aspects are no less of a duty than the financial aspects. The accountable officer should ensure that the board—the corporate body—is clear about all that and that it acts not just within a budget, but within a series of other requirements relating to efficiency within the public sector.

The Convener: There are no more questions. I thank Eleanor Emberson and Alastair Sim for their attendance.

11:18

Meeting suspended.

11:24

On resuming—

The Convener: The third panel comprises representatives of the Public and Commercial Services Union. I welcome Ken Brown, the branch secretary; Eddie Burrows, the branch learning representative; and Brian Carroll, the former branch chairman of the union's Scottish Court Service branch. We have received the PCS submission and circulated it to members. We will now proceed with our questions.

John Wilson: Have you had sufficient opportunity to contribute to the Government's consultation process? Have your representations been considered and taken into account?

Ken Brown (Public and Commercial Services Union): We are satisfied. We have had meetings with the chief executive, and the director of personnel and development confirmed in writing on 19 February that

"the intention within the legislation is for the existing and future staff of the Scottish Court Service to continue as civil servants and have membership of the Principal Civil Service Pension Scheme (PCSPS)."

John Wilson: Under the proposed governance arrangements, to what extent is there a risk of the Scottish Court Service becoming a servant of the

judiciary rather than a servant of the Crown and of the public?

Ken Brown: There has been some clarification of that in the evidence that the committee has heard. When we were considering that, there was a feeling amongst our members that there could be problems in the relationships between the judiciary and Scottish Court Service staff. However, I have listened to the evidence that has been given to the committee and, now that the point has been clarified, we do not think that such a conflict will arise.

John Wilson: You have based what you have just said on the evidence that you have heard in the committee. As staff representatives, do you propose to take up the issue and formalise what you have heard today, especially if it has assured or satisfied you?

Ken Brown: We have partnership arrangements with the Scottish Court Service management. From what we are hearing, we think that those arrangements will continue. As far as we can tell, the union will not have any direct involvement with the judiciary for dealing with issues that arise for our members within the Scottish Court Service.

John Wilson: Your response to the consultation paper indicated that the SCS had

"undergone a massive change in its Management structure".

How equipped is it to undertake further change?

Ken Brown: That is one of our major concerns. Lothian and Borders is going through unification at the moment; Grampian, Highland and Islands will follow; and the rest of the sheriffdoms in Scotland will go through unification by the end of the year. That is a major change, which should be bedded in before we move to a unified court service under the jurisdiction of the judiciary.

We acknowledge that a unified judiciary will be good for the SCS and we are pleased to see it happening. However, there is an awful lot going on and we are not entirely sure that we can cope at the coalface. I am sure that things are okay at board level, but we feel that we might be taking on too much with all the changes that are going on in the courts.

Paul Martin: Do the panel members support the judiciary's involvement in the strategic governance of the SCS? Are they content with the proposed composition of the service?

Ken Brown: Last week, it was suggested that the chief executive should not be on the board. That concerned us a bit, because it is at board level that the voice of the service will be heard. We are fairly content with the proposed set-up, and acknowledge the involvement of judges and sheriffs in selecting certain court staff because they have been given the appropriate training to enable them to do that. We might be concerned about the involvement of judges and sheriffs in the management of day-to-day business.

Paul Martin: Can you give us any examples of difficulties that could arise as a result of the proposals?

11:30

Ken Brown: Part of the problem is that the involvement of the sheriffs principal varies. In one sheriffdom, the sheriff principal has had little involvement with his sheriffs or the sheriff clerks, whereas in another, the sheriff principal is very much hands-on, which can cause its own problems.

Paul Martin: Do you have any views on the ability of the proposed SCS board to take into consideration the views of court users?

Ken Brown: As Alastair Sim said, regular surveys are conducted in the local courts and in the courts of the Scottish Court Service. Complaint forms are available in all our courts to enable members of the public to complain about the sheriff clerk's staff. However, I think that many complaints are about the handling of the case by the sheriff or by the parties—that is, about the outcome of the case—rather than about the administration of the courts.

Paul Martin: Given that your members are also court users, what is your experience, as a representative of staff, of the feedback forms that we heard about earlier? Do those forms have any impact?

Ken Brown: In the case that Alastair Sim mentioned, part of the problem is that sheriff clerks are responsible for the building, irrespective of whether the witnesses are in attendance for the Crown or for the defence. Steps were taken to ensure that court officer staff keep witnesses informed regularly about how cases are proceeding and when they are likely to be taken. Over the years, we have tried to make the situation more comfortable for witnesses. However, the Crown is responsible for calling witnesses. Sometimes, witnesses need to be present for the whole day and are then called back the following day. People may not be too content about having to sit around without knowing what is happening.

Paul Martin: Does the feedback from your members suggest that the situation has improved as a result of the new arrangements?

Ken Brown: Yes. Over the past number of years, a great deal of focus has been placed on the customer. Many moves have been made to try

to improve the lot of people who come into the courts.

Paul Martin: The PCS response to the consultation on the draft bill proposed the introduction of an appraisal system for the judiciary. Are you still in favour of that? What purpose would such a system serve?

Ken Brown: It was interesting that Lord McCluskey said earlier that, from reading a judgment, he can get a feel for whether the person who wrote it is a fast worker or a slow worker and for whether that person fully understands the law. We think that that should be identified. Continuous learning should apply. If a judge is found wanting in specific areas, that should be addressed through an appraisal system.

Paul Martin: Are you satisfied that such arrangements could be put in place effectively?

Ken Brown: Yes.

Paul Martin: The Scottish Court Service will be responsible for determining and implementing policy, but it will operate within a set of policies that are set out in the corporate plan that has been agreed with the Scottish ministers. The Scottish Court Service will be required to have regard to guidance that is given to it by the Scottish ministers. Are you satisfied with those arrangements? Will they provide clarity on the governance of the SCS?

Ken Brown: Yes. Having heard what has been said, I think that we are satisfied now.

Bill Butler: On the suggestion that an appraisal system should be introduced for the judiciary, how does the PCS envisage that working? Who would be competent to appraise members of the judiciary?

Ken Brown: A number of people would be competent. Obviously, senior judges and others in the Scottish Court Service have experience of working with sheriffs principal and with judges. Within the sheriff courts, the sheriff principal should be aware of how his sheriffs are performing. Within the supreme courts, I imagine that the Lord President and the Lord Justice Clerk are likely to be well aware of how judges are performing. They could identify any shortcomings and ensure that those were addressed.

Nigel Don: Mr Brown indicated that the current unification of the courts presents a challenge and that it might be too soon to undertake another change. What sort of timescale might make such a change more manageable? Are we talking about six months, one year, two years or five years?

Ken Brown: I think that Douglas Osler's report on the service's first 10 years as an executive agency suggested that a suitable timescale might be after three to five years. That would allow the judiciary to get its house in order prior to taking control of the running of the SCS.

The Convener: As there are no further questions, I thank the gentlemen for their attendance, which has been extremely helpful.

We will have a brief suspension.

11:36

Meeting suspended.

11:37

On resuming—

The Convener: I welcome our final witnesses, who are from Victim Support Scotland. Susan Gallagher is the head of policy and research; Jim Andrews is the head of community justice; and Frank Russell is the head of quality and audit. We are grateful for their attendance.

Margaret Smith: What impact will the bill have on court users? Clearly, we are also interested in the perspective of victims of crime who come into contact with our courts.

Susan Gallagher (Victim Support Scotland): From our perspective, the impact could be quite far ranging but it will depend on whether certain things are put into place. In the research that we undertook prior to today, we found that it was stated that, in a variety of jurisdictions, public confidence in the judiciary has fallen as a result of particular shortcomings. Those shortcomings have been identified as a lack of accountability in the courts system, a lack of opportunities for public participation in the justice system and judicial isolation—for example, judges seeming to be out of touch with reality.

From the perspective of Victim Support Scotland, we can give evidence about those elements. As an organisation that supports victims and witnesses of crime, we feel strongly that the judiciary should be accountable to the public generally. If the Lord President is given extra responsibilities and powers over the Scottish Court Service and is made accountable to the general public, the impact of the bill will be quite far reaching.

For example, if, as we suggest in our submission, there was a code of conduct for the judiciary, accountability for the conduct of individual judges could be made more evident. The code of conduct could cover, for example, judges intervening when they feel that inappropriate questioning is taking place in court. In addition, we feel strongly that the public would have more confidence in the judiciary if the Lord President made training of the judiciary

mandatory. Involving victim agencies would also help.

Including those elements in the bill would enable it to have more impact for victims and witnesses in the court arena. It would allow the court system to be more open, more transparent and more accessible to the public.

Margaret Smith: Do we have a written submission from Victim Support Scotland, convener?

The Convener: No.

Margaret Smith: Can we get access to the research that you talked about, Ms Gallagher?

Susan Gallagher: Absolutely.

The Convener: That would be helpful.

Margaret Smith: Thank you. It would be helpful for us to see it.

The bill sets up rules for the suspension of judges. Are you happy with that, or would you like the bill to go further?

Susan Gallagher: We are happy with that. It will be the Lord President's duty to undertake those responsibilities himself.

Margaret Smith: You referred to judges intervening when inappropriate questioning is taking place. Many of us have considered that issue; indeed, the subject of inappropriate questioning in sexual offence cases was considered during a parliamentary debate two weeks ago. How do you envisage the bill approaching the matter of judges deciding what is appropriate and inappropriate in their court? Surely if we got involved in that, we would stray into areas that go beyond the bill's remit and challenge the principle of judicial independence, which the bill is meant to enshrine.

Susan Gallagher: You are right to suggest that it is for judges to make value judgments about what happens in their court. However, there is evidence that the anxiety of victims and witnesses of crime is intensified by questions that they deem inappropriate—for example, repeated questioning on the same issue. We would like judges to intervene if they deem questioning to have gone beyond a specific level of appropriateness. Currently, judges do that in some cases but not in all. We would welcome the setting of a level for appropriate examination.

Margaret Smith: That might touch on the issue of the training of the judiciary, to which my colleague Cathie Craigie will return. Are you happy with the bill's various provisions on judicial conduct?

Susan Gallagher: Victim Support Scotland recommends having a prescribed code of conduct that is enforceable. Most organisations have such codes of conduct for individuals in the organisation. For example, MSPs have a code of conduct, and we have one for the work that we do. Codes of conduct are more prescriptive regarding the sanctions that people can expect if they breach the code. Our experience is that the existence of a code of conduct enables the public to understand what is expected of individuals who hold different offices. Guidance is not enforceable, so what it recommends does not necessarily have to occur.

Margaret Smith: I may be putting words in your mouth, but I presume that you would say that having a code of conduct in place would make it easier for a legitimate complaint to be identified.

Susan Gallagher: Absolutely.

11:45

Margaret Smith: What is your experience of the existing arrangements for dealing with complaints about judicial conduct?

Frank Russell (Victim Support Scotland): Not many complaints about the judiciary have been documented, but if you went on to the internet, you would see a load of comments about what happens in courts and people's displeasure with the system—not just generally about the outcome of a case or sentencing.

The general public do not know how to complain. Prior to taking up my post as head of quality, I was head of the witness service, so I had a lot of engagement with court people. The public do not know what to do or where to take a complaint. That is why there is so much stuff on the internet—there is no clear line of sight for people to make any comments.

Not everything would have to be a complaint—the judiciary would benefit from comments and general feedback. In the 21st century, there is an expectation that every business, industry or agency relies on feedback from the people who have contact with it. There needs to be a vehicle to enable people to make complaints and other comments and to give feedback. That is an expectation in today's business world, but it is not readily accessible in relation to the judiciary.

Margaret Smith: That contradicts the evidence that we heard from the Scottish Court Service, which said that people can find a feedback form in every court on which to make their comments. Are you saying that that is not the case?

Frank Russell: No. The Scottish Court Service has just conducted and published the results of a large survey, but you will not find many complaints

lodged or much feedback documented on the judiciary, which is what the general public want. Feedback on the Scottish Court Service's provision of facilities and complaints about the judiciary are totally different things.

Margaret Smith: What comments, complaints and concerns about the judiciary are you aware of? We will put to one side people's concerns about actual judgments, because they are ultimately dealt with differently. What are the main grounds that people have for complaints? You say that there are a few people who make complaints—how are they handled?

Frank Russell: People have displeasures in a number of areas, and it is difficult to deal with complaints because it involves getting to the heart of what is important to the person who is not happy. The complaint is often not necessarily about judicial issues—it could be about a number of things.

The general public do not know the difference. If they make a complaint about the court service, it could actually be about the witness service or the fiscal service. If they make a complaint about the fiscal service, it could actually be about the court service. The general public do not know and do not particularly care—they know just that the system has upset or failed them.

A number of incidents have been referred to us, as Ms Gallagher has presented. People can be uncomfortable, angry, frustrated and upset about the relentless pursual in court of a particular issue when the point has been clearly made and they expect the judge to intervene. We know that it can be a fine and dangerous line for judges to cross when they intervene because, if that is done at the wrong time, it can put the case into the appeal court. We are conscious that judges watch for that and often intervene when the situation becomes incompetent in law rather than inappropriate. That does not help the victim or witness who is subjected to the relentless pursual of a question that has been answered so many times that it should be dropped. We believe that judges should intervene at such times, and we believe that the public have made genuine and sincere complaints, which never go anywhere.

The Convener: I want to follow up on that briefly. You referred to certain websites on which we can find the complaints. What are those websites?

Frank Russell: You just need to type "judges complaints" into Google to find a list of judges, lawyers and a range of people that have comments associated with their names and pictures. That is not the best way in which to address failings in the judicial system. We need to make a vehicle that people can access and through which they will receive a response. They are unlikely to receive a response to stuff that has been put on the net.

There are two levels of complaints. An informal complaint, in which people want just to voice their unhappiness, can be acted on. Any business would be expected to act on such feedback. A higher-level complaint, which I will call a formal complaint, is one to which people want a personal response such as an apology or compensation. Whether a complaint is informal, when a person just voices their view, or whether a personal response is wanted, that needs to be taken back to the judiciary and the Scottish Court Service and used to develop further the provision to people who use the services. Such continuous improvement through feedback from people who access services and who have contact with people in an organisation is expected in modern business. It is not unreasonable to expect that.

The Convener: Ms Gallagher made a related point about repetitive questioning, particularly in cases when sexual assault is alleged. Will you give examples of that?

Susan Gallagher: Victim Support is bound by confidentiality and we do not want to stray from that. With the permission of the people involved, we could present their experiences as case studies in any future training of the judiciary, but I will not disclose cases today.

The Convener: I understand that.

Cathie Craigie: I return to the complaints process. Mr Russell's evidence echoes some other evidence that we have heard. Few complaints have been made against the judiciary, but people do not know how to complain. In their evidence last week, even judges were not quite sure what the proper route was. The bill provides for a judicial complaints reviewer, on which I would welcome your comments.

Frank Russell: A complaints reviewer would be appropriate, given that we have organisations such as Quality Scotland, Audit Scotland and the Scottish Consumer Council. The Scottish Consumer Council expects organisations to listen to complaints and to keep a record of them and whether they were resolved locally or nationally. The judiciary should not be exempt from that. Everybody else must provide evidence that they have addressed complaints, and—dare I suggest it—they accept those complaints as a gift to use to develop and improve services.

Cathie Craigie: It has been suggested that the complaints reviewer would not have teeth, because that individual would investigate processes but would not publish complaints, so issues would go no further. What are your comments on that?

Frank Russell: You have anticipated my answer. We would expect the number of complaints received to be published. The same is expected of Victim Support and a range of organisations that are trying to make progress on quality. The number of complaints received is a measure of customer satisfaction. Even if the complaints reviewer had no teeth, it would be good for the public to see that their comments had been acknowledged and accepted. The number of complaints would need to be published; otherwise the process would be pointless.

Cathie Craigie: Would it be wise to have a proper complaints process within the judiciary's own ranks before someone was brought in who was—

Frank Russell: That would not be unreasonable. That is what happens in other organisations. An investigation would be carried out and a resolution sought at the lowest possible level, before a complaint climbed the tree or went out to another agency. Hopefully, complaints could be resolved in that way.

Having a complaints procedure is not unusual in any other business. A number of changes need to be made. The introduction of a complaints procedure, whereby issues would be addressed at the lowest possible level in the first instance, would be quite acceptable to me and would probably be acceptable to the general public.

Cathie Craigie: There is a worry that frivolous or vexatious complaints might be made. Do you have any views on how that could be controlled?

Frank Russell: That happens in every organisation. Sometimes the wrong organisation receives the complaint. Sometimes people do not understand the position. It may be unpalatable to them, but if that is the way it is, that is the way it is. There is a way of dealing with customer complaints and getting over the point, "We are sorry that you are unhappy on this occasion, but that is the system and that is how it works." Frivolous complaints and spurious allegations will be made. That is not uncommon in other organisations; we all live with it. Someone has to sift them out, which is why the process needs to be carried out at the lowest possible level in the first instance.

Cathie Craigie: I will move on to training. The bill will give the Lord President, as the head of the judiciary, responsibility for judicial training. Petitions that are before the Parliament call for training to be provided specifically for sheriffs who deal with child custody cases. Should the judiciary be required to attend training on how to deal with vulnerable witnesses, especially in the cases that Susan Gallagher mentioned? More generally, should training for the judiciary be mandatory?

Susan Gallagher: In our opinion, judges today need to know more than law and technicalities—they are also expected to make value judgments. Victims and witnesses will feel more respected and valued, and will feel that trials are fair, if their needs are taken into account and the judge is knowledgeable about the world in which everyday people live.

It is important for us that judges understand and are aware of the issues that court users in particular face. Such understanding can be acquired only by listening to the experiences of court users, victims, witnesses and the general public. As is the case in other organisations and agencies, the judiciary, through regular professional development, will become much more knowledgeable about the everyday world. Public confidence will increase if people in contemporary society know that the judges in front of them know where they come from and understand the issues that they face. Victim Support feels that such training should be mandatory. If people are merely encouraged to attend, they might not do so. Even if attendance is mandatory they might not attend but, under the Lord President's jurisdiction, sanctions could be applied to ensure that they attend.

Having worked in victim support for 10 years, I know, for example, that victims' and witnesses' needs have changed substantially over that time. New laws and service provision are introduced, and people's needs change. As far as I know, judges do not have to undertake regular training, but they can do so within a five-year period—it is something along those lines. That means that they might become out of touch with the changes in victims' needs and, especially, in court users' needs.

As Frank Russell has said, giving people the opportunity to come in and talk about the specifics of how their case was handled and the procedure that was followed, and also listening to the experiences of victims of crime within a training environment, would enable the judiciary to be far more accountable to the public and would make the judiciary a much more listening and responsive agency.

12:00

Cathie Craigie: Can you share with the committee any experiences of victims seeing more understanding of their situation in the specialist courts, of which we have had some pilots in Scotland? If the same people sit on the bench over a period of time, they will gather knowledge and experience of the types of case that come before them. How does that translate into the experience of victims in the courts system?

Susan Gallagher: Jim Andrews has experience of the domestic abuse court in Glasgow and the specialist cases that have been brought there.

Jim Andrews (Victim Support Scotland): The domestic abuse court that is being piloted in Glasgow has made provision for better information sharing between sheriffs, procurators fiscal and other people who are involved in the process. From a sheriff's point of view, it has brought a new awareness of victims' issues, which has had the knock-on effect of creating a degree of empathy with the victim that did not exist previously. The experience in the domestic violence court of raising sheriffs' awareness of victims' issues has proved to be beneficial to the whole process.

Cathie Craigie: I have one final question. The bill will establish a new board. How will your organisation or victims in general be able to engage with the board? What improvements could the board bring to court procedures?

Susan Gallagher: Are you talking about the Judicial Appointments Board for Scotland?

Cathie Craigie: Yes.

Susan Gallagher: Victim Support would like the board to be more representative—

The Convener: Can I interrupt you there? I think that what Mrs Craigie is trying to get from you is how the group that will run the courts is likely to work with you in improving matters for court users.

Susan Gallagher: In terms of the Judicial Studies Committee, or—

The Convener: No.

Cathie Craigie: No, the board.

The Convener: It is the Judicial Appointments Board.

Susan Gallagher: We would like the Judicial Appointments Board to be representative of the people of Scotland, embracing the principle of diversity as far as possible. Diversity needs to be addressed in terms of social background, disability, race, gender et cetera. Engagement with people from a diverse range of backgrounds should be proactively encouraged from the bottom level, which will generate upwards for future judiciary. That also goes for appointments.

The public need to be able to identify with judges if the law is to be respected. A judiciary that reflects more the demography of society and is drawn from a wide range of backgrounds will understand contemporary society much better than a judiciary comprised of people from a similar background. The public, and victims in particular, need to know that the judiciary understands them and their issues. That process needs to start. A diversity working group is in place, and more proactive engagement with people from a range of backgrounds should be encouraged, to enable the judiciary of the future to better reflect society.

Cathie Craigie: There have been comments—in fact, you might have heard some of them in earlier evidence—that the Judicial Appointments Board should be made up of judges, or people who have experience. However, the bill provides that it should include some laypeople. How do you feel about that? Would victims add quality and value to the board?

Susan Gallagher: Yes. We would like an equal balance between laypeople and judiciary on the Judicial Appointments Board. Frank Russell talked about enabling victims to participate in the process. One of the issues in the research that I mentioned was the lack of confidence. Participation would be possible if people were enabled to engage with the judiciary or the Lord President and to comment on how they experienced particular cases. If we open up the judiciary and make it much more publicly accountable, people will not feel that the appointments process and what occurs within the judiciary is such a closed book. There are opportunities, but if laypeople are to be involved there should be more than one layperson, so that they are not seen as a token in the process.

Margaret Smith: You mentioned the need for proactive engagement with the public and that the judiciary should come from a wider range of backgrounds than they do at the moment. We heard evidence earlier from Lord McCluskey. To paraphrase him, he essentially said that there should be a meritocracy, that the best people should get the job, and that doing anything other than that could be detrimental to the process of getting the best people on to the bench.

I want to understand better where you are coming from. Are you saying that we should have positive discrimination at all costs, to ensure that we change the make-up of the bench, or are you saying that, against the background of a meritocracy, we should have affirmative action earlier on in the process—which I think is where Lord McCluskey was coming from—to try to ensure that people from diverse backgrounds get on to the bench, without that having any impact in terms of the merits of those who achieve judicial office?

Susan Gallagher: I agree absolutely with your latter point. Merit must come first, then diversity can be encouraged from a proactive stance.

Stuart McMillan: In response to Margaret Smith's first question, you said that the bill could be quite far reaching, and you talked about a lack of accountability, out-of-touch judges and a lack of participation. What do you mean by a lack of

participation? You explained the other points, but you did not really explain that one.

Susan Gallagher: It goes back to the issue that Frank Russell raised about victims, and about people having an opportunity to participate by telling others about their experience of the court arena.

John Wilson: I am trying to tease out the issue of accountability, which you said came up in the survey. You also mentioned the appointments process for judges, and an attempt to bring about greater diversity in the establishment of the Scottish Court Service. How would you envisage getting greater diversity in the service?

We see the bill as an attempt to assert the independence of the judiciary and, at the same time, to introduce more accountability in how the service is delivered. There may be a conflict there. If we are saying that the judiciary should be independent, how do we also make it accountable?

Susan Gallagher: On diversity, we want the appointments process to be open and transparent. Although we recognise that one cannot suddenly make up a diverse appointments board tomorrow, the process should be made more accessible to the public, so that people will know that steps are being taken to engender diversity.

On independence and accountability, in order to achieve public confidence, the judiciary cannot be seen to be influenced by any political agenda. The judiciary needs to be a constant in the face of potential changes in political agendas. The confidence of witnesses and victims is paramount, and their confidence in the judiciary is gleaned through the judiciary exercising its power without political favour and without direct or indirect pressure from anyone or anything other than the law itself. Such confidence can be created if the public is made more aware of the procedures and the judiciary is made more accountable to the public.

John Wilson: I am sorry to labour the point. I put to you a scenario in which a tabloid newspaper runs a campaign on a particular issue in which it feels that a judge or sheriff has made the wrong decision in a case. On the accountability of that decision, how would Victim Support Scotland see that type of decision being made? The issue is public perception and anger, which can quite clearly be led in some cases by certain tabloid newspapers. How do you protect the judiciary from such campaigns and vilification?

Frank Russell: I am not quite sure what you are asking us. Are you asking how we would protect the judiciary and why we would want to do that?

John Wilson: You are saying that there should be greater public accountability around decisions. What protections should be put in place for decisions that are made in the courts? You have blank expressions.

Frank Russell: I am not sure that that is a matter for us.

John Wilson: You are raising the issue of the public's perception of the court system and the decisions that are made in courts. That issue came out of the survey that was conducted. I am asking how you measure the perception of the decisions that are made in the courts—whether they are right or wrong. How do we get the correct balance so that we can identify the decisions that are being made and the public perceptions of them?

Frank Russell: The public do not understand a number of things about the justice system. The decisions that are made are a matter of law. As Susan Gallagher said, if a decision is being challenged, as long as it is open, transparent and public—if appropriate—I do not think that the public can expect more. They would not want challenges to be dealt with behind closed doors. I appreciate that for a range of reasons the media lead on many issues. There is public interest: the public want to know when matters are under way or are being challenged or are suspect and they want to see that an infrastructure is in place that they can understand. If they know that the process is being followed within an infrastructure that they can understand, they will probably be happy with it.

I am not quite sure that I have answered your question. To be honest, I do not think that the infrastructure is a matter for either Victim Support Scotland or the public.

12:15

Cathie Craigie: I promise that this will be my final set of questions. Part 4 of the bill will establish a body to be known as the Scottish Court Service, which will replace the existing Scottish Government executive agency known as the SCS. The body will consist of seven judicial members and six non-judicial members. What difference will the change make to the proceedings and procedures of courts?

Frank Russell: The public do not know. Hopefully, the change will be seamless. This morning the chief executive of the Scottish Court Service made the point that it will not happen overnight. The public are unlikely to see any change. When victims and witnesses come to court, they do not understand who fits with whom—they do not need to know that. At the moment, they probably think that the judge, the

clerk, the court officer and, in the High Court, the macer belong to one family. They do not understand the nuts and bolts of the system. The only people to whom the issue becomes of interest are those who become embroiled in arguments and debates at a higher level—in high-profile cases where there are challenges. In such cases, people start to break down the justice system in order to understand how it works, what may have gone wrong and what could have been done better. The general public do not understand the system and are unlikely to notice the change.

Cathie Craigie: Would the general public expect a Government minister to have overall responsibility for effective administration of the court system?

Susan Gallagher: The general public would not want the judiciary to be governed by a specific governing party.

Cathie Craigie: I am asking about the administration of the court system, not the judiciary.

Susan Gallagher: As the Lord President will head up the court system, it needs to be independent. That is why our submission refers to public accountability and confidence in the independence of the system. We must ensure that the general public are made aware that, because of the involvement of the Lord President, the judiciary and all that is part of it will be independent of any political agenda. Having a minister oversee the system would mean that it was no longer independent.

The Convener: As members have no further questions, I thank Ms Gallagher, Mr Russell and Mr Andrews for appearing before us this morning. Their evidence has been helpful.

12:18

Meeting suspended.

12:20

On resuming—

Subordinate Legislation

Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2008 (Draft)

The Convener: Item 4 is subordinate legislation. The draft Civil Legal Aid (Financial Conditions) (Scotland) Regulations are subject to the affirmative procedure. I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who is accompanied by Chris Graham, from the civil legal aid policy team, and Fiona Glen, a solicitor with the Scottish Government.

I refer members to the draft regulations and to the cover note—J/S3/08/8/14. Members should note that the draft regulations were drawn to the committee's attention on the ground that an explanation had been sought from and provided by the Government. I invite the cabinet secretary to speak to the draft regulations and to move motion S3M-1406.

The Cabinet Secretary for Justice (Kenny MacAskill): The draft regulations will make changes to the financial eligibility rules for advice and assistance, which provides for initial legal advice, and to civil legal aid, which provides for a solicitor taking a case to court. The rules specify the amounts of disposable income and disposable capital above which an individual is not eligible to receive assistance. They also specify the amounts below which individuals are not required to make a financial contribution and the levels of contribution which apply to the various bands of income between the two limits.

The draft Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008 and the draft Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2008 will apply to those limits an increase that is broadly in line with the rate of inflation, and will adjust the income bands for contribution payments accordingly. That means that, from April this year, individuals will be eligible to receive support for the costs of initial legal advice if they have weekly disposable income of up to £223. The calculation of disposable income disregards a wide range of benefits such as child tax credit, pension credit and housing benefit, and allows deductions for maintenance payments and allowances for dependent children or adults. Individuals whose weekly disposable income is £95 or less will be eligible without having to make any contribution. The table of contributions for disposable income between £95 and £223 is shown in the regulations.

The draft legal aid regulations make similar amendments to the annual disposable income and

disposable capital limits above which an individual may not be eligible to receive civil legal aid. Contributions to the costs of civil legal aid are calculated as a proportion of annual disposable income above a specified figure. The draft regulations will, from April this year, increase that figure to £3,156.

These annual inflationary increases are an important and long-standing practice that is designed to ensure that the current range of eligibility for publicly funded legal assistance is maintained in real terms.

I move,

That the Justice Committee recommends that the draft Civil Legal (Financial Conditions) (Scotland) Regulations 2008 be approved.

The Convener: As members have no questions or comments, I do not think that the cabinet secretary will feel the need to wind up.

Kenny MacAskill: Absolutely not.

Motion agreed to.

Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008 (Draft)

The Convener: We now turn to the next item of subordinate legislation. I ask Mr MacAskill to remain for the moment.

The draft Advice and Assistance (Financial Conditions) (Scotland) Regulations are subject to the affirmative procedure. I refer members to the draft regulations and to the cover note—J/S3/08/8/15. Members should note that the draft regulations were drawn to the committee's attention on the ground that an explanation had been sought from and provided by the Government. I invite the cabinet secretary to speak to the draft regulations and to move motion S3M-1407.

Motion moved,

That the Justice Committee recommends that the draft Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008 be approved.—[*Kenny MacAskill*.]

The Convener: Have the cabinet secretary's previous remarks encapsulated the debate?

Kenny MacAskill: I would adopt the points that I made previously, since we are dealing with legal matters.

The Convener: As there are no questions or comments, I take it that the cabinet secretary feels no need to wind up.

Kenny MacAskill: That is right.

Motion agreed to.

The Convener: I thank the cabinet secretary for his attendance and suspend the meeting briefly.

12:24

Meeting suspended.

12:25

On resuming—

Protected Trust Deeds (Scotland) Regulations 2008 (Draft)

The Convener: Item 6 is another item of subordinate legislation. The draft Protected Trust Deeds (Scotland) Regulations 2008 are subject to the affirmative procedure. I welcome Fergus Ewing, the Minister for Community Safety. He is accompanied by Gillian Thompson, who is the accountant in bankruptcy, and Simon Roberts, who is policy manager at the Accountant in Bankruptcy.

I refer members to the draft regulations and to the cover note, which is paper J/S3/08/8/16. Members should note that the draft regulations were drawn to the committee's attention on the ground that an explanation had been sought from and provided by the Government. I invite the minister to speak to the draft regulations and to move motion S3M-1365.

The Minister for Community Safety (Fergus Ewing): Thank you, and good morning to members of the committee and others.

The Bankruptcy and Diligence etc (Scotland) Act 2007 contains the power to make new regulations for protected trust deeds. Protected trust deeds provide a less formal alternative to bankruptcy and have an important place in Scotland's law of personal debt. However, it is essential that both creditors and debtors are confident that protected trust deeds operate fairly. The draft regulations are a response to concerns about protected trust deeds that were expressed in debates during the passage of the Bankruptcy and Diligence etc (Scotland) Bill.

The draft regulations will improve the administration of protected trust deeds and ensure that the Accountant in Bankruptcy is empowered to supervise them. They will also introduce a process to formalise the discharge of debtors and ensure that student loans are treated in the same way as they are in bankruptcy.

The enabling power in the primary legislation is fairly wide, but I decided to exercise the power narrowly in the draft regulations. It is important that we are seen to address the valid concerns that debtors and creditors have raised about the operation of protected trust deeds in Scotland. The

draft regulations will achieve that by making the operation of protected trust deeds more transparent and accountable. They support the proper use of protected trust deeds as a form of debt relief and will improve public confidence in them.

We will monitor the performance of protected trust deeds and review the effect of the regulations. If necessary, we will make more radical changes at a later date.

I move,

That the Justice Committee recommends that the draft Protected Trust Deeds (Scotland) Regulations 2008 be approved.

The Convener: Thank you. As there are no questions or comments, I ask the minister whether he feels the need to wind up.

Fergus Ewing: No.

The Convener: I am relieved to hear that.

Motion agreed to.

12:28

Meeting continued in private until 12:42.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 25 March 2008

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by RR Donnelley