JUDICIARY AND COURTS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Judiciary and Courts (Scotland) Bill introduced in the Scottish Parliament on 30 January 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 6–EN.

POLICY OBJECTIVES OF THE BILL – AN OVERVIEW

2. Scotland's justice system is built on traditional values of integrity and fairness. Over the years the society which the system serves has changed. Parliamentary scrutiny has increased and so have public expectations. The Scottish Government is committed to ensuring that Scotland is served by justice institutions that have the capacity and flexibility to respond to those changes, while retaining the values on which its reputation has been built. At the core of the justice system in any modern developed democracy is a judiciary that is independent of the other arms of government: the legislature and the executive. The Scottish Government strongly believes in the independence of the judiciary which is a "pre-requisite to the rule of law and a fundamental guarantee of a fair trial."[1] This Bill makes changes to the arrangements for Scotland's judiciary and the way in which its courts are administered. The intention is to modernise the arrangements for the judiciary and the management of the court system, thereby strengthening the independence of the judiciary and bringing about improvements for those who come into contact with the courts.

3. Proposals to reform the arrangements for Scotland's judiciary were first consulted upon in the paper *Strengthening Judicial Independence in a Modern Scotland,* published in February 2006. This recognised that aspects of the way the judicial system is currently administered do not sit entirely comfortably with aspects of judicial independence. The paper canvassed opinion on a number of proposals to modernise the organisation and leadership of Scotland's judiciary and to reduce the involvement of the Scottish Government in the day to day administration of the system. Proposals included making the Lord President head of the judiciary and giving him new responsibilities and powers concerning the disposal of business in both the inferior and superior courts and the training, welfare, deployment and conduct of the judiciary.

[1] The First Principle; *The Bangalore Principles of Judicial Conduct*, 2002

4. The responses to the consultation paper revealed a measure of support for developing the proposals further than had appeared on the face of the consultation paper, by reviewing the arrangements for the Scottish Court Service, currently an Executive Agency of the Scottish Government, and introducing judicial control over the strategy of the Service. Among the principal advocates for such a development were the Lord President and the other judges of the Court of Session. They considered that such arrangements would further strengthen judicial independence as it would give the judiciary control over the administrative structure necessary to support them in fulfilling the broad range of new responsibilities proposed in the paper.

5. Proposals for reform were developed and refined in light of the responses to the 2006 consultation paper, and set out for further comment in the white paper *Proposals for a Judiciary (Scotland) Bill*, published in February 2007.

6. The overarching aim of the Bill is to improve the justice system by modernising the arrangements for the judiciary, and strengthening their role through greater authority over the Scottish Court Service. The Bill makes substantive provision in relation to 4 main policy areas (judicial independence, the judiciary, the courts and the Scottish Court Service (the "SCS")). The Bill will also put the Judicial Appointments Board on a statutory basis, bringing its status into line with Northern Ireland and England.

7. Part 1- Judicial Independence - provides a statutory guarantee of the continued independence of the judiciary in Scotland.

8. Part 2 – The Judiciary - provides for the Lord President of the Court of Session to be the head of the Scottish judiciary; sets out procedures in relation to the vacancy, incapacity and suspension of the senior judiciary; places the Judicial Appointments Board on a statutory basis; sets out procedures for the appointment of the Lord President and the Lord Justice Clerk; extends eligibility for appointment as a judge; sets out arrangements for retired and temporary judicial office holders; makes provision for a scheme for dealing with issues of judicial conduct and for a common procedure for the removal of judges and sheriffs.

9. Part 3 – The Courts - provides for matters relating to the judges of the Court of Session; responsibilities and powers in relation to the sheriff courts; and responsibilities in relation to the justice of the peace courts

10. Part 4 – The Scottish Court Service - sets out new governance arrangements for the Scottish Court Service establishing it as a statutory body and detailing its functions, membership, powers and responsibilities.

11. Part 5 makes miscellaneous provisions, including provision in respect of orders and regulations made under the Bill.

CONSULTATION

12. There has been extensive consultation on the policy which is being implemented through this Bill. The consultation began in February 2006 with the publication of the paper *Strengthening*

Judicial Independence in a Modern Scotland. Around 630 copies of the consultation paper were issued covering 338 individuals and bodies across Scottish society. In addition to judicial, legal and government bodies the paper was sent to a wide range of religious, representative and support organisations. The aim was to ensure the widest possible discussion of the proposals. The paper invited comment on a quite broad range of proposals concerning the unification of the judiciary under a single judicial head, the way judges and sheriffs were appointed and removed from office and other aspects of the arrangements for Scotland's judiciary. The proposals were grouped as follows:

- the unification of the judiciary under the Lord President of the Court of Session who would take the role as head of the judiciary, and have a range of new responsibilities for the management of the court business, for representing the judiciary in its dealings with the Scottish Parliament, and for the welfare, training and deployment of the judiciary;
- the provision for the Judicial Appointments Board to be established on a statutory basis;
- the arrangements for the removal of judges and sheriffs;
- the introduction of a scheme to deal with issues of judicial conduct;
- the arrangements for retired and temporary judicial office holders; and
- the grounds of eligibility for appointment as a judge of the Court of Session.

13. A total of 60 responses were received. Just over half (53%) were from members of the judiciary or bodies representing the judiciary. 20% were from various public bodies and organisations representative of court users. The legal profession, mainly acting through the various representative bodies, accounted for 8% of the responses. A number of academics and academic organisations provided comment (5%), as did the representative bodies of the various ranks of the police service (8%). Local authorities (3%) and members of the public (3%) accounted for the remainder of the responses. All responses where the Scottish Government has permission to publish, together with a report of an analysis of the consultation, are lodged with the Scottish Government library and are available on the Scottish Government website at www.scotland.gov.uk\topics\justice\courts.

14. Whilst the responses to the consultation were varied there was a recognition by the judiciary that it was timely to consider the balance of responsibility and powers in the constitutionally important relationship between the judiciary and the executive. The development of the policy underlying this Bill has benefited from the consultations which the Scottish Government has had with the judiciary and other significant interests. Responses to each policy area are discussed further below under the relevant policy area.

15. In February 2007 the White Paper – *Proposals for a Judiciary (Scotland) Bill* – was published. Around 350 copies were issued to judicial, legal and government bodies and all others who responded to the 2006 consultation document. This paper and draft Bill were informed both by the responses to the earlier consultation paper and the ongoing discussions with stakeholders. In taking account of what was said during that consultation, decisions were taken in some cases not to proceed with a proposal or sometimes to proceed in a different way.

16. A total of 26 responses to the February 2007 White Paper were received. Just over half of the responses (55%) were from the judiciary and legal profession; 30% from public and representative bodies. Where the Scottish Government has permission to publish these, they are lodged with the Scottish Government library and are available on the Scottish Government website at www.scotland.gov.uk\topics\justice\courts. It was recognised at the time of publication that it was not possible to finalise the legislative requirements until decisions were reached on the role of the Lord President in the governance of the Scottish Court Service. Consequently, an ongoing dialogue, which included a number of meetings with the judiciary and main stakeholder groups, was maintained during the instructing and drafting process for the Bill.

RESEARCH

17. To aid the debate, the Scottish Government has published a Research Finding[2] exploring the system of judicial appointment, conduct and removal in the judiciary in four comparable jurisdictions: England and Wales, Canada, Australia and New Zealand. These jurisdictions are all founded on the English common law system and have since developed in a similar vein. They therefore have a common language of law and similar pre-existing systems of appointments, conduct and removal. These systems have been subject to intensive debate in all four of these jurisdictions.

18. The Research Finding draws on documentary review, web-based evidence and information from experts to describe and compare the reforms that have taken place and the debates surrounding them. Reforms of appointments systems have taken place in England and Wales and Canada, while reforms to the procedures for dealing with conduct and removal have taken place in all four jurisdictions. Key findings are:

- the four jurisdictions had similar judicial appointments systems where appointments were made by the head of state and selection was made by the chief law officer, a member of the executive branch of government, until reforms were undertaken in Canada and England and Wales.
- the debate on appointment systems centred on (i) criticism of the selection of judges by the executive branch of government which allows potential for political patronage, (ii) the potential for appointments to reflect the characteristics of the dominant ethnic group and exclude minority ethnic groups, women and those with disabilities, (iii) the lack of open competition and the use of consultation which can be perceived as covert and unsystematic.
- reforms centre on the introduction of judicial appointments bodies, referred to as commissions or committees, in the provinces of Canada in the 1980s, and in England and Wales in 2005.
- debate on the introduction of judicial appointments bodies has taken place in Australia and New Zealand but neither jurisdiction has introduced such a system.
- in all four jurisdictions statutory provisions historically exist for the removal of judges.

[2] Matters of Judicial Appointment, Conduct and Removal in Commonwealth Jurisdictions available at www.scotland.gov.uk\topics\justice\courts.

- conduct systems were unsystematic until reform in Canada in 1971, New South Wales in Australia in 1986, England and Wales and New Zealand in 2005.
- all four jurisdictions have introduced bodies responsible for investigation and determining disciplinary action for complaints against the judiciary. Bodies differ in composition and in role.

PART 1: JUDICIAL INDEPENDENCE

Policy objectives

19. The Scottish Government is committed to a strong independent judiciary, recognising that this is fundamental to the rule of law and the impartiality of the courts in a modern democracy. This is a core value for modern Scotland, and it is important that all its citizens and all who do business here should be in no doubt of the Government's commitment. The Bill therefore sets out a statutory guarantee of judicial independence.

20. In the Constitutional Reform Act 2005 the Westminster Parliament imposed duties across the United Kingdom to guarantee the independence of the judiciary, but those duties were limited in relation to Scotland in recognition of the devolved jurisdiction. The provisions in this Bill are consistent with and complement the UK wide provisions.

21. Judicial independence goes beyond a statement of the principle. To complement the statement, the administrative arrangements in place to support the judiciary should be such as to reflect that independence in the relationship with the executive branch of government. The Scottish Government recognise this, and set out later in this Memorandum the changes that are being made to the governance of the SCS to provide the judiciary with greater strategic control of its operations. Separate provision is being made in the section on judicial independence to impose a duty on the Scottish Ministers to have regard to the need for the judiciary to have the necessary support so that they can fulfil their functions. This support extends not only to the provision of resources but also to matters such as support in promoting legislation to assist in the administration of justice and the maintenance of an environment in which the judicial role in the administration of justice is respected.

Consultation and alternative approaches

22. While some respondents questioned what a statutory guarantee would add to the present constitutional position, the balance of view from those who responded to the consultation was in overall favour of some statutory provision being made, with many welcoming the statutory reinforcement of the long established and recognised principle of independence of the judiciary. Some expressed the view that a statutory provision in itself was not an effective guarantee and that practical measures were also required. The Scottish Government recognises this point and other measures to strengthen judicial independence form part of the overall package contained in the Bill.

23. A number of respondents, while welcoming the proposal, indicated that it would be valuable for the statutory statement to encompass an obligation to reflect the need for the judiciary to have the necessary support. This view has been reflected in the Bill.

24. While it would be possible to retain the status quo, resting on current conventions, on balance, the Scottish Government concluded that inclusion of a statutory statement underlining its commitment would be a powerful and obvious reminder of the constitutional significance of judicial independence. Placing this commitment as section 1 of the Bill reflects the fundamental importance of this principle.

PART 2: THE JUDICIARY

CHAPTER 1 – HEAD OF THE SCOTTISH JUDICIARY

Policy objectives

25. The office of Lord President is of ancient origin, dating from the institution of the College of Justice in 1532. The role of the office is largely undefined in statute. While the status of the Lord President as Scotland's pre-eminent judge is universally respected by the judiciary and by the legal profession, both at home and abroad, the office differs from the comparable office (often known as "Chief Justice") in other jurisdictions in that it does not have responsibility for all the courts, and indeed all branches of the judiciary, within Scotland.

26. The policy intention is that the Lord President should be recognised as head of the Scottish judiciary with the necessary statutory authority to fulfil that role. The Lord President would have leadership of all branches of the judiciary and overall responsibility for making arrangements for the efficient disposal of the business in all courts. Reforming the leadership and administrative arrangements by bringing them under a single judicial head, and transferring to the Lord President responsibilities for the judiciary that presently rest inappropriately with the Scottish Government, puts in place a structure for further developments and improvements for the benefit of those who use the court system and for the judiciary themselves.

27. The Bill confers a range of powers and responsibilities on the Lord President. Many of these relate to functions that the Lord President has traditionally carried out, some to functions currently carried out by the Scottish Ministers. Some of the responsibilities are presently not the subject of statutory provision and are dealt with through various administrative arrangements. Among these are the welfare, training and conduct of the judiciary. The Bill will formally confer responsibility for these matters on the head of the Scottish judiciary. It is consistent with the independence of the judiciary that these matters are dealt with by the head of the Scottish judiciary, and creating formal responsibility will allow the senior judiciary to develop effective procedures and policies for these matters.

28. The Bill makes provision for the Lord President as head of the Scottish judiciary to have statutory responsibility to represent the views of the judiciary to the Scottish Parliament and to Scottish Ministers and to lay before the Scottish Parliament written representations on matters that appear to him or her to be matters of importance relating to the judiciary or otherwise to the administration of justice. He or she is to maintain arrangements to secure the efficient disposal of business in the courts of Scotland; maintain appropriate arrangements for the deployment of the judiciary and for the welfare, training and guidance of the judiciary. Formal responsibility is placed on the Lord President to introduce a scheme of conduct for members of the judiciary. The content of such a scheme is provided for separately later in the Bill.

29. To allow the Lord President flexibility in how he manages the responsibilities as head of the judiciary and in recognition that the judicial office of Lord President is already onerous, provision is being made to enable the Lord President to delegate the functions of head of the judiciary to another member of the judiciary, although there are limitations. The Lord President will not be able to delegate the responsibility for making of rules in respect of a scheme of conduct or the exercise of disciplinary powers. Additionally, in recognition of the key role and responsibilities of sheriffs principal, the Lord President will not be able to delegate certain of the responsibilities for the sheriff courts and the justice of the peace courts, nor the power to issue directions to the sheriffs principal.

Consultation and alternative approaches

30. While an alternative approach would be to retain the status quo, responses to the 2006 consultation showed considerable support for conferring the status of head of the judiciary upon the Lord President. A range of views were expressed about whether the Lord President should have statutory responsibilities for the disposal of court business. In general it was accepted that, if formally recognised as head of the judiciary, the Lord President should have some responsibility for these matters.

31. Proposals to give the Lord President overall responsibility for the training and welfare of the judiciary were welcomed, and there was support for the proposal to transfer responsibility for deployment of sheriffs from the Scottish Government to the Lord President and for giving the Lord President responsibility for dealing with issues of conduct. However, there was less support for the introduction of a formal conduct scheme.

32. There was limited comment on this aspect in response to the 2007 white paper. The main concerns expressed were about:

- the resources, both financial and administrative, to support the additional functions for the Lord President;
- the statutory responsibilities for the Lord President to make the judiciary's views known to Ministers and Parliament and to make written representations to the Scottish Parliament; and
- the need to define the relationship between the Lord President and sheriffs principal in respect of the efficient disposal of business in the sheriff courts.

33. The Scottish Government recognises that the Lord President will require additional staff in his or her private office to handle the new functions and this has been reflected in the additional costs that will arise as a result of the new arrangements. Supporting the Lord President in his functions will also be a function of the SCS under the new governance arrangements being introduced by the Bill.

34. There is one matter which was proposed in the 2006 consultation as complementary to the Lord President's role as head of the judiciary. This was whether a statutory Judges' Council should be established. There was considerable support for the setting up of a Judges' Council, chaired by the Lord President. However, there was much less support for giving the Council a statutory basis. The Lord President has taken this forward in consultation with the judiciary. A

non-statutory body, the Judicial Council for Scotland, has been established with a remit to provide the Lord President of the day (who will chair the body) with a means to seek and obtain the views of Scottish judges at all levels. The Council complements the existing representative bodies, such as the Sheriffs' Association and the Scottish Justices' Association.

CHAPTER 2 – SENIOR JUDICIARY: VACANCY, INCAPACITY AND SUSPENSION

Policy objectives

35. The Bill repeals the Senior Judiciary (Vacancies and Incapacity) (Scotland) 2006 Act and re-enacts the provisions with some modifications which in the main reflect comments made during the passage of the 2006 Act.

36. In June 2006, the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 ("the 2006 Act") was introduced as an emergency measure to deal with the immediate consequences of the ill health of the serving Lord President. The 2006 Act made provision to enable the functions of the two most senior judges (the Lord President and the Lord Justice Clerk) to be carried out when either, or both, is incapacitated by reason of ill health or when the office is vacant, to ensure that there is no disruption to the operation of the courts and in those areas of public administration where the senior judges have responsibilities.

37. The Lord President is the head of the Court of Session. In addition to functions as the presiding judge of the Court, a range of responsibilities of public administration are placed by statute on the Lord President alone. The position is similar when the Lord President carries out his role in the criminal rather than the civil courts as Lord Justice General, the head of the High Court of Justiciary. The Lord Justice Clerk is the second most senior judge.

38. The 2006 Act set out a process through which the Lord Justice Clerk and at least four other judges of the Inner House, may, if they are satisfied of his or her incapacity, declare that the Lord President is unable to carry out his or her functions owing to ill health. This means that a majority of the judges of the Inner House, the most senior judges of the Court, must agree. On making this declaration to the First Minister, the Lord Justice Clerk would then be able to carry out any function which otherwise would be carried out only by the Lord President. In the case of a vacancy in the office of Lord President, the Lord Justice Clerk can act in his or her stead automatically.

39. The 2006 Act also provides that during such time as the Lord Justice Clerk is carrying out the functions of the Lord President the senior judge of the Inner House will carry out any function otherwise falling to the Lord Justice Clerk. The situations where the Lord Justice Clerk is similarly incapacitated or his office is vacant, where both of the two senior offices are vacant or their holders incapacitated, and where the senior judge who is replacing the office holder concerned is unavailable, are also provided for. The arrangements ensure that there continues to be an orderly administration of the court system, in the circumstances described, and that everything which requires to be done, can be done.

40. Whilst the policy remains that a majority of Inner House judges is needed to sign a declaration of either incapacity or of no longer being incapacitated the Bill now makes reference

to 'a majority of judges' rather than 'at least 5' in acknowledgement that the number of judges in the Inner House may change over time. (The number of Inner House judges has changed since the 2006 Act was passed.) This revised wording also addresses points raised during the passage of the 2006 Act.

Consultation and alternative approaches

41. When the 2006 Act was debated in the Scottish Parliament, there was overall consensus for the proposals and for this reason no alternative approaches to the overall policy reflected in that Act have been considered. A number of points were raised, and an undertaking was given to allow Parliament to consider the various issues further when a suitable opportunity arose. It was recognised in 2006 that as the Bill was an emergency Bill there had not been the benefit of a full and specific consultation. It was concluded that the provisions in the Act were worthy of further consideration and that it would be appropriate to do so under the ordinary procedure and for the principles to be debated fully in Parliament. Consequently the provisions contained in the 2006 Act formed part of the draft Judiciary (Scotland) Bill which was consulted on as part of the 2007 White Paper. There were no comments offered on this aspect of the Paper.

CHAPTER 3 – JUDICIAL APPOINTMENTS

Policy objectives

42. The Bill puts the Judicial Appointments Board on a statutory basis.

43. The Judicial Appointments Board is a non-statutory public body established in 2002 by administrative action. The Board was set up in order to maintain and strengthen judicial independence, to take responsibility for selecting candidates for judicial office out of the hands of the Scottish Ministers and to make the appointments process clearer and more accountable. Its remit is to:

- provide the First Minister with a list of candidates recommended for appointment to the offices of judge of the Court of Session, sheriff principal, sheriff and part-time sheriff;
- make such recommendations on merit, but in addition to consider ways of recruiting a judiciary which is as representative as possible of the communities which they serve; and
- undertake the recruitment and assessment process in an efficient and effective way.

44. At the time the Board was established in 2002 it was stated to be the intention that after some experience of the new arrangements the Board would be placed on a statutory footing. The Board has worked well in the 5 years since its inception and proposals for placing it on a statutory footing were set out in *Strengthening Judicial Independence in a Modern Scotland.* The Scottish Government considers that placing the Board on a statutory footing will strengthen the independence of the process. Much of what is proposed was informed by the experience of the present arrangements.

45. Section 11 of the Sheriff Courts (Scotland) Act 1971 provides that the Scottish Ministers may appoint temporary sheriffs principal where a vacancy occurs and the appointment of a temporary replacement would be expedient. Section 11A provides that the Scottish Ministers may appoint part-time sheriffs. In line with the overall policy objective of transferring responsibilities to the Lord President from the Scottish Ministers where it is appropriate to do so, the Bill amends the 1971 Act to require the Scottish Ministers to appoint a temporary sheriff principal at request of the Lord President and to consult the Lord President prior to appointing a part-time sheriff.

Consultation and alternative approaches

46. Returning to the previous arrangements under which Ministers selected candidates for judicial office was not considered a realistic option. The previous arrangement had been the subject of criticism as lacking transparency and equality of opportunity. Any return to such an approach would not be consistent with the modern approach to public appointments generally, and which has been applied satisfactorily in the appointment to judicial office since 2002.

47. While it would be possible to retain the status quo and continue the arrangements for the Judicial Appointments Board on an administrative basis, the Scottish Government has concluded that it would be appropriate to honour the commitment made by the previous Administration to put the Board on a statutory basis, bringing it into line with the arrangements that are now in place in England and Wales and Northern Ireland.

48. Respondents to the consultation generally welcomed the proposal and the proposed functions and remit. However, some concern was expressed about some of the detailed aspects of the proposal in particular the composition of the Board, the status of the Board as an advisory NDPB and in particular the provision of support staff, Ministers' power to issue guidance to the Board and the arrangements for appointing members.

Composition

49. The membership of the Board comprises judicial (a judge of the Court of Session, a sheriff principal, a sheriff), legal (an advocate, a solicitor) and lay members. The combined number of judicial and legal members is equal to that of the number of lay members. One of the lay members is to be the chair. No change is proposed to the existing balance of membership. Some concerns were expressed that there is a judicial minority on a Board which has as its principal function the appointment of members of the independent judiciary; other respondents were entirely supportive of the status quo. There was no consensus on an alternative composition for the Board.

50. Although first-rate legal skills are a pre-requisite for judicial appointment, the criteria for a good judge go much wider. The public and the professionals who use the courts must have confidence that the man or woman on the bench has the ability to give them a fair hearing and come to a measured decision. Lay membership helps to instil public confidence in the selection procedure. The Bill provides for this composition. As a safeguard, current ministerial guidance and Board procedures dictate that it is for the legally qualified members of the board to be satisfied that a candidate has the requisite professional legal competence. To give effect to this policy that safeguard is being enshrined in statute.

51. Consideration was given to increasing the membership of the Board to include 2 judges from the Court of Session, one from the Inner House and one from the Outer House, on the basis that having two judges on the Board would provide additional assurances in the assessment of a candidate's legal ability and fitness for judicial office and offer greater reassurance of objectivity. There was no consensus from consultees on this proposal however and some concerns were expressed that such a move may create an imbalance and give one particular body disproportionate representation. It was therefore decided to remain with the existing composition which ensures equality of participation by members and is considered a particular strength.

Status

52. The Board will be classified as an Advisory Non-Departmental Public Body (NDPB) with the existing arrangements for the staffing, finance and provision of support through the Scottish Government continuing. Whilst it has been argued that this approach may impact adversely on the independence of the Board, the alternative of classifying the Board as an Executive NDPB would mean that it must carry out its own administrative, commercial, executive or regulatory functions, employ its own staff and manage its own budgets. The Board currently has 4 support staff and a budget of around £500,000. Such classification would be overly bureaucratic and would simply not be justifiable in terms of efficiency.

53. There is no suggestion that the present arrangements encroach on the Board's independence. All NDPBs are operationally independent from Ministers, but remain accountable to them for the decisions they take and money they spend. The governance framework applicable to Executive NDPBs is more involved than that for advisory bodies but would not offer any more operational independence than is currently envisaged. The Scottish Government will enter into a Memorandum of Understanding with the Board to ensure clarity in the arrangements for providing staff and services, and in the process for determining budgets.

Appointments to the Board

54. The consultation paper *Strengthening Judicial Independence in a Modern Scotland* proposed that the Board itself would be appointed partly by nomination and partly by public advertisement and that all appointments would be made by the Scottish Ministers and that such appointments would fall within the remit of the Commissioner for Public Appointments. The Scottish Government has, however, reconsidered this approach slightly. In line with the new responsibilities being given to the Lord President, it has been decided that judicial appointments to the Board (i.e. judges, sheriffs principal and sheriffs) should be made by the Lord President. The legal and lay members will continue to be appointed by the Scottish Ministers and these appointments will fall within the remit of the Commissioner for Public Appointments

Selection criteria

55. A transparent process for appointing judges was seen as being essential for public confidence in the system. There was a strong body of opinion in favour of giving the Board a statutory remit and for that remit to make clear that merit was the sole basis for appointment. This part of the Bill therefore places the Board on a statutory footing and makes statutory provision that selection for appointment must be solely on merit. See also paragraph 56 below.

Diversity

56. The Scottish Ministers want to encourage a broad range of applicants so as to ensure the widest possible choice of candidates for selection and to promote diversity through fair and open processes for selection to judicial office. The Bill therefore places the Board under a duty to encourage diversity. This sits alongside the provision that selection must be solely on merit.

Miscellaneous

57. The Board's remit is to be extended to include appointment of temporary judges (except where a candidate already holds judicial office). Both Ministers and the Lord President will have power to issue guidance on procedural matters. In either circumstance the Board must be consulted first. Ministers must provide the staff and resources to enable the board to carry out its functions and so that the Board are fully involved a statutory duty to consult the Board as to the staff, property and services required, has been placed on the Scottish Ministers. It will be for the Board to manage the recruitment of any of its staff from within the wide pool of civil servants.

LORD PRESIDENT AND LORD JUSTICE CLERK

Policy objectives

58. The Bill sets out the process to be followed when a vacancy arises in either of the two most senior judicial offices, that is those of Lord President and Lord Justice Clerk. The approach proposed is based on the process to appoint the current Lord President. The Scottish Government considers that placing the panel on a statutory footing will strengthen the independence of the process by offering openness and transparency.

59. The arrangements for appointing to these offices are set out in section 95 of the Scotland Act 1998. This provides that it is for the Prime Minister to recommend to The Queen the appointment of a person as the Lord President or the Lord Justice Clerk. However, the Prime Minister cannot recommend any person who has not been nominated by the First Minister.

60. The Judicial Appointment Board will not be responsible for recommending to the First Minister individuals who are suitable for appointment to one of these offices. A separate panel will be set up for this purpose. However, the Scottish Government considers that one of the strengths of the current arrangements for selecting candidates for judicial office is that a serving judge from each tier to which the Board makes recommendations for appointment sits on the Board. The assessment of candidates can therefore be informed by the experiences of a judge serving at the level to which the candidate aspires. It is very unlikely that any of the Board will hold, or have held, judicial office at the highest level so a separate arrangement is required for assessing candidates for the two highest judicial offices.

61. The Bill requires the First Minister to establish a panel to recommend to him individuals suitable for appointment, and to have regard to the panel's recommendations before making his nomination. The panel will comprise:

- the Chairing Member of the Judicial Appointments Board
- one of the other lay members of the Board nominated by the Chairing Member, and

- where the panel is to consider candidates for the office of Lord Justice Clerk, the Lord President and a qualifying judge nominated by the First Minister, otherwise two qualifying judges nominated by the First Minister.

62. Qualifying judges are:

- those judges of the Supreme Court of the United Kingdom who have held office as judges of the Court of Session (i.e. those judges currently known as the Scottish Law Lords, and who will in due course become the Scottish Supreme Court Judges), and
- the judges of the Court of Session (provided the judge concerned has given notice that they are not willing to be appointed to the vacancy)

Consultation and alternative approaches

63. There was unanimous support for this proposal from the respondents who commented in the 2006 paper although there was some comment about the detail. No alternative arrangements were considered. No comments were made when the proposal was firmed up in the 2007 White Paper.

ELIGIBILITY OF SOLICITORS FOR APPOINTMENT AS JUDGES

Policy objectives

64. The Bill further extends eligibility for appointment as a judge of the Court of Session to include solicitors who, for a continuous period of not less than 5 years, have held rights of audience in either the Court of Session or the High Court of Justiciary.

65. At present, those who are eligible for appointment as a judge of the Court of Session are: advocates of 5 years standing; Writers to the Signet of 10 years standing who have passed the civil law exam two years before appointment; and, since 1990[3], sheriffs principal and sheriffs who have served for 5 years, and solicitors with rights of audience in both the Court of Session and High Court for 5 years. The proposed change to the rules is designed to reflect current practice where very few solicitors have sought rights in both courts but are choosing instead to specialise in Court of Session work or High Court work.

Consultation and alternative approaches

66. Establishing an independent judicial appointments board, which proceeds on the principles of equality of opportunity and selection on merit, means that the Scottish Government needs to keep under review the continuing relevance of set eligibility criteria.

67. *Strengthening Judicial Independence in a Modern Scotland* floated the idea of extending eligibility to all solicitors recognising that the Judicial Appointments Board provides a fair, objective and rigorous mechanism for ensuring the best qualified candidates are recommended for appointment. Many of those supporting this proposal saw this as an important step to

[3] section 35 of, and paragraph 1 and 2 of schedule 4 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

increasing greater diversity among the judiciary, while others considered that experience of pleading before the superior courts, or service as a sheriff, was an essential qualification. However, there was some acceptance that there was an argument for extending eligibility to solicitors who have extended rights of audience in either the Court of Session or the High Court.

68. Having considered the balance of argument, the 2007 white paper concluded that it would not be right to extend eligibility to all solicitors. But, in recognition of the fact that solicitors are choosing to specialise in Court of Session work or High Court work, the White Paper proposed that the rules of eligibility should be widened to include solicitors who have had rights of audience in either the Court of Session or the High Court for 5 years. Only one respondent disagreed with the proposal although some pointed out that, in practice, significantly more than 5 years experience of pleading before one of the higher courts would be needed for a successful application as a judge. This is borne out by experience. Those appointed to the Court of Session bench in the last 5 years had on average practised for over 20 years before the supreme and superior courts.

69. While it would be possible to retain the status quo, the 1990 reforms were designed to extend eligibility to include a broader group of solicitors, bringing forward new candidates for consideration. In the event this reform has not had the opportunity to bring forward candidates and the Scottish Government considers that there is a case for the further modest reform proposed.

THE OFFICE OF TEMPORARY JUDGE

Policy objectives

70. The Bill strengthens the independence of the office of temporary judge and reinforces its role within the judicial resources available to the Lord President by providing that the office of temporary judge will fall within the remit of the Judicial Appointments Board (except where a candidate already holds judicial office) and by placing the tenure on a similar basis to that enjoyed by part-time sheriffs.

71. Section 35(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 gives Ministers a power to appoint temporary judges after consulting the Lord President. In practice appointments are made at the request of the Lord President. They are not subject to consideration by the Judicial Appointments Board. Those appointed have the full powers of a judge of the Court of Session, and automatically become temporary judges of the High Court of Justiciary.

72. Paragraphs 5 to 11 of Schedule 4 to the 1990 Act regulate the appointment of temporary judges. The provisions differ from those regulating the other judicial offices whose holders provide assistance from time to time in the sheriff courts, namely the part-time sheriffs. The Scottish Government considers that there should be, so far as is possible, a consistent approach to issues that are common across the judiciary. The Bill therefore brings the provisions for the appointment of a temporary judge into line with the existing provisions relating to part-time sheriffs.

Consultation and alternative approaches

73. An alternative approach would be to remove the office of temporary judge. However, this was not considered to be a realistic option. The Scottish Government recognises that a need for flexibility and resilience within the court system will always require some supplementary resource available to the Lord President.

74. When this proposal was first raised in *Strengthening Judicial Independence in a Modern Scotland*, there was a body of opinion that favoured the Board having a role in the appointment of temporary judges, although this was balanced by a strong contrary view that favoured the existing arrangements. There was very little comment in response to the February 2007 White Paper firming up the proposal.

75. It would be possible to retain the status quo and the Scottish Government accepts that the present arrangements for appointing temporary judges allow appointments to be made quickly. However, the arrangements are not entirely consistent with the principles of equality of opportunity and transparency of process that are now features of all other judicial appointments. It is also recognised that those who bring their cases before the highest courts have an expectation that there is consistency in the way the judges are appointed. On balance therefore the Scottish Ministers decided that the Judicial Appointments Board should have a role in the appointment of temporary judges. However they believe that a distinction can properly be made in the case of those who have already been appointed to judicial office, such as serving and retired sheriffs principal and sheriffs, and are then appointed a temporary judge. Such individuals will have already satisfied the Board or have many years of judicial experience. This approach offers flexibility to act swiftly when necessary, by appointing a member of the shrieval bench at short notice, and also opens the prospect of creating a wider pool of temporary judges to be called upon to meet planned commitments.

RE-EMPLOYMENT OF RETIRED JUDGES AND SHERIFFS.

Policy objectives

76. The Bill enables a sheriff principal to engage a retired sheriff principal or sheriff to act as a sheriff from time to time when assistance is required to deal with the business before the court in the same way that the Lord President is presently able to invite a retired judge to sit. Ministerial consent will not be required in either case. There will be no right of re-employment, merely an eligibility to sit, if willing to do so.

77. Legislation currently allows the Lord President, with the approval of Ministers, to re-engage retired judges so that they can give assistance to the Court of Session and the High Court. At present, any sheriff principal or sheriff who leaves full-time office and who wishes to continue to offer some public service as a sheriff must apply to the Judicial Appointments Board for appointment as a part-time sheriff. To require a sheriff principal or sheriff who has left full time office in unexceptional circumstances to follow the procedures for a person seeking judicial office for the first time seems unnecessary on merit and not a good use of the time of the Judicial Appointments Board. The Scottish Government considers that a similar approach to that applied in the Court of Session and the High Court should be applied in the sheriff courts. This would

provide the sheriff principal with greater flexibility to deal expeditiously with the business of the courts in the sheriffdom.

Consultation and alternative approaches

78. An alternative approach would be to retain the status quo. However, as indicated above, the Scottish Government considers this unnecessary on merit and not a good use of the time of the Judicial Appointments Board.

79. This proposal was first considered in *Strengthening Judicial Independence in a Modern Scotland* and was almost unanimously welcomed by those who commented on it. It was firmed up in the White Paper, *Proposals for a Judiciary (Scotland) Bill*.

80. Respondents to the White Paper commented on the intention to restrict deployment to the sheriffdom in which the retired sheriff last held office and suggested that this may need to be broader so that sheriffs could sit in sheriffdoms other than the one in which they last served. On reflection the Scottish Government considered that the additional flexibility this would allow was to be welcomed. The provision will operate in the reformed organisational structure proposed in the Bill. It will ultimately be for the Lord President to determine how judicial resources are to be deployed within the overall resources available.

CHAPTER 4 – JUDICIAL CONDUCT

Powers of Lord President

Policy objectives

81. The Bill makes provision for a scheme for dealing with any matter concerning the conduct of a member of the judiciary. Responsibility for dealing with issues of conduct will be conferred on the Lord President, as head of the Scottish judiciary. Statute will provide a framework of powers, leaving the Lord President to determine the detail in rules which will be published. No definition of what amounts to conduct falling below the standard expected of a member of the judiciary will be made. It is anticipated that the required standards will be determined by the judiciary and set down in a code of conduct or judicial ethics under the authority of the Lord President.

82. At present there are no statutory provisions for dealing with questions of conduct other than in the most serious of cases where a question of continuing fitness for office arises. While it is consistent with the principles of judicial independence that the conduct of the judiciary should not be subject to investigation by the executive arm of the state, the Scottish Government considers that the absence of any process for considering an occasion when judicial conduct might fall short of the reasonable expectations of those who use the courts is inconsistent with modern day standards. The number of complaints received at present is not significant, and the majority are found to be vexatious or to be complaints about a judicial decision, but the absence of a process for dealing with the complaints that are made may, on occasion, undermine public confidence in the judiciary.

83. However, any consideration of the arrangements for dealing with issues of misconduct must recognise that judges are not employees. They are public office holders, appointed by, or under authority of, The Queen, and constitutionally independent of the Parliament and the Government. An essential element of their position is the freedom from influence which they enjoy when carrying out their judicial functions. This independence is fundamental to the effectiveness of the judiciary in preserving the rule of law, and protecting the citizen from the activities of the state. The arrangements that are being proposed for a scheme for dealing with issues of conduct respect that principle. In particular, it will not be open to any person to use a complaints scheme to complain about a judicial decision.

84. The Lord President, as head of the judiciary, will:

- have power to give any member of the judiciary formal advice, a formal warning or a reprimand;
- have power to delegate functions under the conduct scheme to other members of the judiciary as he considered appropriate;
- have a general power to suspend from office (for a specified period) any judicial office holder in circumstances where the Lord President was satisfied that such suspension was necessary to maintain public confidence in the judiciary. Salary would continue to be paid throughout the period of suspension; and
- have a general rule making power allowing him to determine the procedure to be followed in dealing with issues of judicial conduct.

85. Investigation of complaints will be confidential, and the outcome, while made known to the complainer, will not be the subject of any publicity except where the Lord President considered that it would be in the interests of the administration of justice for the outcome to be given some publicity.

Alternative approaches

86. It would be possible to retain the status quo where complaints about judicial conduct may be submitted to the Scottish Government, the Lord President or a Sheriff Principal. Complaints without grounds are rejected. Other complaints are considered by the Lord President or the Sheriff Principal who deal with them as they see fit. There are no powers of sanction.

87. In all cases, regardless of the final decision of the individual case, a high standard of personal conduct is expected of judges, on or off the bench. The Scottish Government considers that when there is evidence that a judge's behaviour has fallen below the standard reasonably expected of the judiciary, the system falls into disrepute if there is no process for considering that concern. When a judge's conduct is called into question there must be a robust process which is open, transparent, and easily accessible, but fully respects the independence of the judiciary. Introducing a more structured scheme would bring Scotland into line with other jurisdictions such as Canada and New Zealand who have had such schemes for some time and England and Wales and Northern Ireland who introduced one in 2006.

Judicial Complaints Reviewer

Policy objectives

88. The Scottish Government wants those subject to the conduct provisions and the wider public to have confidence in the process. The Bill therefore provides both the complainer and the subject of the complaint with a right to have an independent person review the administration of the case to ensure the set procedures have been followed.

89. An individual, independent of both the judiciary and government, would monitor the operation of the complaints process to provide assurance for the public that the procedures were being followed and that all complaints were receiving due consideration. The reviewer would have no powers to consider the merits of any complaint, or the disposal of that complaint; his or her role would be to ensure procedures had been followed. The appointment would on an individual basis, made by Ministers with the agreement of the Lord President. It is not anticipated that the reviewer would be employed for more than a few days a month. Nor is it envisaged that he or she would have separate staff. Such administrative supports as might be required would be provided from within the Scottish Court Service

Alternative approaches

90. Consideration of this proposal has been carried out against the background of public sector reform and the principles of streamlining bureaucracy and simplifying the public sector delivery landscape. The involvement of the Scottish Public Services Ombudsman had previously been considered and rejected as this did not seem to be the correct approach to reviewing the application of a disciplinary processes by the senior judiciary. To confer this function on the Ombudsman would not sit at all easily with the constitutional position of the judiciary. In England and Wales an independent ombudsman, with additional functions concerning judicial appointments, has been provided for. Given the relatively small number of cases which it is anticipated would be referred for review the Scottish Government is not convinced that the public expenditure associated with establishing and maintaining an independent ombudsman would give the public best value for that expenditure. What is proposed for Scotland is therefore a simpler arrangement proportionate to the perceived need.

Consultation

91. Nine respondents commented on this aspect of the White Paper. The majority agreed with the proposal although there was some concern that the arrangements being proposed were unnecessarily complicated for the small number of complaints that are made, and the absence of any difficulty in dealing with them.

92. However, the Scottish Government considers that it is important for maintaining public confidence in our legal system that appropriate arrangements are in place for dealing efficiently and effectively with conduct falling short of unfitness for office.

CHAPTER 5 – REMOVAL OF JUDGES AND SHERIFFS

Policy objectives

93. The Bill sets out provisions for the removal of judges and for standardising the arrangements for investigation into fitness for office of sheriffs principal, sheriffs and part-time sheriffs in line with that proposed for judges.

94. It is intended that the First Minister, when requested to do so by the Lord President or otherwise when he thinks fit (having consulted the Lord President) will constitute a tribunal to investigate and report on whether a person holding judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour. It will be a 4 person tribunal (2 judicial office holders as appropriate to the office in question, an advocate or solicitor of long standing and an independent lay person). The senior judge will be the chair and have a casting vote if necessary. The judicial office holder under investigation may be suspended on full salary by the Lord President, or by the First Minister if the tribunal has so recommended.

95. The procedures to be followed by and before the tribunal will be made by the Court of Session in an act of sederunt. Tribunal reports are to be submitted to the First Minister who will lay the report before Parliament.

96. Section 95 of the Scotland Act introduced, for the first time, a procedure for the removal of a Court of Session judge. That section left it to the Scottish Parliament to make provision for a tribunal to investigate fitness for office. A temporary order was made at the time of devolution to deal with any situation that might arise before the Scottish Parliament legislated. The transitional arrangements regulate the appointment of a tribunal to advise the First Minister on whether such a judicial office holder is unfit for office by reason of inability, neglect of duty, or misbehaviour. The provisions in the Bill will replace these transitional arrangements.

97. Section 12 of the Sheriff Courts (Scotland) Act 1971 makes provision for the removal of a sheriff principal or sheriff from office. The Lord President and the Lord Justice Clerk jointly undertake an investigation and report to the Scottish Ministers either that the sheriff principal or sheriff is fit for office or that he or she is unfit by reason of inability, neglect of duty or misbehaviour.

98. Section 11C of the 1971 Act makes provision for the removal of part-time sheriffs by a tribunal appointed to investigate a question of fitness for office.

Alternative approaches

99. An alternative approach would have been to legislate to provide substantive arrangements for investigating alleged unfitness for office of a judge of the Court of Session, leaving in place the current arrangements for sheriffs principal, sheriffs and part-time sheriffs. However, that approach would have perpetuated 3 separate sets of procedures, one, that relating to sheriffs principal and sheriffs, quite different in approach to the more modern arrangements for judges and part-time sheriffs. While there was strong support from certain quarters for retaining the present approach for sheriffs principal and sheriffs, there was a view from the consultation that

the procedure was in need of reform. The Scottish Government considers that there is benefit to be gained in taking this opportunity to bring a common approach to the investigation of questions of fitness for judicial office.

Consultation

100. The majority of respondents agreed with the general thrust of the proposal that there should be a common approach for the various judicial offices although they disagreed with some elements, in particular the role of the First Minister in setting up Tribunals, both in terms of his right to do so at his own hand (having consulted the Lord President) and in appointing members to the tribunal. There was also some concern expressed about the involvement of a lay person in the tribunal although this was balanced by a view that the involvement of non-legal members should help to ensure openness of the process. The Sheriffs' Association were strongly opposed to the repeal of section 12 of the Sheriff Courts (Scotland) 1971. Their concern was that the proposed new procedure would not offer equivalent protection to the existing provision and that repeal would remove or substantially weaken what has been described as the "bulwark standing between the sheriff and any undue interference by the Government".

101. The Scottish Government considers that the role described for the First Minister in constituting the tribunal to investigate the fitness for office of the judiciary appropriately reflects his statutory role in the appointment process for the judiciary. In any event, the First Minister's role regarding the removal of judges is set in terms of the Scotland Act 1998 and it would be outwith the competence of this Bill to make any changes to that.

102. The Scottish Government are content that, while the new arrangements will be different from those contained in section 12 of the 1971 Act they will not undermine the guarantee of judicial independence. What is important is ensuring that removal can only follow a finding of unfitness on the grounds of inability, neglect of duty or misbehaviour; that the process is free from Government influence, and follows the basic principles of natural justice, respecting the rights of the individual members of the judiciary. The Scottish Government believe the new procedures respects all these considerations.

PART 3: THE COURTS

THE COURT OF SESSION AND THE LAND VALUATIONS APPEAL COURT

Policy objectives

103. The Court of Session Act 1988 provides that her Majesty may, by Order in Council increase the number of judges of the Court of Session and that the Scottish Ministers may by order alter the number of judges in the Inner and Outer House. In line with the overall policy objective of transferring responsibilities to the Lord President from the Scottish Government where it is appropriate to do so, the Bill requires the Scottish Ministers to consult the Lord President before a draft of an order is laid before the Parliament in both cases.

104. The Bill also provides for the quorum of the Inner House of the Court of Session and the Lands Valuations Appeal Court to be modified by acts of sederunt.

105. Currently the Court of Session Act 1988 sets out at section 2(4) that the quorum for a Division of the Inner House shall be 3 judges. In law this means that procedural matters, including the question of the competency of an appellate cause, require to be dealt with by a bench of 3 or more judges. This is not always necessary.

106. The Bill therefore provides the Court with the flexibility to fix an appropriate quorum either in relation to the general business of the Inner House or in relation to specific classes of circumstances or cases where a different quorum is appropriate. The power by act of sederunt may therefore be exercised differently for different circumstances or classes of circumstances and for different classes of cases.

107. The same change is being made in relation to the Lands Valuation Appeal Court. There is a similar provision in the Valuation of Lands (Scotland) Amendment Act 1879 in respect of a quorum of 3 judges. As Lands Valuation Appeal Court business is also managed in practice by the Court of Session together with the business of the Inner House, it is sensible to make similar provision here.

Consultation and alternative approaches

108. There was no formal consultation on these provisions, rather they developed in consultation with the judiciary in the context of the wider reforms. Consideration was given to alternative means by which this policy aim could be achieved, for example: - repealing section 2(4) (and the equivalent provision in the Valuation of Lands (Scotland) Amendment Act 1879); substituting 'one' for 'three'; and even the use of an order making power conferred upon the Scottish Ministers. However, the issue purely relates to the administration of the business of the Court and is therefore more appropriately a matter for the Court of Session (rather than Ministers). It was therefore concluded that an Act of Sederunt was the most suitable means of achieving this.

SHERIFF COURTS AND JUSTICE OF THE PEACE COURTS

Sheriff courts

Policy objectives

109. Sheriffs Principal will continue to have responsibility for the efficient disposal of business within their respective sheriffdoms. This responsibility and the supporting power which enables Sheriffs Principal to give directions of an administrative character (i.e. not in respect of a judgment) to sheriffs and officers and staff of the Scottish Court Service is strengthened by the fact that the Lord President may not delegate his responsibilities in respect of Sheriff Courts and JP courts.

110. Sheriffs Principal continue to have powers and duties in respect of all aspects of sheriffs duties and leave of absence – whether that leave be annual leave or otherwise. Where a sheriffs leave of absence for a period over 7 weeks previously required the agreement of the Scottish Ministers, this now requires the agreement of the Lord President.

111. These provisions recognise the key role that sheriffs principal play in their sheriffdoms and ensures that they have all of the necessary powers to carry out their responsibilities. However, in further support of Lord President's role as head of the Scottish judiciary the role that the Scottish Ministers currently have in respect of the organisation of sheriff courts will transfer to the Lord President.

The courts

112. Under existing legislation, the responsibility for determining the boundaries of sheriffdoms, sheriff court districts, where sheriff courts should be held, or cease to be held, and the deployment of sheriffs rests with Scottish Ministers. These arrangements are inconsistent with the reforms being introduced by the Bill. Under these reforms responsibility for the arrangements for the disposal of business and deployment of the judiciary are to pass to the Lord President. The Lord President is also to become chair of the Scottish Court Service, the body corporate with responsibility, amongst other things, for the provision of property and services in support of the Scottish Courts. The Bill accordingly makes provision for the Lord President as head of the Scottish judiciary to take over the responsibilities currently held by the Scottish Ministers. While it will be for the Lord President at his own hand to determine sheriffdom boundaries, being principally an arrangement for the organisation of the judiciary, in exercising the powers concerning court districts and the places where courts are to be held, the Lord President will act on the recommendation of the Scottish Court Service, these being aspects of the provision of court services. In carrying out this function, the Scottish Court Service will be required, to take into account the needs of the members of the public and others involved in court proceedings and to co-operate and co-ordinate activity with other organisations involved in the administration of justice in Scotland.

113. The Lord President would exercise these powers by making subordinate legislation. There are precedents for the Lord President's presenting legislation and whilst this is an unusual approach, the Scottish Government considers it reflects the constitutional position, recognising both judicial independence and the need to ensure that the Scottish Parliament is afforded an opportunity to scrutinise what is being done.

114. The Lord President could not be required to give evidence to Parliament about any order made by him (section 23(7) of the Scotland Act 1998 prevents compelling a judge to appear). However, it is anticipated that the Lord President would recognise the importance of participating in the process if invited to do so. In any event, the Parliament would be able to call on senior officials of the SCS to give evidence about the order.

Deployment of sheriffs

115. The appointment of sheriffs principal and sheriffs will be made in accordance with section 95 of the Scotland Act 1998. But thereafter the various powers of deployment of sheriffs currently held by the Scottish Ministers will pass to the Lord President thus reducing the involvement of the Scottish Government and transferring the responsibility for what might be termed operational and career deployments to the Lord President.

116. The role that the Scottish Ministers currently have in respect of: authorising sheriffs principal to perform duties of other sheriffs principal in addition to their own either due to a

vacancy or where a sheriff principal is unable to perform or rules that he is precluded from performing all or some of his duties; and authorising a sheriff to perform duties in addition to or in place of his own duties will also transfer to the Lord President.

117. It will be for the Lord President to take the initiative in relation to the appointment and recall of temporary sheriffs principal, and provision has therefore been made that in these circumstances the Scottish Ministers must issue a direction when asked by the Lord President to do so.

Justice of the peace courts

Policy objectives

118. Section 59 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 provides the Scottish Ministers with a power to establish Justice of the Peace courts ("JP courts") by order, with reference to particular sheriff court districts. Before making an order establishing JP courts, the Scottish Ministers must consult the sheriff principal for the relevant sheriffdom. Section 63 of that Act provides that the Scottish Ministers may make amendment to provide that a JP court (where not constituted by a stipendiary magistrate) is to be constituted by one JP only. The Bill transfers these responsibilities to the Lord President reflecting the Lord President's new responsibility for securing the efficient disposal of business in all of the Scottish courts.

119. Section 61 of the 2007 Act places the responsibility for the efficient administration of JP courts in the sheriffdom on the sheriff principal. In exercising this responsibility, the sheriff principal may issue administrative directions to those involved in the administration of JP courts (other than the Scottish Ministers). The Scottish Ministers may also issue administrative directions for the purpose of ensuring the efficient administration of JP courts, subject to prior consultation with the sheriff principal. The Bill replaces section 61 giving sheriffs principal the power to give administrative directions to any justice of the peace, including part-time justices of the peace, within their sheriffdom and also the staff of the SCS within their sheriffdom. These new provisions also recognise the over arching role of the Lord President in respect of the efficient disposal of business across all courts in Scotland and makes the duties and responsibilities of sheriffs principal subject to that role and to the direction giving power of the Lord President.

Consultation and alternative approaches

120. It would have been possible to retain the status quo, however, this would be at odds with an overall policy intention of transferring to the Lord President responsibilities for the judiciary that presently rest inappropriately with the Scottish Government.

121. Whilst not all of these changes formed part of the proposals contained in the formal consultation, they have evolved as a logical consequence of giving effect to judicial independence and the new responsibilities being given to the Lord President. They have been the subject of consultation with the Lord President.

GOVERNANCE OF THE SCOTTISH COURT SERVICE

Policy objectives

122. The Scottish Court Service (SCS) was established administratively in 1995 as an Executive Agency of the Scottish Office. It is responsible for the administration of the Court of Session, the High Court of Justiciary, the sheriff courts and, when the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 is implemented, the justice of the peace courts. Its main functions are:

- providing properly trained and experienced court staff and ensuring their effective management;
- providing support services to the judiciary;
- providing and maintaining appropriate court buildings and accommodation;
- providing information on the court system to the public; and providing facilities for users of the courts.

123. In 2006 the SCS changed its corporate structure to establish a new Strategic Board with four non-executive directors, two of whom are members of the judiciary. The main responsibility of this new Board is to advise the Chief Executive on high-level strategic direction based on analysis of key change drivers including policy direction, public confidence and priorities for the wider justice system. The Strategic Board is chaired by the Chief Executive, who remains accountable for all aspects of SCS performance. An internal Executive Board of SCS's senior managers continues to take responsibility for running all aspects of the agency's business.

124. The Bill changes the status of the SCS to that of a body corporate which will be part of the Scottish Administration but independent of the Scottish Government. The SCS will no longer come under the direct authority of the Scottish Ministers but will operate within a set of priorities agreed with them. Its non-judicial members will be accountable to Parliament for the efficient use of public resources. The cost of running the SCS will be covered by a separate vote in the annual Budget Act. There is a requirement for a section 104 order under the Scotland Act 1998 to facilitate the establishment of the Scottish Court Service as an office within the Scottish Administration whose staff remains as civil servants. The section 104 order is required to enable the SCS to employ civil servants directly rather than, as is the case with the Agency, on behalf of Ministers. It is considered appropriate that the SCS functions, which are a key duty of the state in running the courts, should be carried out by civil servants. This is the matter of principle. The issue of potentially establishing a separate pension fund arrangement is an example of costs associated with changing the status of existing staff. The maintenance of civil service status is a crucial part of the reforms. Apart from issues of principle this will avoid the cost and controversy associated with moving staff to non-civil service contracts.

125. The functions of running the court service will be transferred from the Scottish Ministers to the SCS which will be chaired by the Lord President and have a judicial majority. Members of the SCS other than the Lord Justice Clerk and the Chief Executive, will be appointed by the Lord President. The SCS will determine policy in relation to the Scottish Court Service and

oversee implementation of that policy. The SCS will appoint a Chief Executive and staff of the Scottish Court Service who would be civil servants.

126. In carrying out their functions the SCS will be under a duty to support effective co-ordination and co-operation with the other agencies involved in the justice system.

127. It is not proposed that there should be any change to the current arrangements whereby the level of court fees is set by the Scottish Ministers. SCS would continue to have a role in providing advice on this issue.

128. It is proposed that the membership of the SCS will be as follows:

The Lord President;

The Lord Justice Clerk;

A judge of the Court of Session;

A sheriff principal;

Two sheriffs;

A justice of the peace;

A practising member of the Faculty of Advocates;

A practising solicitor;

3 lay members with relevant knowledge and experience in commerce, finance or administration or who appear otherwise to have skills and experience which would contribute effectively to the work of the Scottish Court Service; and

The Chief Executive of the Scottish Court Service.

129. Provision is made for the length of appointments, removal from office, resignation etc. Arrangements for the appointment or nomination of members will be provided for in regulations to give a degree of flexibility as to the actual process involved. Appointments will be made by the Lord President.

130. Whilst the membership of the SCS will be on the face of primary legislation provision will be made to amend it by order made by affirmative resolution procedure to enable future flexibility. A limitation of this order making power will be that the judiciary must maintain a majority.

131. The SCS will operate within a set of priorities set out in a corporate plan agreed with the Scottish Ministers, and will be required to have regard to guidance given to it by the Scottish Ministers. It will operate within the resources voted to it by the Parliament, on the basis of the annual Budget Bill presented by the Scottish Ministers to the Parliament. The Chief Executive would be appointed Accountable Officer by the Permanent Secretary as provided for by the Public Finance and Accountability (Scotland) Act 2000 and the Chief Executive would be accountable to the Permanent Secretary and to the Scottish Parliament for the SCS's use of resources. The SCS will be required to report annually to the Parliament on its performance and use of resources.

132. It is not proposed to have a Ministerial power of direction but rather to have a provision that in the event of a serious failure by the SCS to carry out its functions the Scottish Ministers may by order made by statutory instrument provide for those functions to be carried out instead by them. This power is intended for use in extreme circumstances where the administration of justice is put in danger by the SCS's failure to manage its business. It avoids the potentially unsatisfactory situation of Ministers giving direction to the SCS which it may not have the capacity to carry out. As such an order would be a response to an immediate and serious problem the Bill provides for the statutory instrument to be laid before the Scottish Parliament after being made and that, unless earlier revoked, to be approved by resolution of the Parliament within 40 days.

133. The Bill makes provision for all those staff employed by the Scottish Ministers for the SCS as an Executive Agency, with the exception of the Chief Executive, to transfer to the new body corporate on the date the section comes into force. The bill provides that the transfer of property and liabilities may be made to the SCS by means of an order made by statutory instrument.

Consultation and alternative approaches

134. The responses to the consultation on *Strengthening Judicial Independence in a Modern Scotland* demonstrated that it would be difficult to put the Lord President in the position of having an overall responsibility for the efficient disposal of business in all courts without giving him authority over the administrative support for those courts. The second consultation, *Proposals for a Judiciary (Scotland) Bill* gave an outline of proposals for governance of the Scottish Court Service but said that discussion on the detail was continuing. These discussions have taken place with 4 members of the judiciary on behalf of the Lord President who agreed the proposals in principle.

135. The creation of the Scottish Court Service as a new statutory entity within the Crown was clearly the appropriate way forward if the SCS was to be governed by a judicially-chaired corporate body. The SCS, in administering the courts, performs a core function of the state and is appropriately a Crown entity. If the Lord President is to have overall responsibility for the disposal of business in the courts it is appropriate that he should be in a position of leadership in relation to the administration of the courts. The transfer of responsibility for courts administration from the Scottish Ministers to a judicially-chaired SCS requires the creation of a new statutory entity separate from the Scottish Ministers so that the duty is clearly removed from the Scottish Ministers and so that an entity with the necessary powers and duties is created under the Lord President's chairmanship. A non-statutory route would not have achieved the necessary clarity over transfer of powers and duties, and a non-statutory route would have perpetuated the confused situation where the Scottish Ministers have a nominal responsibility for administration of the courts but effectively cannot discharge this without the agreement of the judiciary.

136. Meetings have also been held with the Crown Office and Procurator Fiscal Service, the Sheriffs' Association, Sheriffs Principal, the Faculty of Advocates and the Law Society. There does not seem to be any significant opposition to the principle of the proposals although some reservations have been expressed about the membership of the Board and the predominance of judicial members.

137. The establishment of a statutory body with a judicially led Board is a necessary support to the Lord President taking on responsibility for the efficient conduct of business across the courts. Similarly an efficient and effective judiciary is vital for the smooth running of the courts. These proposals aim to achieve the establishment of a new body which will enable the judiciary and the courts to operate as efficiently and effectively as possible.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

138. The provisions of the Bill do not discriminate on the basis of gender, race, marital status, religion, disability, age or sexual orientation. In arriving at this assessment of the impact on equal opportunities by the Judiciary and Courts (Scotland) Bill we have responded to the six equalities questions as endorsed by the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission in 1999 and used by both the Equal Opportunities Commission and the Scottish Government.

What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

139. The policies contained in the Bill are intended to modernise the operational framework for the Judiciary, consolidating and strengthening the independent status of the judiciary, and putting in place a unified judiciary with the Lord President as head of the Scottish judiciary responsible for the governance of the Scottish Court Service. These reforms will result in improved public confidence in the judiciary and courts and more effective arrangements for managing the business across courts and will therefore benefit the people of Scotland.

Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

140. Careful consideration has been given to the effect of the Bill in relation to any potential impact on different equality groups. The policies to be implemented through the Bill will impact across the Scottish judiciary and courts and there is no intention that the Bill's provisions will have a discriminatory impact on equality groups.

141. The provisions contained in the Bill which relate to the appointment process for the Scottish judiciary are intended to ensure that appointments are made on merit and that the process is transparent and independent. The Bill contains a specific provision relating to the encouragement of diversity. This duty placed on the Judicial Appointments Board for Scotland is intended to encourage a wider range of applicants so as to ensure the widest possible choice of candidates for selection and promote diversity through fair and open processes for selection to judicial office that are based solely on merit.

Has the full range of options and their differential impacts on all equality groups been presented?

142. The policies contained in the Bill have been the subject of full and comprehensive consultations with a wide range of stakeholders. A wide range of equalities groups as well as groups representative of equality interests (such as the Commission for Racial Equality, Scottish

Disability Equality Forum, Age Concern Scotland and the Scottish Council for Voluntary Organisations) were included in the consultation process.

What are the outcomes and consequences of the proposals? Have the indirect, as well as the direct, effects of the proposals been taken into account?

143. The outcomes have been stated at paragraph 139 above. Both the direct and indirect effects of the proposals have been taken into account. The provisions of this Bill will improve the justice system by modernising the arrangements for the judiciary, strengthening their role though greater authority over the Scottish Court Service. The Bill will also place the Judicial Appointments Board for Scotland on a statutory footing.

How have the policy makers demonstrated that they have mainstreamed equality?

144. We have carried out extensive consultation on the policy provisions in the Bill and in developing the policy we have been mindful of ensuring that the provisions do not create differences and are non-discriminatory. We have received no responses to the consultations suggesting that the Bill provisions will impact negatively upon equality interests.

How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?

145. The impact of the diversity clause in relation to judicial appointments will be monitored in line with the current monitoring the Judicial Appointments Board undertakes in relation to the gender, ethnicity, and disability of applicants.

Human rights

146. It is considered that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). The guarantee of continued judicial independence, the placing of the Judicial Appointments Board on a statutory footing and the establishment of the Scottish Court Service as a non-Ministerial Department in particular further contribute to the overall independence (both perceived and actual) of the judiciary. Article 6 (right to a fair trial) of the ECHR states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The provisions in the Bill re-inforce this right.

Island communities

147. The Bill has no differential effect on island communities. The Scottish Court Service will have due regard to the particular needs of island communities.

Impact on local government

148. The Bill has no impact on local government.

Impact on sustainable development

149. The Bill has no impact on sustainable development. The Scottish Court Service will have due regard to sustainable development in carrying out their functions – for example through energy efficiency in operating courts and sustainable travel plans etc.

This document relates to Judiciary and Courts (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 30 January 2008

JUDICIARY AND COURTS (SCOTLAND) BILL

POLICY MEMORANDUM

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