JUSTICE COMMITTEE

Tuesday 25 March 2008

Session 3

£5.00

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

CONTENTS

Tuesday 25 March 2008

JUSTICE COMMITTEE
9th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor Sir David Edward (University of Edinburgh)
Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 25 March 2008

[THE CONVENER *opened the meeting at 10:16*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask anyone with a mobile phone to ensure that it is switched off. Item 1 is a decision on taking business in private. The committee is asked to agree that item 7, which is consideration of the main themes arising from the evidence sessions on the Judiciary and Courts (Scotland) Bill, be taken in private. The committee is also asked to agree that all future consideration of draft reports on the bill be taken in private. Is the committee agreed?

Members *indicated agreement.*

Judiciary and Courts (Scotland) Bill: Stage 1

The Convener: Item 2 is the committee's third and final scheduled oral evidence session on the Judiciary and Courts (Scotland) Bill. It gives me great pleasure to welcome Professor Sir David Edward KCMG QC, honorary professor at the University of Edinburgh's school of law. Sir David has studied, taught and written about European institutions. He made a comparative study of the judicial institutions of the European Union and member states. He was called to the bar in 1962 and was appointed Queen's counsel in 1974. He was a judge at the European Court of First Instance from 1989 to 1992, and at the European Court of Justice between 1992 and 2004. In addition to his role at the University of Edinburgh, Sir David sits as a temporary judge in the Court of Session.

Sir David, the committee is particularly pleased to welcome you here today. We consider your coming at such short notice as praiseworthy and we express our considerable gratitude that you have found the time in what is clearly a busy schedule. We have studied your initial comments in response to the consultation, as well as the supplementary paper that you provided us with last week. That, too, is greatly appreciated. We will go straight to questioning, if you do not mind. I ask Nigel Don to start with the subject of judicial independence.

Nigel Don (North East Scotland) (SNP): Good morning, Sir David, and thanks for the speed with which you responded to our request for help. Section 1 of the bill increases the scope of statutory statements about the independence of the judiciary. However, concern was expressed last week that that provision might restrict the independence of the judiciary by placing a duty only on a certain class of people—it might remove the general by specifying the particular. I think that that is where Lord McCluskey was coming from. I have had a brief look at your comments; could you confirm whether it is your view that we should put a phrase into the bill stating that the common-law position still stands, or that we should accept the bill as introduced on the ground that the common law remains?

Professor Sir David Edward (University of Edinburgh): My personal view is that the common law remains unless removed. As I have said, it seems to me that you could add the words "without prejudice to", but that might simply cause more problems than it solves.

Nigel Don: Would you expand on that?

Sir David Edward: It would not be certain what exactly it was without prejudice to. It is always

easy to put in "without prejudice to", but you must have a clear idea what it is that you are liable to prejudice. That is what I am not clear about.

Nigel Don: The example that Lord McCluskey gave was of a developer—he named one, but that is not remotely relevant—who might decide that because section 1 applies only to the First Minister and one or two others, he was under no duty not to talk to a judge. If that were to finish up in court and, ultimately, in the European court, are we clear that the common-law statutory offence would still obtain?

Sir David Edward: I do not see why it should not. I do not understand the argument.

Nigel Don: Thank you for that—that is the major point on that issue.

Should the Scottish Parliament be included in the list of bodies required to uphold the independence of the judiciary? It has been suggested that if the duty were to be put on the Parliament, it would have to come via the Scotland Act 1998 rather than anything that this Parliament could do. I would be grateful for your thoughts on that.

Sir David Edward: It is not clear to me that the Parliament can put an obligation on itself. I suppose that it could put an obligation on members of the Parliament.

Nigel Don: Would that be a useful thing to do?

Sir David Edward: Yes. I do not feel strongly about it, but it could be useful. In section 1(1)(d), members of the Parliament are

"persons with responsibility for matters relating to—

(i) the judiciary, or

(ii) the administration of justice".

The Convener: In fairness, as a self-denying ordinance, most of us are careful about what we say under that heading, tempting as it may be at times not to be careful.

Nigel Don: Thank you. I think that that has dealt with the issues.

The Convener: We move to the role of the Lord President.

Paul Martin (Glasgow Springburn) (Lab): Good morning, Sir David. What is your understanding of the role played by the senior judiciary in the governance of the court administration in other jurisdictions?

Sir David Edward: As I understand it, the Scottish Court Service will have a chief executive and a board. The Lord President and some members of the judiciary will be members of that board, in the same way, although in a different context, as—if I remember rightly—the Lord President of the Court of Session is ex officio a member of the board of trustees of the National Library of Scotland. The judges are not there to perform a judicial function; they are there to be members of the board. The fact that they are judges qualifies them, if you like, to be members of the board; to put it another way, it is considered desirable or even necessary that there should be judges on the board. However, it is confusing to think of them as being there in a judicial capacity.

Paul Martin: How does that compare with your experience of other jurisdictions throughout the world?

Sir David Edward: It is very common for the governing body of organisations that have responsibility for the administration of justice to be wholly or partly composed of judges. In some countries, those bodies are composed wholly of judges. It is important to distinguish what judges do as judges from the administrative functions that they are appointed to do.

The Convener: As you will be aware, a number of points have been made about judicial appointments, some of which seem a bit contradictory. How do other jurisdictions appoint judges and what is the role of the executive in such appointments?

Sir David Edward: I have given the clerk a copy of a paper by a professor at Cambridge, which appears on the web, looking broadly at a number of different methods of appointment. In some countries, judges are appointed or co-opted by judges—in other words, the executive has no part in the selection of judges. Some countries, particularly those with experience of dictatorship and a compliant judiciary, regard that as a necessary protection against any sense among the judges that they have to comply with the wishes of those who appoint them. In some countries, the appointment of judges is entirely within the discretion of the executive; there is not even a consultative committee. There is a vast range of possibilities. As I said in the paper that I submitted yesterday, the public seem less interested in how judges are appointed than they are in how judges perform their function.

The method of appointment depends very much on the structure of the judiciary. It will be necessarily different in a context in which the judiciary is a career judiciary, which people enter, in the main, from university after deciding that they want to be a judge—in some countries, that can include the career of public prosecutor. If people who want to be a judge pass an examination, they go to a school to be trained. In France, they go to a school for two years to be trained as a judge. Judges in such countries start off as one of three. They do not start off sitting alone but learn their

job as the winger, so to speak, with an experienced judge in the chair.

There are all sorts of variations. It all depends on the kind of judiciary you have and the kind of judiciary you want.

The Convener: I was intrigued to read that paper, which referred to the career judge concept. Some have greatness thrust upon them, whereas others take a different course of action. Do you think that it is desirable to have career judges? Is it better to have people who have learned their trade practising at the bar, in some cases for many years?

10:30

Sir David Edward: It is useful to have had experience at the bar, because having a reasonably varied practice is one way in which one begins to understand that there is more than one point of view. Acting for clients in all sorts of situations helps one to understand how people behave. In a system such as ours, in which the credibility of witnesses plays a large part, practice at the bar helps a judge to make that assessment. However, throughout the 14 years in which I served in the European court, I never sat alone and almost never had to hear a witness. I found that having to discuss cases with colleagues and reach a decision that was acceptable to us all—we all had to sign the decision even if we did not ultimately agree with it—was a good discipline and an incentive to judicial modesty, because a judge was not a very public figure. There are perhaps advantages in such a system.

In our system we still adhere to the idea that judges should have relevant experience. However, we are appointing more and younger judges, so the arrangements that are made for judicial training and studies are important.

The Convener: You make interesting points, which will be interesting to follow up in future. However, we must stick to what is on our agenda.

Margaret Smith (Edinburgh West) (LD): Good morning, Sir David. Is the role of the Scottish ministers in Scottish judicial appointments compatible with the principle of judicial independence? In your initial submission, you commented on ministerial guidance, so it would help us if we could hear your views on the matter.

Sir David Edward: As I understand it, the consultation paper included a provision for ministers to give guidance to the Judicial Appointments Board for Scotland—I do not remember the precise wording. My concern at that stage was that such guidance could become instructions. Either we have a board or we do not. If we are to have a board, it must be allowed to operate independently, albeit that broad parameters can be set as to how it ought to operate. We must avoid a situation in which guidance becomes instructions.

It seems to me to be perfectly legitimate in a democratic society that the appointment of judges should be made by people who are democratically accountable. I see nothing inherently wrong with the involvement of ministers in the Executive, which is responsible to the Parliament, in the appointment of judges.

Margaret Smith: In general, on the basis of what you know about the bill, are you happy that the proposed statutory Judicial Appointments Board for Scotland will be sufficiently independent of the Government?

Sir David Edward: As Sandra Day O'Connor said, it is about people, not rules or institutions. If the people behave independently, that is a sufficient guarantee.

It is a matter of opinion whether the complete structure of an appointments board, which has an applications process and various other aspects on which the committee has commented, is the best approach to judicial appointments. However, as long as the board is composed of people who are not only independent but prepared to act independently, I envisage no problems.

Nigel Don: I have been contemplating the issue of guidance. One circumstance in which guidance might be needed would be if nobody was sure what a decision of a European court meant at the national level. In that situation, it might be appropriate for the Judicial Appointments Board, or any board, to ask the Government for guidance on how it should proceed, on the basis that the Government, ultimately, foots the bill. Would that be an appropriate circumstance in which guidance might be sought and given?

Sir David Edward: I assume that, by the European court, you mean the European Court of Human Rights.

Nigel Don: I do not mean any particular European court, although I am conscious that there are two. We sometimes have decisions that we are not sure how to interpret and work through. For example, issues of employment law or discrimination might suddenly turn on a decision that comes from outside the United Kingdom.

Sir David Edward: Let me tell you a story, if I may. One of my colleagues on the Court of First Instance was a member of the panel that was appointed to vet judges of the German Democratic Republic for their suitability to become judges in the united Germany. He had many disappointing experiences but, in interviewing one young judge, he thought that he had found the right person. At

the end of the interview, the young judge said, "I suppose that if I'm in difficulty in deciding a case, I can always ring the ministry of justice to find out what I ought to do."

There may be many ways in which the Judicial Appointments Board can get guidance on interpreting or applying a judgment of a European court, but asking the Executive for help is not one of them.

The Convener: I think that we agree with that.

We move to the issue of diversity in judicial appointments, which has been raised from time to time.

Bill Butler (Glasgow Anniesland) (Lab): Sir David, you will be aware that section 14(1) states that the Judicial Appointments Board

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

What is your view of that provision? Is it sensible?

Sir David Edward: On the one hand, it is very important that opportunities should be equal. However, in our system, most judges operate alone. I am not sure that a litigant or accused person of a particular gender or race will feel more comfortable because in another court in another place a person of that gender or race is sitting on the bench when the person who will deal with him or her is not of that gender or race. Therefore, the real issue is equality of opportunity generally, rather than the race, gender or other identity of the person who sits on the bench. I return to the point that what matters to the public is that the person is good at administering justice.

Bill Butler: Given that response, is there any need for section 14(1)?

Sir David Edward: My answer is the answer that was given to me when I discussed the issue recently with a professor down south. She said that these kinds of provisions condition the way people behave and are therefore useful, as long as they are not carried too far.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I will move on to part 4 of the bill and talk about the Scottish Court Service and accountability. I am sure you agree that running our court services efficiently is a key duty of the state. Do you think it appropriate that the function of running court services should be transferred from Scottish ministers to the Scottish Court Service?

Sir David Edward: There are two aspects to this. First, I have the impression from quite a lot of discussion that there has been unhappiness among the judiciary about the attitude of the Executive to running the courts. An example given to me was that a particular official referred to the judiciary as being simply one of the stakeholders in the justice system. That kind of attitude is dangerous.

The chief executive of the Scottish Court Service gave evidence to the committee recently. It is encouraging that her position is that the new system is working well. She said that the mutual trust between judges and officials on the board of the Scottish Court Service, how they assist each other and how it is now being run are advantageous. That situation is much more likely to give general satisfaction because it takes account in a real way of judges' experience of running their courts.

Cathie Craigie: I have a further point on that. Things may have changed a bit since, but in your submission to the original consultation on the draft bill you said:

"there is deep dissatisfaction amongst judges of the Court of Session and High Court about the arrangements made for the regrading and recruitment of Clerks of Court."

You stated that it is important to have qualified clerks who can support the judges. Do you have anything further to say to the committee on that point?

Sir David Edward: As I understand it, the problem was that a diktat came down from the Treasury about the grading of civil servants. The problem for the clerks of court is that, by the nature of their job, they do not have people working under them, so they were downgraded. Sufficient account was not taken of the fact that they perform a very important function, which needs training and experience to perform it well. They are not just administrative officials of any sort—that was the essential concern. One would need to know how far the Scottish Court Service was able to depart from Treasury requirements, but I imagine that the new Scottish Court Service might be able to overcome the problem.

Cathie Craigie: An administrative body such as the Scottish Court Service will be limited in what it can do by the resources that it is offered. The bill proposes that the budget for the Scottish Court Service will be voted separately from the Scottish budget as a whole. However, ultimately the Scottish Government will still determine how much money will go to the Scottish Court Service—he who pays the piper calls the tune, so to speak. Are you still convinced that what the bill proposes will give the Scottish Court Service the degree of independence from Government that you regard as necessary?

10:45

Sir David Edward: I had considerable experience of such a process in the European

Court of Justice, which is given a budget that is approved by the Council of Ministers and the European Parliament on the basis of a recommendation from the European Commission. The court proposes a prospective budget for the following year that is voted by the budgetary authority, and the court must operate within that budget.

One of our greatest difficulties in Luxembourg was that the permission of three political bodies—the Commission, the Parliament and the Council of Ministers—was required if we wanted to move money from, say, the computer account to the telephone account. At all costs, one wants to avoid such micromanagement by the budgetary authority of the way in which the court service allocates its resources. However, I do not see that it is possible to avoid a situation in which the budgetary authority says how much money is available to spend. One cannot have a situation in which an administrative body is free to spend as much as it likes. Yes, there must be some budgetary control and budgetary limits, but please do not micromanage. Micromanagement will not improve the system.

Cathie Craigie: I am quite puzzled by those provisions in the bill. On the one hand, the intention is to shift responsibility for management of the courts from the Government to the Lord President, and responsibility for the service's budget will be shifted from the Scottish Government to the Parliament. However, the Scottish Government will still be able to set fees for the courts. To me, the thinking seems to be clouded and I am not sure how that shift will work.

Sir David Edward: I am not clear about that, either. I think that the issue comes back to the need to avoid a situation in which, having given a body further responsibility, one then takes away that responsibility by giving detailed instructions and specifications as to how its budget is to be applied. If I may say so, that is probably exactly the sort of problem that the committee ought to address.

Cathie Craigie: It does not give me much comfort that you agree with me, but I hope that we can put that issue to the minister, who will give evidence after you.

Sir David Edward: I am sorry that I cannot be of more help.

Cathie Craigie: I will move on. There is a view that the Lord President should have a degree of accountability to Parliament as a consequence of his additional administrative responsibilities. The paper that you provided raises a number of points about that. Do you have anything to add to what you said in your submission?

Sir David Edward: I do not think so. We need to be extremely careful about how much we load on to the office of Lord President. As I pointed out in my response to the consultation paper, England does not provide a good parallel because the divisions of the High Court and of the Court of Appeal have their own presidents, whereas, as we are a small jurisdiction, the Lord President is essentially the leading judge as well as the administrator. It is important that, having decided that it should be so, the Parliament and the Government should trust the Lord President to do the job to which he has been appointed. Excessive pressures in the name of accountability might make it extremely difficult to perform that job well in our Scottish context.

Nigel Don: Let us return to temporary judges, on which subject we have heard evidence from several folk. If I recall aright, you said in your original submission that all judicial appointments should at least be consistent—to which general principle I am sure that we all want to adhere.

It occurs to me, however, that there might be a case for having two different classes of temporary judge: one would be for people such as you, who have been judges previously and who might be asked to come back temporarily; and the other would be for people appointed from the ranks of lawyers and who have not previously sat on the bench. Although I take your point about consistency, perhaps we do not need to be too consistent—someone who has already held a judicial appointment could be reinstated or moved around, whereas someone who has not previously sat on the bench should be appointed through the Judicial Appointments Board. I get the impression that you follow my logic. Does my suggestion make sense to you?

Sir David Edward: I will mention my own case. If the law had stood as it was when I returned from Luxembourg, I could not have been appointed as a temporary judge. I would have had to apply to be a temporary judge and go through the whole assessment process, and nothing in the bill enables the appointment of a temporary judge other than by that method. Had I been placed in that position, I am not sure that I would have wanted to go through the application and interview process.

As a result of one of the peculiarities of my position in Luxembourg, I am not a person who, in statutory terms, has held high judicial office. For reasons that I have never understood fully, the position of judge in the European courts does not constitute high judicial office for United Kingdom statutory purposes. If one thinks that it is desirable that people in my position should be able to come back and offer such assistance as they can, it is obviously desirable that it should not be imperative for temporary judges to go through the appointments procedure.

I am concerned about calling such judges temporary and subjecting them to a procedure that is designed for the appointment of permanent judges. I am not sure of the current position in England, but it has been common there for members of the bar to sit as recorders and act as deputy High Court judges. Given the temporary nature of such judicial appointments, I am not sure that it is desirable for them to be converted into a form of permanent appointment. It would become difficult if the temporary judge were to apply for a permanent post. If she or he passed successfully through the scrutiny process for a temporary appointment, on what ground would one refuse them a permanent appointment? One might do so precisely because the temporary position is a probationary position.

A variety of considerations lead me to agree that, for appointment purposes, it is not entirely satisfactory to treat a temporary judicial post in exactly the same way as a permanent judicial post.

Margaret Smith: I have an observation to make. I agree that, as you have said several times, what members of the public are interested in is how the person who has been appointed as a sheriff or a judge goes about discharging their duties. Whether that sheriff or judge has been appointed on a temporary basis, a part-time basis or a permanent, full-time basis probably does not matter to the people who appear in front of them. Do those people not have a right to expect that, regardless of who is on the bench, they will have gone through the same process to get there?

Sir David Edward: That argument can be made, but it deals with a different situation from the one that Mr Don mentioned. His point was about whether a person who had already been a judge in another context should be subjected to the same appointment process. You may be right, but that is an argument for not having temporary judges.

Margaret Smith: Indeed.

The Convener: We started our questioning with judicial independence, so let us end it on the same subject.

I want to tease out the point that you make in paragraph 7 of the paper that you have submitted today, in which you express a reservation about section 1(2)(a). You suggest that some people might consider that provision to mean that the special access that politicians such as ministers have to the judiciary, as a result of the nature of their job, is "the *only* way" in which they could seek to influence judicial decisions. You propose a helpful amendment, which would involve inserting the phrase "in particular" at the start of section 1(2)(a). That would highlight the fact that there are different ways of skinning of a cat—ministers might seek to influence judicial decisions through press statements, for example. Will you expand on your suggestion?

Sir David Edward: I do not know that I can. There is a slight problem with the phraseology of section 1(2), because it includes the Lord Advocate. Plainly, if the Lord Advocate appears as counsel before the judges, it is perfectly legitimate for him or her to seek to persuade the judges to do something.

However, there are many ways in which the First Minister and the Scottish ministers might seek to influence particular judicial decisions other than through the use of special access to the judiciary. The inclusion in section 1(2)(a) of the words "in particular" would make it clear that they are not to do so, but it would not create a problem in relation to the Lord Advocate because, in that case, one would be saying that the Lord Advocate must not seek to exert such influence because of his or her special access to judges. It would be helpful to clarify that point.

The Convener: We will give that suggestion active consideration.

Thank you very much for coming. You have given us a lot of food for thought, some of which we will now pursue with the Cabinet Secretary for Justice, who is the next witness.

I suspend the meeting briefly to allow for a change of witnesses.

10:58

Meeting suspended.

11:00

On resuming—

The Convener: I welcome the Cabinet Secretary for Justice, Kenny MacAskill; Moira Wilson, the Judiciary and Courts (Scotland) Bill team leader; Alastair Sim, the director of policy in the Scottish Court Service; and Alison Fraser and Catherine Scott, solicitors in the constitutional and civil law division of the Scottish Government.

Cabinet secretary, as you will be aware, we have taken a considerable amount of evidence on the bill, some of which has been exceptionally interesting and has raised a number of questions that we would now like to pursue with you. Nigel Don will begin the questioning on the subject of judicial independence.

Nigel Don: To what extent does section 1 of the bill simply replicate the provisions of the Constitutional Reform Act 2005? What does providing a statutory guarantee of judicial

independence achieve, beyond being merely symbolic?

The Cabinet Secretary for Justice (Kenny MacAskill): We believe that it is more than simply symbolic. However, at the outset, I would like to state that symbolism has a place in the courts and should not be underestimated. After all, we often bring people before the courts to show them the full majesty and weight of the law. Having said that, I should say that the proposal is not merely a symbolic gesture. We are committed to a strong, independent judiciary. It is important that Scotland's citizens and all who do business here should be aware of that. We believe that the bill is of constitutional significance and that enshrining in it the principle of judicial independence will help to ensure judicial independence. The bill adds value to the currently accepted common-law position by reiterating it.

Nigel Don: As discussions have gone on, we have become increasingly aware of the fact that there is a common-law position. Could you clarify whether the bill adds to the common-law position or just picks out parts of the common-law position, albeit for good—if, perhaps, symbolic—reasons?

Kenny MacAskill: To some extent, we are taking a belt-and-braces approach. We accept the common-law position, but there is good reason to enshrine that position. It is accepted by the body politic in the parliamentary chamber that the separation of powers between the legislature, the executive and the judiciary is correct and that their respective roles are to be cherished. One of the ways of doing that is to enshrine the position, which is what the bill does.

Does the common-law position provide some safeguard at the moment? Yes, it does. Does the bill go beyond that position? We believe that it does. Is the symbolism important? Yes, it is, but we believe that the text that will be committed to is also important.

Nigel Don: Several detailed points have emerged in our evidence, and I would like to go through them.

The duty to uphold the independence of the judiciary is laid on the First Minister, the Lord Advocate and ministers, but not specifically on Parliament. The point has been made that, although Parliament cannot bind itself, we could, perhaps, impose that duty—even if it were only symbolic—on members of Parliament. Do you think that that extension might be valuable? We could argue that MSPs, as "other persons with responsibility", are already covered under section 1(1)(d).

Kenny MacAskill: We are genuinely open-minded on that matter. Our position is that, to some extent, there is a difficulty about whether Parliament can bind itself in a way that is separate from the way in which it is bound by others. We are happy to consider arguments and views around the issue. However, it was felt to be necessary to ensure that the executive did not seek to interfere with the judiciary.

At the moment, we believe that the proposal in the bill is satisfactory, but if it is thought that the legislature should be provided with an additional duty, we would be happy to consider that.

Nigel Don: Sir David Edward spoke to us about section 1(2)(a) of the bill, which states:

> "the First Minister, the Lord Advocate and the Scottish Ministers … must not seek to influence particular judicial decisions through any special access to the judiciary".

It is thought that that provision is narrowly drawn and that it might be better to specify that those people "in particular" are not to seek to influence such decisions, so as not to lose the generality.

Kenny MacAskill: We would be happy to reflect on that. I see where Sir David Edward is coming from. Such issues take us back to what the Lord President said about trust. We must ensure that Governments—of whatever political hue—and law officers do not seek to interfere. Even in a small jurisdiction such as Scotland, meetings, discussions and interfaces must take place. To some extent, it is a matter of trust and respect. We take the view that things can be construed liberally enough to ensure that there are no difficulties when there are sensible interfaces and discussions, and that the clear view that no attempt should be made to lean on people or influence them inappropriately will not be undermined. However, the Government would be happy to consider a textual amendment to the bill if it was thought that that was needed.

Nigel Don: I do not think that it would need to be reflected in statute, but do you envisage the ministerial code being modified to reflect the provision?

Kenny MacAskill: We have not considered that, but we would do so if it was thought necessary. The matter would have to be reflected on, probably more by those who deal with the ministerial code than by the justice department. The ministerial code may need to be amended. We are happy to consider the matter and pass it to those who constantly seek to review and update the code.

The Convener: We proceed to the role of the head of the Scottish judiciary.

John Wilson (Central Scotland) (SNP): Good morning, cabinet secretary. How do you respond to the concern that giving the Lord President formal status as chair of the Scottish Court Service will detract from his judicial function?

Kenny MacAskill: I do not think that it will. It is a matter of common sense. It is important that the office of Lord President is not overburdened—we take that as read. Obviously, the Lord President can delegate some of his responsibilities, and he will have an enhanced private office to support him. He will also be able to call on support from the chief executive and staff of the Scottish Court Service.

It is a matter of getting the appropriate balance. It is down to the Lord President making commonsense judgments. Our judges are appointed on the basis that they are capable of making such judgments, and we do not envisage any difficulties. Resources and staffing will be made available to the Lord President, and it is appropriate that he should be in such a position. As he said, it is a matter of trusting him to do his job. He is perfectly capable of doing that job, as his successors will be, whoever they are.

John Wilson: What consideration has been given to the bill's impact on the role of sheriffs principal?

Kenny MacAskill: The bill's impact on sheriffs principal has been considered, and they will have an appropriate position. The Lord President will have the opportunity to intercede at various junctures, but it seems to us that sheriffs principal will operate as they currently do in relation to the sheriff courts and justice of the peace courts in their sheriffdom. However, their role will be subject to directions from the Lord President, who will have the power to step in if major difficulties arise in a sheriffdom. Such powers are currently in the hands of Scottish ministers, which does not seem appropriate to us. It appears to us that the Lord President should ultimately have that pivotal role.

Again, it comes down to trust and respect, not simply between politicians and the judiciary but between the Lord President and the sheriffs principal. We are striking the appropriate balance by putting the powers in the Lord President's hands, rather than Government ministers' hands. That will allow him to work out the nature of his relationship with the Scottish Court Service and sheriffs principal. Both are important and both are best dealt with by the judiciary. We are striking an appropriate balance, which allows sheriffs principal to get on with the job that they do well. Equally, significant difficulties are better dealt with by the Lord President than by Government ministers.

Stuart McMillan (West of Scotland) (SNP): The committee has received representations that the Scottish Land Court should be added to the list of courts that are included in the definition of Scottish courts. Why is it not included, and would the Scottish Government consider including it?

Kenny MacAskill: The Scottish Land Court is not included in the definition because it is administered by the Scottish Government rather than by the Scottish Court Service.

The Convener: Is there not an inconsistency in that? Given the nature of the Scottish Land Court's functions, it might well be argued that it carries the same status as other courts.

Kenny MacAskill: That is a valid point. We are going to lay regulations to resolve that anomaly. At present, the Scottish Land Court is not included in the definition, because it is not within the Scottish Court Service's domain, but there are plans to ensure that it is brought into that domain. Once that happens, logic dictates that it should be included in the definition.

The Convener: We will perhaps consider that at a later stage.

Cathie Craigie: I am sure that the committee will want to look at the issue in detail when we are considering our response to the bill. Will the minister give us more information about the situation and respond to the points that have been made about it in the written submissions that we have received?

Kenny MacAskill: I am certainly happy to write to you about the timetable for the regulations, which might well be relevant to what should or should not be in the bill. We are happy to deal with that. The bill contains a regulation-making power, which could be used to include the Scottish Land Court in the definition. Therefore, even if the matter is not dealt with formally in the bill, that power will exist. We can provide you with up-to-date information on where we are in seeking to address the anomalous situation that seems to exist and on the proposed timescale for laying regulations to deal with it.

The Convener: That would be helpful.

You will have heard some of the evidence that we have taken on the Judicial Appointments Board for Scotland. There is a view that allowing Scottish ministers to appoint board members is contrary to the principle of judicial independence. The Law Society of Scotland and the Faculty of Advocates consider that they should have the responsibility for appointing the legal members of the JAB. The committee has also heard evidence that it would be desirable to have another sheriff on the board when considering shrieval appointments, and another judge on the board when considering appointments to the senate of the College of Justice. Are you satisfied that the proposed composition of the board is right and that allowing Scottish ministers to appoint the majority of members is consistent with the principle of judicial independence, which I know that you support firmly?

Kenny MacAskill: We do not appoint a majority. Clearly, a balance is set and a lay member ultimately presides. This matter has been looked at long and hard by the previous Administration and by us. We have looked at situations in a variety of jurisdictions and there does not seem to be any one particular model. We were persuaded that the current Judicial Appointments Board is working well and it appears to us that there are no real difficulties. Our starting point was: if it ain't broke, why fix it? Therefore, we have not sought to vary the current situation.

It seems to us that there should be lay involvement. Shrieval and judicial appointments will have the benefit of both lay perusal and experienced perusal. The Judicial Appointments Board works well at present and the balance appears to be right. On that basis, we are happy to continue with that balance. If we were to ensure a judicial or shrieval majority, the danger is that it could be perceived that we had almost a self-fulfilling ordinance.

11:15

The Convener: We have considered the situations in other jurisdictions, not all of which have lay involvement. If I detect the committee's mood correctly, it is in favour of retaining lay involvement in the board. However, the interesting point about the situation elsewhere is the percentage of lay members. As far as I can ascertain, Scotland is the only place where the lay members are de facto in the majority, because there is a lay chairman. Do you have any comment on that?

Kenny MacAskill: My comment is that the Judicial Appointments Board has served us well. The board's view is that it wishes to continue as it is at present—we are persuaded by that. We must take into account the fact that the judiciary serves our communities and that judges do not live in a vacuum. It is important that we have an overall balance. An inbuilt majority would not be in the interests of presentation.

The Convener: If you and I and Mr Butler were on an interview panel for a consultant orthopaedic surgeon position, would you be comfortable that you had the ability to make a choice?

Kenny MacAskill: We must consider the balance in the board. The lay members' role is not to advocate or to argue about people's individual abilities in legal matters, but to take into account a variety of other factors. We do that in an array of other situations. Politicians are not simply judge and jury—certainly not in this jurisdiction and Parliament. That is the appropriate situation. Furthermore, the chairing member of the JAB does not have a casting vote, so there is a balance. The lay members bring something to the board. Our judiciary and our judicial system are not meant to exist in isolation. They exist to represent our communities, so it is appropriate that our communities should have a say.

If, in another life, the convener and I sat on a tribunal, I would not expect, in dealing with an expert legal adviser or a consultant surgeon, to comment on their individual abilities as lawyer or surgeon. However, lay people bring other skills to the table. That has been the case in the Judicial Appointments Board to date. I believe that the situation enhances the judiciary—it does not detract from it. Evidence on skills and other matters is provided in a variety of ways. Some board members have the relevant backgrounds and can comment on such issues but, equally, the board must consider Scotland as a society and how our judicial system fits with our communities. The balance that we have is fair and appropriate.

The Convener: The funding for the Judicial Appointments Board comes from the Scottish Government. I accept that it is difficult to envisage how we can get round the problem, but that is a bit of an impediment to total independence. The perception could be that the board has to do what the Government tells it, because the Government provides the money.

Kenny MacAskill: That is a valid point. There is no way to square that circle without giving the board a blank cheque. However, we have a similar situation with the Crown Office and Procurator Fiscal Service. The Lord Advocate negotiates with the Cabinet Secretary for Finance and Sustainable Growth to ensure that the service is funded appropriately. At the end of the day, we cannot have a mechanism other than negotiation between that body and the Government. Obviously, if rancour developed, as in any situation, there would be a breakdown in trust and we would veer towards difficulties for the body politic. We cannot get away from the point that judicial independence must be paramount but, equally, we must take cognisance of the public purse. Irrespective of who is in government or who the Lord President may be, we must start from a position of trust and respect. If we do that, we will manage to deliver, as we have done in relation to the Lord Advocate and the Crown Office.

The Convener: On a final minor point, schedule 1 provides that the Scottish ministers may remove a lay member of the Judicial Appointments Board for Scotland from office if the member

"has been convicted of any offence."

Would it be appropriate for a minor road traffic offence such as speeding to result in a board member's removal? I suspect that you think that that would not be appropriate. Have you considered amending the provision?

Kenny MacAskill: I understand that removal would not be obligatory and could simply be considered, but I am happy to reflect on that. A minor road traffic infraction might not justify removal, although there might be circumstances in which it would do so. I understand that there would be flexibility to consider the issue, but we can come back to the committee on that.

The Convener: Perhaps you will reconsider the provision.

Bill Butler: The committee has heard that the point of entry to the judiciary is too late in the career cycle for us effectively to encourage diversity in the legal profession. How will the Government encourage a more diverse range of people to acquire the skills that judges need? How will section 14 help in that regard?

Kenny MacAskill: I speak not just as Cabinet Secretary for Justice, but with 20 years' experience as a practising solicitor in Scotland when I say that there has been a significant shift in the diversity of the shrieval and judicial bench, which has enhanced the office and benefited Scottish society. We should acknowledge that appropriate changes have been made.

I heard Sir David Edward's evidence. It is inappropriate for us to give direction, but we can give guidance on a variety of matters that might be the subject of legislation in due course, for example to do with employment. Guidance seems to be appropriate in that context.

It seems that the shrieval and judicial bench is on a journey, as is Scottish politics, in relation to increasing diversity and representation of women and ethnic minorities. To some extent, we should let the judiciary get on with the job, but we reserve the right to give guidance, for example on forthcoming employment matters. We would not seek to direct the judiciary on other matters, such as sentencing policy.

Bill Butler: Do you agree with Sir David Edward that section 14(1) would condition the way in which people behave and will therefore be useful as long as it is not taken too far? I think that is what he said.

Kenny MacAskill: Sir David Edward was quite correct. As I said, it is about trust and respect. If trust and respect break down we face an impasse, but if the legislature and—more important in this context—the executive act with trust and respect, we should not have problems. The diversity of the shrieval and judicial bench has changed drastically and appropriately. We should welcome the judiciary's journey in that regard and allow it to continue. We can take the opportunity to provide guidance as and when the legislature in Scotland wants to introduce changes in employment matters that would affect the people who preside over our courts, as much as they would affect people who work elsewhere.

Bill Butler: The bill makes no provision for what should happen when Scottish ministers are not minded to accept a recommendation from the Judicial Appointments Board for Scotland. What is the Government's view of the suggestion that the Government should publicly declare its reason for not accepting a recommendation?

Kenny MacAskill: As I recall, ministers have to give a reason to the JAB. There might be good reasons why the individual concerned should not be subject to a public spat—constitutional or otherwise. We must remember that three parties would be involved and there might be good reason not to put into the public domain information about an individual. The proposed approach strikes an appropriate balance.

Recommendations have to come from the JAB, and ministers, if they have good reason, are entitled to remit them back. The JAB has the right to reconsider. Once we hit such an impasse, there is probably very little that can be done in legislation. Trust and respect will have been damaged, and there will be a significant problem that will probably have to be dealt with in another way. The appropriate balance already exists. I would be concerned that public declarations might impact negatively on an individual who may have no reason to be dragged through a spat between the executive and the judiciary.

Bill Butler: You say that little can be done in legislation, but what process do you envisage would help to avoid the development—or would, at least, end—such a stand-off, so that the matter did not go back and forward between ministers and the Judicial Appointments Board?

Kenny MacAskill: It is hard to think of such circumstances. Usually, such matters eventually come down to personalities. It comes back to the issue of trust and respect. There would have to be some discussion about what had brought about the impasse. I would hope that a minister would not interfere without good reason and that those who recommend appointments would not seek to foist an appointment on a Government and ministers unless the person recommended was appropriate and qualified for the job. This is one of the junctures at which we would have to sit down and work it out. Seeking to legislate for such matters could make the situation worse.

Bill Butler: Would the best way forward be to employ that most uncommon sense, common sense?

Kenny MacAskill: It is about common sense, trust and respect. People should realise that everybody is trying to do the right thing, whether they are coming at it from the point of view of

politicians, those who make appointments to the bench or those who sign off the appointments. It comes down to trust and respect. If that breaks down, there is a significant problem that has to be tackled, and people have to get their heads together and discuss it while respecting one another's constitutional independence and respective roles. It is difficult to legislate for a solution to such an impasse because it is a significant impasse for the entire nation, which would have to be worked out. We hope and assume that such situations would not arise but, if they do, they are usually symbolic of a problem with deeper roots than simply that one person likes candidate X and another person does not like candidate X. Such a situation would signify that trust and respect had broken down. Apart from the fact that common sense would have to prevail, I do not think that it would be possible to introduce any arbitration. Common sense would have to prevail. The interests of the nation would see pressure brought to bear on both parties to get their heads together and get the problem sorted.

The Convener: Before we leave the Judicial Appointments Board, I want to consider an area in which a difficulty could arise. I am sure that it would not, but we must legislate for what might appear to be fairly remote possibilities. As you are aware, the appointment of judges results in a series of interviews being carried out and the candidates being graded in a particular order. The process is time limited and, during the course of the interviewing panel's deliberations, there may be insufficient vacancies to incorporate all the applicants, which would mean starting all over again and re-interviewing people. The candidates are not told the order in which they are ranked. Would not it be more open if they were? There might otherwise be a feeling that once the panel's report had been received by Scottish ministers, the ranking was adjusted according to the currency of the board's deliberations.

11:30

Kenny MacAskill: To some extent, such matters are best dealt with by the Judicial Appointments Board. There is merit in its reasons for ranking. Situations arise in which there are insufficient vacancies. It is not a matter of having people on a waiting list for ever and ever. Besides that, people's circumstances can change. New people can arrive on the scene who are better qualified—it should not simply be Buggins's turn.

I am not convinced that candidates should be advised of their ranking. That might be best dealt with in the privacy of the Judicial Appointments Board, as it is a question of how the board operates. We do not seek to be dogmatic about that. If the JAB is satisfied with how it operates—it certainly seems to operate well—I am happy to leave the matter with it. If the board was persuaded that advising a candidate whether they were number 7 or number 2, for example, had merit, I would be happy to accept that. However, the present balance is appropriate. We do not have unseemly spats in which people say, "It should have been me." Some issues are best dealt with confidentially.

Cathie Craigie: Is the First Minister's role in relation to the appointment of Court of Session judges—and in particular the Lord President and the Lord Justice Clerk—compatible with judicial independence?

Kenny MacAskill: Yes. The system that will be created is appropriate. The First Minister must be involved, but we must ensure that he has the appropriate advice—that has been touched on—from specialists who know about the candidates' qualifications and expertise, and lay people should have input. The balance is correct.

Cathie Craigie: Are you satisfied that the appointments system will not favour, or appear to favour, the compliant candidate and will not deter highly qualified candidates who are of independent mind?

Kenny MacAskill: I do not think that that will happen. It is important for the First Minister to have a role and the checks and balances are correct. The Lord President and the Lord Justice Clerk are two major offices of state, so it would be absurd for the First Minister not to have some involvement in their appointment. However, we must ensure that the appointments are not political. The proposed methods strike the appropriate balance.

Cathie Craigie: As is right, you hold the Lord President's views in high regard. He expressed reservations to the committee about placing the appointment of temporary judges in the Judicial Appointments Board's remit, because that could hinder the Lord President's ability to respond swiftly to circumstances. How do you respond to that concern?

Kenny MacAskill: If temporary judges did not fall within the proposed appointments system, that would be anomalous. If the concern is about the timescale, the time could be truncated—an accelerated procedure must be possible. Ensuring that the systems incur no undue delay is a matter for those who deal with appointments. However, if a temporary judge did not require to go through the same mechanisms as a permanent judge, that would be anomalous.

Cathie Craigie: Is the Government continuing to discuss that issue? Are any changes likely?

Kenny MacAskill: We are happy to have discussions, but the bill will establish the principle.

If temporary judges were appointed under a different system from permanent judges, that would be anomalous. The systems are better dealt with by the Judicial Appointments Board than by us. Accelerating the process, if need be, is not beyond the board's wisdom.

Paul Martin: Why did you stress the importance of the role of the First Minister of the day in the appointment of the Lord President and the Lord Justice Clerk? If the First Minister was not involved in their appointment, how would that affect how we would deliver justice in Scotland?

Kenny MacAskill: I stand by what I said. The Lord President and the Lord Justice Clerk are two of the highest offices of state in Scotland and not simply the two highest legal offices. Given that, it appears appropriate to me that the First Minister be involved in the appointments.

Paul Martin: Do you accept that, if the First Minister was not involved in that appointment process, that would not affect how justice would be delivered? If the Lord President was appointed independently of the First Minister, that would not undermine the role of the state.

Kenny MacAskill: The arrangements are set out in section 95 of the Scotland Act 1998, which provides that it is for the Prime Minister to recommend to the Queen the appointment of persons as Lord President and Lord Justice Clerk. However, the Prime Minister cannot recommend any person who has not been nominated by the First Minister. It seems to me, therefore, that the 1998 act takes a belt-and-braces approach.

Paul Martin: I appreciate that. I am just interrogating why you regard it as being crucial that we go forward in the direction that you suggest. Would an independent appointment process that did not involve the First Minister affect the mechanism for delivering justice?

Kenny MacAskill: No—but we seek to ensure an appropriate balance. What we propose in the bill will provide such a balance. Given the importance of the offices of the Lord President and the Lord Justice Clerk, and given the significance of the office of the First Minister, the latter should be involved in those judicial appointments. I do not regard that as being irreconcilable with or in conflict with the concept of balance. It appears to me that the proposed methods will provide an appropriate balance whereby any suggestion of partiality by a First Minister would be dealt with by checks and balances. It would be absurd to suggest that the First Minister should not have an input.

Paul Martin: Can I move on, minister, to the issue—

The Convener: Before you do that, I ask Nigel Don to follow up on a point that he has.

Nigel Don: I want to return to the appointment of temporary judges. There appear to be two classes of potential candidates. One is those who come up from the ranks of lawyers, and the second is those who have already sat on the bench somewhere and who are retired sheriffs, retired High Court judges or retired European Court judges. It seems to be logical to suggest that the appointment of those who return to the bench as temporary judges might not need to go through the Judicial Appointments Board because they already have a bench licence, to coin a phrase. Do you envisage giving the Lord President scope for reappointing people without having to go through the JAB?

Kenny MacAskill: That scope is already in the bill. Signing off such appointments would be a matter for the Judicial Appointments Board, but the bill includes provision for a truncated version of appointment, if I can put it that way. What we are looking at is how the Judicial Appointments Board should be involved—it is correct for it to be so involved. However, I believe that the bill covers such aspects.

The Convener: We turn to the question of judicial conduct and complaints.

Paul Martin: What are your views of the current arrangements for dealing with judicial conduct in the courts?

Kenny MacAskill: First, we must put on record that we are well served by our judiciary and that there are few complaints. However, justice needs not only to be done but to be seen to be done, so it seems to me to be appropriate to have a structure that provides a balance that allows complaints to be dealt with but which also seeks to protect the judiciary from vexatious complainers.

Paul Martin: Lord McCluskey gave evidence that suggested that he could not envisage a situation in which anyone would have the capability or the qualifications to judge judges independently. I wonder how you will bring forward a plan that will meet Lord McCluskey's concerns.

Kenny MacAskill: I do not quite follow the question. It seems to me that there must be the opportunity for some element of review—that is why we have a complaints system. As we have said, the number of complaints that are made is not substantial. The bill provides for a structured process for dealing with complaints while not creating unnecessary bureaucracy. In a constitutional arrangement that respects the principle of judicial independence, managing the conduct of judges is a function that can be undertaken only by the judiciary. The bill sets out a framework of powers, but leaves it to the Lord President to determine the rules that will be published.

However, the fact that the bill provides for the appointment of a judicial complaints reviewer seems to offer the general public some satisfaction that such matters will be dealt with. That proposal is beneficial and will protect us against the accusation that the system is simply about judges reviewing themselves to protect themselves.

Paul Martin: I want to take up your point about public confidence. In respect of the policy objectives I agree that the process that will be followed will be made public, but the outcome of any complaints will not be made public. How do you respond to that?

Kenny MacAskill: There is good reason for not making public the outcome of complaints. A vexatious complaint can cast a slur on a judge or a sheriff. Such matters must be investigated, however, and the proposed system, which involves a structure that gives the Lord President the appropriate powers, is appropriate. The last thing that we want to do is to provide an opportunity for holders of judicial office to be maligned and disparaged, and for complaints about them to be made public, without providing them with any protection. We need to strike a balance between protecting judges from malicious complaints and ensuring that the public is protected from people who, for whatever reason, fail to deliver on their judicial duties.

Paul Martin: I understand that, but when misconduct has been proven, should the evidence of that misconduct not be published—as is the case under the current regime for MSPs—to ensure public confidence?

Kenny MacAskill: I am not necessarily persuaded. There might be good reason for not publishing evidence of misconduct. Third parties might be involved. Such evidence might relate to the conduct of a case, with the result that litigants could suffer unduly. There could be impact on appeals. There could be a variety of consequences for people other than the judicial office holder who was under investigation. Litigants in a case that came before the judge could be affected. There is good reason why details of complaints are not published.

I believe that the appointment of a judicial complaints reviewer is the appropriate way of ensuring public protection. Superficially, it might appear that we should just publish evidence of misconduct, as is the case with MSPs, but there is good reason not to do so in cases of complaints against judges. There could be an impact on civil or criminal appeals and other people could be dragged in. The issue can be reviewed, but I am not yet persuaded that it would be appropriate to publish evidence of judicial misconduct.

Paul Martin: I understand that you considered the possibility of the Scottish Public Services Ombudsman's involvement in the process. Why was that discounted?

Kenny MacAskill: Given that the SPSO already has a wide remit and that the nature of the proposed position of judicial complaints reviewer is distinct and almost unique, it was felt that it would be better for such matters to be dealt with separately. I have no doubt that, in time to come, my colleague the Cabinet Secretary for Finance and Sustainable Growth might have views on where the reviewer's office should be located and whether there should be any sharing of back-office functions. There is a significant difference between the role of the proposed judicial complaints reviewer and that of the SPSO, so the two offices should be kept separate.

Paul Martin: My understanding is that the judicial complaints reviewer will not be involved in considering the rights and wrongs of particular complaints but will investigate only whether the proper procedures were followed. I understand that that is exactly the function that the SPSO carries out at the moment. Why is there a requirement for specialist knowledge, if only the following of procedures is to be interrogated?

11:45

Kenny MacAskill: That is not the case. We must go back further than that. We approach the issue from the position that, in Scotland, the judiciary has a specific role. That is what we are seeking to enshrine in the bill. We are not simply looking at faulty service by a council or health board, which can be dealt with in other ways and in relation to which there is some element of democratic accountability. What we are dealing with is significantly different. The bill will enshrine the independence of the judiciary in statute, which is why it is inappropriate that complaints should be reviewed by extending the already wide remit of the ombudsman. It is important that the judiciary be independent of any complaints that are reviewed, few as they may be and however important they are. The judiciary should stand alone, because it inhabits an entirely different spectrum from that which involves complaints about the council or the health board.

Paul Martin: I appreciate the unique elements that attach to the judiciary. However, if we are willing to take forward a complaints process, is there not an argument that it should stand alone, separate from the judicial process, if it is to be completely independent? Further, if that is the case, surely the ombudsman would provide that opportunity. I am not making a case either way; I am just interrogating the point.

Kenny MacAskill: Your argument seems to be that a complaints process should not stand alone, but should be within the remit of the ombudsman. However, we have a separate standards commissioner for MSPs because of our distinctive position. The issue comes back to the starting point, which is that we are enshrining the independence of the judiciary. Therefore, the ombudsman route should not be used. There should be a distinct route.

Paul Martin: I am not arguing anything; I am only asking a question.

Bill Butler: In paragraph 23 of his written submission, Sir David Edward said:

"I don't fundamentally disagree with the arrangements proposed in the Bill for judicial appointments, complaints against judges, and discipline of judges, though I don't see the need for the Judicial Complaints Reviewer."

Does he not have a point? Many witnesses have said that we should trust the Lord President.

Kenny MacAskill: Of course we have to trust and respect the Lord President. The issue comes back to the fact that justice must not only be done but be seen to be done. If we are arguing that it might be inappropriate to make such matters public, we have to be able to satisfy the public that there is an element of independent scrutiny that provides a satisfactory way of dealing with the issue. We need to be able to satisfy people that, although certain matters are not being published, we are seeking to ensure that the public's legitimate interest is protected.

Bill Butler: Who would you see as filling the role of judicial complaints reviewer? Who would be more qualified than the Lord President?

Kenny MacAskill: To some extent, we are not talking about reviewing a legal matter; we are talking about someone of fairness, sensibility or whatever reviewing the procedure to ensure that what has been carried out has been carried out fairly and appropriately. It is an administrative rather than a judicial matter.

Bill Butler: I still find it a wee bit difficult to follow that argument. I do not see who would be more au fait with the process and procedure that should be followed than the Lord President.

Kenny MacAskill: Yes, but the role of the reviewer is to ensure not only that justice is done but that it is seen to be done. They are not there to do anything other than ensure that the public interest is protected. That is perfectly reasonable.

Bill Butler: Who would you see as filling such a post?

Kenny MacAskill: I do not think that that is a matter for me. We have means of making public appointments and it would be inappropriate for me to comment on that. However, there are sufficient checks and balances in the public appointments process to ensure that whoever was appointed would be a person of sufficient stature, education, intelligence and good conduct to be able to satisfy the public that they are able to act as a check, on the public's behalf, and are capable of following the appropriate procedures.

The Convener: Obviously, a number of complaints are made each year, but it appears that, rather than being about the conduct of judges, the vast majority of them come from people who are dissatisfied with the outcome of their case. Can you enlighten us about the number of complaints that are made about judicial conduct as opposed to unsatisfactory outcomes?

Kenny MacAskill: The information that we have is that approximately 180 complaints are made a year, but we do not have a breakdown of how many of those have foundation and how many are frivolous or vexatious. However, suffice to say, it is accepted that many are entirely without foundation.

The Convener: So we could be talking about a vacuum of complaints about the conduct of judges. The number of such complaints is probably very small.

Kenny MacAskill: I think that we are well served by the judiciary and that only a very small number of complaints are made about it. The committee can rest assured that, although there is a role for a judicial complaints reviewer, we do not foresee them working 24/7. We believe that it is necessary to provide reassurance to the public, but the job will not necessarily be full time. That is not expected. I hope that very few complaints will be made.

The Convener: Those of us around the table know that complaints multiply when a complaints procedure is set up, which is a problem. Will that happen?

Kenny MacAskill: No. Often, the die is cast by the person who is appointed to an office. If that person is prepared to consider frivolous and vexatious complaints, then it will be clear that there is an open door. We have trusted sensible people in other positions to get on with things and they have made it clear at the outset that they are not prepared to consider frivolous or vexatious complaints. Having triggered that message, they can then address legitimate complaints. That takes us back to trusting and respecting the Lord Justice Clerk and the Lord President. We must also trust that whoever we appoint to the office of judicial complaints reviewer will not only be of good character but will be able to separate the wheat from the chaff and treat the chaff appropriately and with speed.

The Convener: The person should feel no pressing need to overjustify their existence.

Kenny MacAskill: Absolutely.

The Convener: Stuart McMillan has a follow-up question on the removal of sheriffs.

Stuart McMillan: The Sheriffs Association is concerned that section 38 of the bill will reduce the protection that is afforded to sheriffs and that it breaches previous ministerial assurances on the removal of sheriffs from office. How do you respond to that concern, cabinet secretary?

Kenny MacAskill: What has been proposed is perfectly reasonable. We are ensuring that such matters will be dealt with to some extent by the Lord President as opposed to by ministers. There is no suggestion that anyone in that office will seek to interfere unduly. It is a matter of balance. I do not see what the holders of shrieval office have to fear.

The Convener: Our final questions are on the Scottish Court Service.

Margaret Smith: Good morning, cabinet secretary. What contribution will senior members of the judiciary make to the administration of the SCS, given Lord McCluskey's comment that

"Judges are not good administrators"?—[*Official Report*, *Justice Committee*, 18 March 2008; c 630.]

Kenny MacAskill: We are talking about a matter of trust and respect to some extent. I do not necessarily think that it is true that judges are not good administrators. Common sense is needed to run a judge's office. The right balance must be struck. It is appropriate that the Lord President should chair the SCS board and that it should ultimately fall within his domain as opposed to the Government's domain. As I said, we must trust the holders of that office to get the balance right; they must take responsibility where it is appropriate to do so and allow administrative matters to be dealt with by those who are well qualified to deal with them.

Margaret Smith: Paragraph 3(1) of schedule 3 to the bill states:

"It is for the Lord President to appoint the members of the SCS (other than the Lord Justice Clerk and the Chief Executive)."

However, paragraph 3(2) of schedule 3 states:

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

What might such regulations prescribe?

Kenny MacAskill: We are talking about matters that are dealt with by the Office of the Commissioner for Public Appointments in Scotland and others. In this country we ensure that public appointments are not a matter of ministerial diktat or fiat. That applies to the SCS as it does to every other body.

Margaret Smith: Do you intend to consult on the regulations?

Kenny MacAskill: Yes, we absolutely do.

Margaret Smith: There are a number of questions in people's minds about how the new relationships between the SCS, its board, the Scottish ministers and the Parliament will work. The SCS board will be chaired by the Lord President and the majority of its members will come from the judiciary. However, the SCS budget will be agreed by the Parliament and if the SCS fails to do what it should do the Scottish ministers can take control of it. Priorities will be set out in discussion with the Scottish ministers, and the SCS will be required to have regard to guidance from ministers. How do you envisage that the new relationships will develop?

Kenny MacAskill: Your question brings me back to what I said about trust and respect. Although we have a separation of powers we must acknowledge that we cannot operate in silos. There must be an interface, which might relate to how money is apportioned to the SCS, or decisions of the legislature on employment law for example.

It is impossible to predict or legislate for every scenario that might arise. There are areas of interface, as I said. It is about people coming from a position of trust and respect, and it is about ensuring that fundamental matters, such as the independence of the judiciary, are enshrined. In some instances there is an overlap. Although the Lord President has powers, the Parliament will have an opportunity to consider employment law and guidance will have to be given. Giving such guidance is separate and distinct from giving clear direction about how matters are operated. It all comes down to having a framework in which we must let matters develop.

Margaret Smith: Currently, if I wanted information on the SCS I could ask a parliamentary question, write to you or ask you a question during a Justice Committee meeting. How will the board of the SCS be accountable to the Parliament? The Lord President told us:

"One will be involved to a greater extent in an arm of government".—[*Official Report*, *Justice Committee*, 11 March 2008; c 569.]

In recognition of the Lord President's additional administrative responsibilities and his right to make subordinate legislation, it has been suggested that he should have a degree of

accountability to the Parliament. What are your views on that?

Kenny MacAskill: Your question raises several issues. The SCS board will be accountable in a variety of ways. The chief executive is the accountable officer and is responsible for the SCS's proper and efficient use of resources—the chief executive is a compellable witness. The SCS will be required to lay a report before the Parliament every year and controversial decisions would require parliamentary approval of a statutory instrument. If there were serious concerns about apparent failure in the SCS, the Scottish ministers could make an order that would be subject to affirmative procedure, thereby ensuring parliamentary accountability.

As Sir David Edward said, the Lord President has a distinct role in the proper administration of the SCS. Any attempt to make him compellable could lead us into grey areas in relation to the judiciary's independence. The right of the public and of legislators to hold the SCS properly to account is protected by the compellability of the service's accountable officer. That is the practice in other organisations. Respect must accompany the office of Lord President and the trust that is given him. We must accept that he will take the opportunity to interface with and appear before the committee on a variety of matters. However, compelling him would lead us down the route of interfering with the concept behind the bill—the independence of the judiciary.

12:00

Cathie Craigie: I have concerns about part 4, on the Scottish Court Service. In answer to Margaret Smith, you talked about trust and respect from people who expect the Government to have responsibility for running our court services, which is an important duty of the state. The bill establishes the body corporate and transfers responsibility to it, yet the SCS must provide plans to the Government that can be subject to modification and agreement, follow guidance that the Scottish ministers issue and provide information to ministers. What benefit will be gained from shifting responsibility from the Scottish ministers to a body corporate?

Kenny MacAskill: It is much better for the SCS to be within the judicial rather than the executive prong of the trident. As I said, we do not live in silos and interfaces must occur, as the convener said, on the apportionment of funding, for example. However, the SCS should be dealt with as part of the judiciary rather than as part of the Government. If Parliament decided on employment legislation in relation to race, gender or ethnicity, for example, it would be appropriate that we could give the SCS guidance on that. It would be ridiculous if we could not pass legislation that had an impact on such matters, but it would be inappropriate to impose on the SCS decisions about how it operated. The aim is to protect the judiciary's independent role in a democracy but to allow for a clear interface when aspects are appropriately dealt with by the executive or the legislature. There are interfaces on some matters and there is clear separation on others. Such issues concern balance and, ultimately, trust and respect, but we must enshrine some fundamentals.

Cathie Craigie: I also have difficulty in understanding why the SCS's budget will be transferred out of the Scottish budget, so that the Parliament will vote separately on it. You know as well as I do how little parliamentary committees can change the shape of a budget. The budget for the SCS will be presented to the Parliament and we will be expected to vote on and take responsibility for it, yet the Scottish ministers will have responsibility for setting court fees. What is the reasoning behind retaining that ministerial responsibility rather than devolving it to the body corporate?

Kenny MacAskill: On some matters relating to finance, we clearly cannot be expected to give a blank cheque. The matters come down to constitutional negotiations, as happens with the Crown Office and Procurator Fiscal Service, which I mentioned. It is important that we have the opportunity for Government involvement. For example, we retain at Government level certain matters to do with legal aid, which provides access to the judiciary in many ways. It would be absurd to suggest that legal aid should become the fiefdom of the judiciary.

Interaction is needed on some aspects. The bill, which, after all, we inherited from a past Administration, will preserve the fundamental independence of the judiciary and the good running of the Scottish Court Service. Other matters begin to veer into public policy. Court fees and legal aid are often matters of public policy that change with time, rather than matters relating to the fundamental independence of the judiciary and the separation of powers, which are the bedrock on which a democracy is built.

Cathie Craigie: If you believe that it would be absurd for the financing of legal aid to become the responsibility of the judiciary, surely it is absurd for the running of our independent court service to become the responsibility of the judiciary.

Kenny MacAskill: I do not believe so.

Cathie Craigie: Can you explain the difference between legal aid and the court service?

Kenny MacAskill: We are talking about creating a pyramid structure, with the Lord President sitting

at the pinnacle. The court system goes from the bottom up to the very top, but there is clearly ebb and flow. We must allow the judiciary to get on with training and appraisal, if it wishes to go down that route. It is appropriate that the judiciary should be in charge of such matters and should not be subject to interference by the legislature or the executive. Equally, other matters relate to public policy, such as access to legal services, as I said. I do not see a difficulty with that. I do not know whether the member is suggesting that the judiciary should take control of legal aid fees. The bill provides an appropriate balance, by protecting the independence of the judiciary while ensuring that matters that relate to public policy are within the domain of the Parliament or legislature, or of the executive or Government.

Cathie Craigie: I remind the minister that he introduced the issue of legal aid and said that it would be absurd to move the responsibility for decisions on its financing.

We have just discussed the powers that will be shifted to the SCS, but section 66 gives you a default power. Is it common to have default powers in legislation, or do you have a concern that the proposed legislation that is before us might not work to benefit the Scottish public?

Kenny MacAskill: We need a default position in case anything fundamentally untoward arises. The provision in the bill is to an extent the nuclear option—we trust that we would never have to press it, but it would be negligent of any Government of whatever political hue not to have the opportunity to interfere if something substantially untoward happened. It is considered that the power would be used in only the most extreme circumstances.

The Convener: Has such a power been incorporated in previous legislation?

Kenny MacAskill: We can get back to you on that, but I imagine that there are previous instances in which Governments have sought to become the operator of last resort. For example, if a railway line has been privatised, what happens when the private sector fails to deliver? The operator of last resort is the Government, which picks up the tab. Clearly, if the court service fails to deliver, for whatever underlying reason, the operator of last resort will have to be the Government. We cannot not have a court service. We do not anticipate that the power will ever need to be used, but we must work on the basis that if something fundamentally untoward happens, the Government would have to step in and would not allow the system to melt down.

Cathie Craigie: Does the Government intend to privatise the service? It seems as though it is being set off to the side in a nice package.

Kenny MacAskill: That question is absurd. We are enshrining the independence of the judiciary, not privatising it.

Cathie Craigie: I am talking about the Scottish Court Service.

Kenny MacAskill: We are not seeking to make it a corporate body or to have shares in it. There is no power for the Lord President to float the service on the stock market. Frankly, I do not understand the nature of the question; I do not think that it is capable of being answered.

Cathie Craigie: We will see.

The Convener: Indeed, we shall.

I thank the officials for attending. I ask the cabinet secretary to stay where he is, because he is involved in the next agenda item. I suspend the meeting while the officials change over.

12:10

Meeting suspended.

12:11

On resuming—

Subordinate Legislation

Victim Notification Scheme (Scotland) Order 2008 (Draft)

The Convener: Agenda item 3 is a draft order, which is subject to the affirmative procedure. I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who is accompanied by Bill Hepburn of the victim and witnesses unit of the Scottish Government criminal justice directorate, and Barry McCaffrey and Susan Robb of the Scottish Government legal directorate.

I invite the cabinet secretary to speak to the order.

Kenny MacAskill: It might be helpful if I explain what the victim notification scheme is and how it works.

Victims can struggle to recover from the effects of a serious crime that has been committed against them, and their recovery can be jeopardised if they suddenly and unexpectedly meet an offender who they thought was still in prison. The aim of the victim notification scheme is to give victims more certainty and to help them to prepare themselves for the offender's release. When an offender is sentenced to four or more years in prison for a serious or violent crime, any victim of that crime may apply to join the VNS. If they do so, they can be told of a number of things about the offender, including his release date; the fact that he has escaped or absconded, if that happens; and when he first becomes eligible to apply for temporary release. The VNS allows victims to make representations to the Parole Board for Scotland whenever an offender is being considered for parole. The victim can also be notified of any special conditions that have been placed on an offender who is released on licence.

In practical terms, once a sentence has been passed, the Crown Office and Procurator Fiscal Service invites eligible victims to apply to the Scottish Prison Service to join the VNS. The SPS normally writes to victims with details of an offender's release date. The Government contacts victims when parole is being considered and the Parole Board for Scotland advises the victim if the prisoner is being released on parole licence. Several agencies need to work together for the VNS to operate efficiently.

In 2006, the Scottish Executive commissioned an evaluation of the VNS, the aim of which was to gauge victims' views of the scheme and to consider the steps that might be required to extend it. Not unexpectedly, it was found that victims welcomed the VNS. However, they emphasised how important it is to them that offenders do not know that individual victims are members of the VNS. As a consequence, maintaining victim confidentiality is of paramount importance in the plans for extending the VNS.

When we considered extending the scheme, we had to take into account the need to co-ordinate the work of a number of agencies and to maintain victim confidentiality. The worst thing that could happen would be if a scheme were produced that did not deliver on its promise to provide information or to maintain victim confidentiality.

We have decided to proceed cautiously. We could have gone for an extension so that the scheme would cover those prisoners who have received sentences of one year or more, but to do so would have run a number of risks, not least of which would be failure to notify victims timeously. That would add insult to injury and could cause more trauma to victims than if there were no scheme at all. As a result, we have gone for a staged extension of the VNS, the first step of which is the substantial extension of the scheme to cover those prisoners who have been sentenced to 18 or more months in prison. Approximately 600 victims per year currently qualify for the scheme, and we expect that number to increase to well over 2,000 per year.

However, we do not intend to stop there. Once the proposed extension is bedded in and we are confident that it is working, we will review the scheme in a couple of years with a view to extending it further, possibly to cover offenders who have been sentenced to a year or more in prison.

12:15

The order will amend section 16(1)(a) of the Criminal Justice (Scotland) Act 2003 by reducing the sentence of imprisonment that triggers eligibility from the current four years to 18 months. In addition, we are taking the opportunity to clarify one element of the information that can be given to victims. Section 16(3) of the 2003 act sets out the categories of information about which a victim is entitled to receive notification; at present, it provides for the victim to be notified if the prisoner escapes but makes no express provision on recapture.

We will amend section 16(3) to make it explicit that a victim will be notified if the prisoner is returned to custody—for any reason—to continue serving their sentence for the offence that they committed against the person in question. For example, when an offender is recaptured after having been unlawfully at large, the victim will be notified.

We intend the order to come into force on 15 May, and the extended scheme will go live on that date.

Margaret Smith: I welcome the Government's proposed extension of the VNS. As you said, when the previous Administration introduced the scheme, victims welcomed it. The VNS is a valuable provision. Indeed, the Liberal Democrats made a manifesto commitment to extend the scheme to cover sentences of one year.

Your opening statement anticipated some of my questions. Why is the Government taking a staged approach to extending the provision rather than going straight to a year? You said that going straight to sentences of one year could lead to victims not being notified timeously. Will you say something more on that? In taking a staged approach, will you undertake an evaluation in two years' time before extending the provision to sentences of one year?

It is clear that notifying an additional 1,700 victims a year will involve costs. Can you quantify the financial effect of the measure? I am a little concerned that the additional funding will have to be met from existing budgets. The committee is concerned that the extension to the scheme should not be jeopardised by lack of funding. We hope that the Government will not let lack of finance get in the way of this very welcome move. I seek an assurance on that.

Kenny MacAskill: Finance is not the criterion; the costs are largely administrative. In any case, the scheme is operated through the Parole Board for Scotland and the Government and, in particular, through the SPS. We seek to ensure that we can walk before we try to run. The increase in those who qualify for the scheme will be from some 600 to some 2,000. As I said in my opening statement, the worst thing that could happen would be if we were to introduce a scheme that was flawed and in which people could not find out what they needed to find out. For the committee's information, the actual cost of the scheme is approximately £20,000. As I said, the complexity relates more to the numbers and the administration of the scheme than to any cost factor—the costs are, to some extent, marginal.

We want to ensure that we get right what we do. We believe that significant progress will be made by extending the provision from sentences of four years to sentences of 18 months. The extension will be evaluated in two years' time, when we will seek to reduce the minimum period of imprisonment to one year. The reason for the staged approach is to ensure that we get the proposal right. If we were to fail, that would serve only to compound the agony of those who have suffered already. As I said, the committee has an undertaking that we will evaluate the measure. Our intention—subject, of course, to dealing with anything untoward that results from the evaluation—is to reduce the minimum period further to 12 months.

Paul Martin: Like Margaret Smith, I welcome the extension. However, I have issues to raise with regard to the 18-month period and the Government's staged approach. How sophisticated is the current system? On capacity, what are your reasons for saying that there can be no additionality?

In the marketing world, for example, companies can target people en masse according to their profile. We are talking about an existing database of 2,000 people, which could be doubled. I cannot understand why notifying 4,000 victims would be beyond us, given that the 2003 act allows the capacity to be expanded. I would make sentences of six months the trigger for victim notification, because such sentences can be passed in relation to serious crimes, such as serious assaults. Given that the Government deals with expenditure of £33 billion, why do not we have capacity in the scheme to deliver notifications to 4,000 victims?

Kenny MacAskill: First, let us put the matter in context. The increase in the number of notifications is significant, but how that is viewed is similar to whether a glass is viewed as half full or half empty.

Paul Martin looks forward to the sentence trigger being reduced to six months. We inherited the victim notification scheme, for which the previous Executive instigated an evaluation in 2006. I do not recall a previous minister or, indeed, Mr Martin suggesting that sentences of six months should be the trigger point for victim notification. We have considered the evaluation that was instigated by the Administration of which Mr Martin's party was a member, and it seems to us that the best method of ensuring that we deliver a workable scheme for victims is to reduce the trigger point in a staged way. First, it will be reduced to sentences of 18 months; we will then seek to take it down to sentences of 12 months. We are also extending the scheme to cover the notification of victims when offenders are recaptured; that is a significant matter for many individuals who may otherwise worry and fret unduly.

I appreciate Mr Martin's desire to get the trigger point down to sentences of six months, but I point out that the previous Labour-Liberal Democrat Administration did not deliver that. He may begrudge what we are delivering, but we think that it marks significant progress. We will seek to expand the scheme when we evaluate it thereafter.

Paul Martin: I have a serious point to make about the serious issue of victim notification. I will not get involved in party politics in that respect. I

am asking a clear question about a serious matter, which should not be part of a political kick-about.

My point is possibly a criticism of the previous Executive, too, but I do not depart from it. Will the cabinet secretary seek advice from his officials today on why there is no capacity in the current scheme to enable us to extend it to all victims of offenders who receive sentences of six months or more? Why do we not have that capacity, and what are you doing to bring that into focus? It is not good enough for you to say that you will return to the scheme in two years. I want to hear something more effective than that.

Kenny MacAskill: I appreciate Mr Martin's frustration, but a significant timescale is involved. The review was conducted in 2006, but we did not form our Administration until summer 2007. We sought to drive forward the scheme, and we have done so. A variety of things need to be dealt with—for example, the resourcing is not so much about cost as about the complexities involved, bearing in mind the requirement for confidentiality. We must ensure that the scheme that we deliver works. I reiterate what I said at the outset: the worst result would be repeated failures as a result of the scheme being impractical or not appropriate at the time.

There will be a staged delivery of the expansion of the scheme. Taking a glass-half-empty view of that may be a particular trait of Mr Martin's, but we view the reduction in the trigger point from sentences of four years to sentences of 18 months as a significant step forward, which we are delighted to take. You have confirmation that we will seek to drive forward the scheme thereafter to sentences of 12 months. Nobody has suggested until now that the trigger should be sentences of six months, but we are happy to go away and reflect on that. The new scheme will be of considerable benefit, which is why we seek to press on with it.

Cathie Craigie: According to the papers that accompany the order, evaluation of the existing scheme was completed in early 2007. I welcome that evaluation, because when we seek to amend legislation it is always better to base the changes on evidence.

It has taken quite a wee while for the draft order to be produced. We are almost a quarter of the way through 2008, and we will have to wait another two years before you produce proposals for including shorter sentences in the victim notification scheme. I do not know whether I would go as far as to say that there should be a sentence trigger of six months, as my colleague suggested, but if you could speed up the timeframe for extension of the scheme that would be welcome.

Does the Criminal Justice (Scotland) Act 2003 give the minister power to include the local police among those who are notified when someone is released on licence from prison or on parole? I understand that the police are not currently notified as a matter of course.

Kenny MacAskill: First, I appreciate your frustration on the delivery timescale, but I cannot speculate on why the change was not delivered from the start of 2007 until the previous Administration fell in April 2007. When we came into office, we sought to deliver the change as expeditiously as possible; that is what we are now doing.

The VNS is meant to be about the relationship that the Government, the Parole Board for Scotland and the SPS have with the victim; the scheme is not meant to deal with the relationship between the SPS and the police, and it would be inappropriate for it to do so. There are other mechanisms by which the SPS and the police have a relationship to forewarn each other. It would be inappropriate for the victim notification scheme to seek to deal with matters that are, as you correctly say, important, but which are tangential and best dealt with through other schemes.

Cathie Craigie: Are you referring to informal channels between the SPS and the police?

Kenny MacAskill: We can get back to you on that point, which does not fall within the domain and remit of the VNS. There are channels, but I cannot inform you of their precise nature off the top of my head. I am happy to undertake to clarify the situation for you.

Cathie Craigie: The cabinet secretary seems to be making a point about the length of time that it has taken for the proposals to be brought forward. The Executive note that accompanies the regulations states that the evaluation was completed in early 2007. Since it has taken the Government almost a year to produce the order, I hardly think that the previous Executive can be criticised for taking a few months to evaluate the responses. However, the minister might want to let us know when in 2007 the evaluation was completed. I realise that he might not have that information to hand.

Kenny MacAskill: I am sure that we can find that out and inform you.

Margaret Smith: My party's intent was to extend eligibility to sentences of one year if we came back into government, partly because we had seen the value of the scheme that had been introduced by ourselves and the Labour Party. I appreciate that the expected increase in the number of victims who will be eligible to seek notification under the scheme will have an impact, but from your response I am still unsure why you feel that it is acceptable to extend the scheme to

cover sentences of 18 months or more, but not those of a year or more.

The Executive note states that there is a need to develop

"new IT and administrative systems to deal with the anticipated increase in numbers of victims".

I welcome the revised scheme, but I fail to understand why, given that new systems will have to be developed to extend the scheme to include sentences of 18 months or more, it would be impossible at this stage to cover sentences of a year or more. Is it to do with numbers, or is it to do with the inability of partner organisations such as the Parole Board for Scotland or the SPS to cope? Why can we not take the ultimate step of extending the scheme to cover sentences of a year?

12:30

Kenny MacAskill: The major difficulties are bureaucratic and administrative. We have to ensure that we get it right and such things are always a matter of judgment. It is not simply a question whether the minimum period that qualifies for the scheme should be 12 months or 18 months; it could have been two years or whatever. Reducing the minimum period from four years to 18 months is significant progress that we should welcome. As I said, the difficulties arise from the bureaucratic and administrative complexities, not simply of Government but of the SPS and the Parole Board. The worst thing that could happen would be to have a flawed scheme that failed and compounded for the victim the agony of the crime that was perpetrated with the injury of not being kept advised when they had sought to be advised.

We need to get the balance right between delivering what is necessary for those victims and ensuring that what we deliver is workable in practice. It seems to us that moving to a minimum period of 18 months is a significant step forward that should be welcomed. I give you an undertaking that we are working to develop the scheme. At present, however, we are not satisfied that we can assure victims absolutely that they can be notified. There might be difficulties, so we should walk before we try to run.

Margaret Smith: Let us assume that when you walk, you do a better job of it than you think you will and you find that the scheme works better in the two-year period than you anticipated it would. I still do not understand why you think that the 18-month minimum period will work perfectly, but a period of a year would be flawed and a failure. Let us say that within the two years that you have allowed yourself, the extension to the scheme works well and the IT and admin capability of the Government and partner organisations is there to reduce the period to a year. Will you give the committee an assurance that you will at least keep the period under review to see whether it could be reduced in those two years, if the scheme can be developed without giving rise to the concerns that you still have?

Kenny MacAskill: When we talk about evaluating the scheme in two years, we are not saying that that evaluation must take place on 25 March 2010 if progress begins to be made. However, the scheme will not be judged simply on whether it is working; it will have to be further broadened, widened and deepened. For example, we are not simply increasing the number of eligible victims by extending the scheme in terms of the minimum sentence that it covers; we are seeking to ensure that we deal with those who are recaptured and go back to prison. The evaluation will be about not simply the time period, but the category of the offence.

I am happy to give Ms Smith an assurance that it is not the case that nothing will happen to the scheme for two years, but any evaluation has to be based not simply on the time period. Other factors have to be considered—we have to ensure that the method that we use to notify victims works—to ensure that the whole scheme is reviewed and that it delivers what we want.

If Margaret Smith is happy to accept some flexibility in our evaluation of the scheme, we are more than happy to undertake to do what she asks. However, any evaluation will involve meeting victims, asking them how they felt, and what the scheme delivered or did not deliver. That will take some time and cannot be done a fortnight down the road. We do not anticipate financial constraints; it is a matter of ensuring that the system works. The evaluation is about not simply whether the scheme works, but whether it should be varied in other ways. If you accept that, we are more than happy to proceed on that basis.

Margaret Smith: I am happy to accept that undertaking.

John Wilson: Did the evaluation that has already been done throw up any notification failures in the system? If we see a dramatic increase in the number of people who take part in the VNS, I am concerned that the number of individuals who might not be contacted when they should be might also increase. I am keen to ensure that the system operates correctly before we move to Paul Martin's suggestion of a minimum period of six months or Margaret Smith's suggestion of one year. We need to know about failures in the system. I do not want the number of failures to double if we double the number of people who are included in the VNS.

Kenny MacAskill: That is a valid point. A variety of issues have been raised. One is the question of recapture. Another is the reduction in the imprisonment period to which the scheme applies. Any administrative scheme must address those complexities and ensure that victims tell us when they move and, if they do, that we keep in touch with them.

John Wilson: I return to the original question. Did the evaluation highlight failures in notification during the evaluation period?

Kenny MacAskill: We understand that the failures resulted from letters being sent to addresses from which people had moved—they were failures of bureaucracy. There was no suggestion that the scheme was not a good scheme. The only concern related to the recapture of prisoners. Understandably, people could be concerned that prisoners were still at large, so it would be courtesy, if not common sense, to tell them that those prisoners had been apprehended. The scheme was welcomed in the main, and we have sought to build on it. I will be happy to advise the committee of any failures that come to light. The evaluation highlighted difficulties that are associated with any administrative scheme that depends on the information that is recorded being contemporary and not historical.

Stuart McMillan: Since the scheme has been in operation, how many victims have opted into receiving information about when a prisoner has been released?

Kenny MacAskill: When the evaluation was done in September 2006, 774 active victims were registered for 579 offenders. We anticipate that, with the reduction to 18 months of the imprisonment period to which the scheme applies, the number will rise to approximately 2,000.

Stuart McMillan: I am sure that not every victim will want to sign up to the scheme.

Kenny MacAskill: It is an opt-in system—the scheme is not compulsory and does not cover offences of a more trivial nature. It is for individuals to decide whether they wish to opt in.

Cathie Craigie: Were victims or victim support groups consulted after the evaluation and before the laying of the order, which extends the scheme and reduces the imprisonment period to which it applies?

Kenny MacAskill: We have regular meetings with Victim Support Scotland, at which we discuss a variety of matters, including the VNS. The evaluation was done using face-to-face interviews. Thirty-one per cent of victims were fairly satisfied and 24 per cent were very satisfied. The scheme was welcomed not only by the organisations that, correctly, represent the views of victims, but by individuals to whom the researchers who carried out the study spoke face to face.

Cathie Craigie: Were people fairly satisfied or very satisfied with the scheme or with the proposed extension to it?

Kenny MacAskill: The evaluation related to the existing scheme.

Cathie Craigie: Were victims and victim support organisations consulted on the proposal that is before us today?

Kenny MacAskill: Only at the margins, in general discussion. We could not go back to those with whom face-to-face interviews were held in September 2006 on how they thought the previous scheme was operating, to work out where we should go now.

Cathie Craigie: That is concerning. The ethos of Parliament is that, when we introduce or amend legislation, we should consult people on those changes. I am concerned that there has not been further consultation on the proposal that is before us.

Kenny MacAskill: Victim Support Scotland is not champing at the bit to tell us not to proceed. It supports the direction in which we are travelling.

Cathie Craigie: I am sure that the organisation is not opposed to the measure, but it may have wanted you to reduce the imprisonment period to which the order applies to less than 18 months.

Kenny MacAskill: Victim Support Scotland wants us to deliver a workable scheme. That is what we seek to do.

Cathie Craigie: We have not asked the organisation what it wants.

The Convener: The cabinet secretary may wind up the debate, if he wishes to do so.

Motion moved,

That the Justice Committee recommends that the draft Victim Notification Scheme (Scotland) Order 2008 be approved.—[*Kenny MacAskill*.]

Motion agreed to.

The Convener: I thank Mr MacAskill and his officials for their attendance. The debate has been fairly conciliatory. It remains to be seen whether that will last the week.

12:40

Meeting suspended.

12:46

On resuming—

Intensive Support and Monitoring (Scotland) Regulations 2008 (SSI 2008/75)

The Convener: We have six instruments for consideration under the negative procedure. The Subordinate Legislation Committee raised some technical points on SSI 2008/75. Are members content with the regulations?

Members *indicated agreement*.

Bankruptcy Fees (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/79)

The Convener: Are members content with the regulations?

Members *indicated agreement*.

Bankruptcy (Scotland) Regulations 2008 (SSI 2008/82)

The Convener: Members should note that the regulations were drawn to the committee's attention on the ground of failure to follow normal drafting practice, although that did not happen to an extent that would affect the validity of the regulations.

Are members content to note the regulations?

Members *indicated agreement*.

Justice of the Peace Courts (Sheriffdom of Grampian, Highland and Islands) Order 2008 (SSI 2008/93)

Enforcement of Fines (Seizure and Disposal of Vehicles) (Scotland) Regulations 2008 (SSI 2008/103)

Enforcement of Fines (Diligence) (Scotland) Regulations 2008 (SSI 2008/104)

The Convener: Are members content with the instruments?

Members *indicated agreement*.

Statute Law (Repeals) Bill

12:48

The Convener: Agenda item 5 is the Statute Law (Repeals) Bill, which is UK Parliament legislation. I refer members to legislative consent memorandum LCM(S3)11.1, which has been lodged by the Cabinet Secretary for Justice, Kenny MacAskill.

When the UK Parliament considers a bill that makes provision that applies to Scotland for any purpose that is within the legislative competence of the Scottish Parliament, a Scottish minister must lodge a legislative consent motion that seeks the Scottish Parliament's consent to the relevant provisions in the bill. Before such a motion is lodged, a minister must lodge an associated memorandum, which the relevant committee must consider and report on.

The Statute Law (Repeals) Bill results from the "Statute Law Repeal: Eighteenth Report", which the Law Commission and the Scottish Law Commission published jointly on 29 January 2008. The report is the second post-devolution report that the two commissions have published. The "Statute Law Repeal: Seventeenth Report. Draft Statute Law Repeals Bill", which contained a number of repeals within the competence of the Scottish Parliament, was implemented in 2004. Although it will not substantively alter the current law of Scotland in relation to devolved matters, the Statute Law (Repeals) Bill contains provisions that fall within the legislative competence of the Scottish Parliament and which could properly be the subject of legislation in the Scottish Parliament, so it is a relevant bill for the purposes of standing orders and an LCM is required.

As members have no comments, are we content to note the memorandum?

Members *indicated agreement*.

The Convener: Under rule 9B.3.5 of standing orders, the committee is required to report on the memorandum. It need only be a short report confirming what we have agreed. We will do that in due course.

Petitions

Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976 (PE767)

12:50

The Convener: The first petition is PE767, by Norman Dunning, on behalf of Enable, which calls on the Scottish Parliament to urge the Scottish Executive to review the operation and effectiveness of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. This is the second time we have considered the petition.

On 7 March 2008, the Cabinet Secretary for Justice announced that Lord Cullen would lead a review of the 1976 act. The review is expected to take about a year and will make recommendations on possible amendments to the primary and secondary legislation governing FAIs, to ensure that they continue to provide an effective system. In the light of the Government's announcement about the review, which was what the petitioner sought, it is recommended that we now close the petition and advise Mr Dunning accordingly. Is that agreed?

Members *indicated agreement*.

Legal System (Fee Arrangements) (PE1063)

The Convener: PE1063, by Robert Thomson, calls on the Scottish Parliament to investigate the apparent conflict of interest that exists between solicitors or advocates and their clients in the present system of speculative fee arrangements—generally known as no win, no fee arrangements—and to urge the Scottish Executive to overhaul the existing speculative fee arrangements framework and procedures to make solicitors and advocates more accountable to their clients. This is the first time the committee has considered the petition.

I invite the committee to consider the options that are set out in paper 11. The first option is that we write to the Cabinet Secretary for Justice to establish whether no win, no fee arrangements have been, or are to be, considered in the wider context of the access to justice considerations—for example, through Lord Gill's review of the civil courts—and to consider the petition again when we receive a response. The second option is that we close the petition on the basis that it relates to the petitioner's unhappiness with the outcome of his own case and that it was open to him to complain to the relevant professional bodies. The third option is that, after considering the matter, we take some other appropriate action.

Margaret Smith: The petition was obviously inspired by Mr Thomson's experience of the system, but the responses that we have received bring out some interesting points, a few of which we might want to put to the Cabinet Secretary for Justice.

I suggest that we write to the cabinet secretary mentioning points that have been made to us. For example, the Scottish Consumer Council and the Faculty of Advocates raised issues to do with after-the-event insurance policies, which it is reasonable for us to pursue. There are also issues around contingency fee arrangements, which are illegal in Scotland but are allowed in England. In that regard, it will be worth examining what is said in section 5 of the submission from the Faculty of Advocates. It would also be worth our getting from the cabinet secretary a sense of whether he feels that those issues will or should be covered by the work that Lord Gill is doing.

The responses that we have received raise some general points. There is probably a general need for the public to have a greater understanding of such matters. Rather than approach the petition from the perspective of Mr Thomson's case, which we must put to one side, we should pursue the interesting general points that it raises.

The Convener: That is a sensible suggestion. A number of issues have been raised and we clearly wish to know whether they will be considered as part of the Lord Justice Clerk's review. I recommend that we go along the line that has been suggested. Is that agreed?

Members *indicated agreement*.

12:55

Meeting continued in private until 13:48.

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:

Thursday 3 April 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