

Strengthening Judicial Independence in a Modern Scotland

A consultation on the unification, appointment, removal
and management of Scotland's Judiciary



Strengthening Judicial Independence in a Modern Scotland

A consultation on the unification, appointment, removal
and management of Scotland's Judiciary

© Crown copyright 2006

ISBN: 0-7559-4910-2

Scottish Executive
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Executive by Astron B44488 02/06

Published by the Scottish Executive, February, 2006

Further copies are available from
Blackwell's Bookshop
53 South Bridge
Edinburgh
EH1 1YS

The text pages of this document are printed on recycled paper and are 100% recyclable

Contents

Ministerial Foreword

Executive Summary

Chapter 1 Introduction

Chapter 2 The Independence of the Judiciary

Chapter 3 The Lord President

Chapter 4 Judges' Council

Chapter 5 Administrative responsibilities for judges of the Court of Session

Chapter 6 Judicial Appointments

Chapter 7 Removal from Office

Chapter 8 Discipline

Chapter 9 Re-employing retired judges and sheriffs

Chapter 10 Lord Justice Clerk to fulfil duties of Lord President in certain circumstances

Chapter 11 The office of temporary judge

Chapter 12 Eligibility for appointment to the office of judge of the Court of Session

Summary of Questions

How to respond and how your responses will be handled by us



MINISTERIAL FOREWORD

We are pleased to publish a further consultation paper in our programme for reforming Scotland's justice system. We have already made significant progress in modernising the way the courts operate. This is important as an efficient and effective court system is key to the protection of everyone in our communities throughout Scotland.

Much of the reform to date has focused on the processes that affect people when they come into contact with the courts. We have made significant progress, but more needs to be done and work, most notably on the reform of summary justice, is continuing.

The proposals which we are publishing in this paper concern the judiciary. All those who preside over the courts are in a unique position to influence how justice is administered. We want to make sure that our judicial system is organised in such a way that allows our judges and sheriffs to exercise their influence to bring about improvements for those served by the court system.

Scotland is well served by its judges and sheriffs, not only through their judicial work, but also through their contribution to the work of various public bodies, such as the Parole Board and the Sentencing Commission, and in the development of the law through membership of working groups. Our judges and sheriffs have contributed significantly to our programme of reform. The reforms of the High Court which we introduced in April 2005 were based to a large extent on the recommendations of Lord Bonomy's Review Group, and our work on reforming summary justice has been greatly assisted by the efforts of the committee chaired by Sheriff Principal McInnes QC. Individual judges and sheriffs are already contributing to the modernisation agenda by embracing an active case management role in both the criminal and civil courts.

We are very encouraged by the way judges and sheriffs have so readily co-operated with these reforms. This indicates an appetite among the judiciary to improve the system for the benefit of its users. We want to build on this, and give the judiciary greater opportunities to secure the speedier and more efficient and effective disposal of the business in the courts. They are uniquely placed to do this, but the way the judiciary are presently organised works against their developing and implementing consistent policies throughout the system. And the principle of judicial independence rightly restricts the influence which the Executive has over the way the judiciary carry out their judicial functions.

There are also aspects of the way the judicial system is currently administered that do not sit entirely comfortably with the principle of judicial independence. These proposals for change

will modernise the organisation and leadership of Scotland's judiciary, reduce the involvement of the Executive in the day to day administration of the system and introduce a scheme for dealing with judicial misconduct. Modernising the judiciary in line with these proposals will strengthen it as a body and make it more effective as a leader in the development of our court system in the interests of Scotland's communities. Our intention is to bring forward changes in the law to give effect to the proposals we decide to implement after this consultation before the end of the present Parliament.

The consultation paper deals with a number of other matters related to the judiciary.

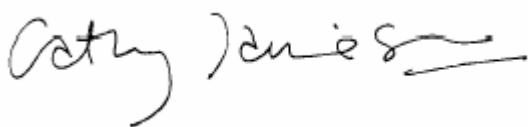
There are proposals to place the reformed judicial appointments system on a statutory basis. This is a commitment of our Partnership Agreement, and we will bring forward a bill to achieve this during the course of the current Parliament.

The consultation also proposes a standard approach to the removal of judges. There are at present a number of provisions in statute dealing with the removal of judges and sheriffs. We propose to move to a common approach and bring forward legislation in 2006.

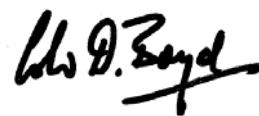
The final element of our proposals is about who should be eligible for appointment as a judge of the Court of Session. We need to keep these matters under review and ensure that existing arrangements, some of which have been in place for many years, remain relevant in a modern Scotland.

We believe that this an exciting and far reaching set of proposals which will strengthen not only the judiciary's constitutional independence, but also its capacity to bring about real change within the system.

We look forward to hearing your views on what is proposed.



Cathy Jamieson MSP
Minister for Justice



Colin Boyd QC
Lord Advocate

February 2006

EXECUTIVE SUMMARY

This consultation paper invites views on a range of proposals to modernise and improve the court system through strengthening the role of Scotland's judiciary. Some of the proposals modernise procedures already in place, bringing them into line with developments in human rights law since they were established; others are intended both to reinforce our commitment to judicial independence and to recognise the unique contribution which an independent judiciary, with adequate powers, can make in improving the way our courts serve all those who use them.

Our proposals are divided into five main areas. These are:

- (a) the creation of a unified judiciary presided over by a Lord President with 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;
- (b) the provision of a statutory basis for the Judicial Appointments Board;
- (c) the arrangements for the removal of judges;
- (d) the introduction of a scheme of discipline for the judiciary;
- (e) the arrangements for retired and temporary judicial office holders;
- (f) the grounds of eligibility for appointment as a judge of the Court of Session.

The paper does not deal with lay justices, other than to recognise that they, along with stipendiary magistrates in the district court, would form part of a unified judiciary. Lay justices are a unique element of the judiciary, and the detailed arrangements for developing their role need to reflect this. We have decided therefore to take forward those arrangements as part of our separate work on summary justice reform.

Unified Judiciary (Chapters 2, 3, 4,5 and 10))

We are strongly committed to the independence of the judiciary, and we propose to make a statutory statement of this commitment.

We do not believe the present organisational structure within the judiciary is entirely satisfactory. The Lord President, although widely recognised as Scotland's pre-eminent judge, has a role that is largely undefined in statute. He or she has no responsibility for the disposal of business in the sheriff courts. This rests with the sheriffs principal, over whom the Lord President has no authority. In matters of judicial discipline, the Lord President and the sheriffs principal have only limited defined disciplinary powers. These arrangements do not provide an effective basis for the further modernisation and development of our courts.

We propose therefore to establish the Lord President as head of a unified judiciary. To ensure this is a role that can lead change effectively, we propose to confer on the Lord President responsibilities for securing the efficient disposal of business in all the courts, and for the training, deployment, welfare and discipline of the judiciary. We would also confer powers on the Lord President to fulfil those responsibilities, either personally or by delegation to sheriffs principal or other members of the judiciary. We also propose the creation of a statutory Judges' Council, representing all branches of the judiciary, under the leadership of the Lord President. The Council would assist the Lord President in developing and implementing policy throughout the judiciary.

Creating a single judicial head, with recognised responsibilities and powers, allows that office to represent the judiciary in its dealings with Parliament and with the Executive. We propose that the Lord President should have an express power to make written representations to the Scottish Parliament on matters of importance to the judiciary, or otherwise to the administration of justice. The proposed structure also offers a potentially powerful mechanism for the judiciary to engage with the Executive, especially the Scottish Court Service, in the development and implementation of policies that would bring about improvements to the court system, and we ask for views on whether the judiciary should have a formal role in the governance of the Scottish Court Service.

These reforms will create a structure within which matters that would be regarded as aspects of management of the judiciary can be carried out by the judiciary themselves, free from inappropriate Executive involvement. This will both strengthen the independence of the judiciary, and allow effective mechanisms for improving the performance of the courts to be developed by the senior judiciary.

In Chapter 10, we invite views on whether a statutory provision authorising the Lord Justice Clerk to fulfil all, or some, of the functions of the Lord President when that office is vacant, or the holder temporarily incapacitated, would be desirable.

Judicial Appointments Board (Chapter 6)

When we modernised the way judicial appointments were made by setting up the Judicial Appointments Board in 2002, we said that after some experience of the new approach we would place the Board on a statutory footing.

The Board has made a number of recommendations for appointment to the offices of judge of the Court of Session, sheriff principal, sheriff and part-time sheriff. We have accepted all the recommendations. We now propose to bring forward legislation to establish the Board on a statutory basis.

Our proposals reflect the positive experience of how the Board has operated, and in many aspects we follow the practices that the Board has developed. We do not intend to alter the Board's function as an independent advisory body, nor do we intend to disrupt the equal balance of lay and legally qualified membership which we consider a particular strength of the present Board. A lay member will continue to chair, and will have no casting vote. In making provision for the appointment of members, we propose a mix of nomination by the senior judiciary for certain of the judicial representatives, and open appointment, in accordance with the code issued by the Commissioner for Public Appointments, for the other members. The term of appointment will be for an initial period of three years, with the possibility of a further term of up to a further three years.

We do not intend to prescribe the remit of the Board, leaving a measure of flexibility for the future, nor do we propose to set out in detail how the board will operate. However, we will provide that the assessment of the adequacy of the legal skill of a candidate should be a function only of the legally qualified members of the Board, and we will take power to issue guidance to the Board about the performance of its functions. Provisions are proposed dealing with issues of conduct of board members, in line with the standards for those in public office. A specific provision is proposed on the matter of confidentiality. There will be a range of other provisions covering matters such as complaints about the way the Board applied its procedures during the appointments and interview process, remuneration for Board members, removal of a member in certain defined circumstances, and arrangements to deal with the lengthy absence of a member. We also propose to take power to change the number of members by order, always preserving the equal balance of lay and legal membership.

Views are sought on a number of questions, including whether there should be both an Inner House and an Outer House judge among the membership (which would require an increase in the overall membership to twelve as an additional lay member would be required to maintain the balance); whether the Court of Session judge or judges should be elected by their peers rather than be nominated by the Lord President; whether the Board should have a role in the appointment of temporary judges, and in appointments to the Inner House of the Court of Session. We also seek views on whether the Board should have a role in the arrangements for appointing to the offices of Lord President and Lord Justice Clerk.

Removal of judges from office (Chapter 7)

Respect for the principle of judicial independence requires that the basis on which a member of the judiciary can be removed from office be clearly stated and carefully regulated. There are at present different statutory provisions regulating the removal from office of a judge of the Court of Session, a sheriff principal or sheriff, and a part-time sheriff. We propose to standardise the approach and provide that where any question of fitness for office arises, the matter will be investigated by a tribunal of four. The tribunal will comprise two judges, an advocate or solicitor of ten years standing, and a person who is not and never has been an advocate or a solicitor. The senior judge will chair and have a casting vote. The basis for

removal would remain unfit for office on the ground of inability, neglect of duty or misbehaviour.

We invite views on whether the procedure to be followed by a tribunal should be set out in statute or in regulations, and whether provision should be made for the suspension of an office holder, in specified circumstances, pending investigation.

Discipline (Chapter 8)

We are proposing a comprehensive scheme for dealing with complaints about inappropriate judicial conduct. The absence of such a scheme, and any proper basis on which to discipline members of the judiciary for conduct falling short of that which would raise a question of fitness for office, is not satisfactory. Our proposals recognise that managing the conduct of judges in a constitutional arrangement that respects the principle of judicial independence is a function that can be undertaken only by the judiciary themselves. We propose therefore that the Lord President, in his new role as head of a unified judiciary, should have responsibility for all issues of judicial discipline, short of removal.

We consider that there is merit in giving discretion to the Lord President in this matter, and we do not propose to define what would amount to inappropriate judicial conduct, nor to set out in detail the procedures to be followed in dealing with complaints, although there may be some advantage in setting a framework in statute. We envisage that the Lord President would delegate the handling of individual complaints, and that those against sheriffs would be dealt with by the appropriate sheriff principal. The disciplinary penalties available to the Lord President would be formal advice, which could amount to a requirement to undertake an aspect of judicial study or training, a formal warning or a reprimand. We seek views on whether, in exceptional cases, it should be open to the Lord President, on the recommendation of a sheriff principal following consideration of an issue of a sheriff's conduct, to transfer that sheriff to another court in the interests of the administration of justice.

We will incorporate specific provisions about confidentiality as we need to ensure a balance between openness and avoiding a situation that undermines public confidence in our judges.

We are also inviting views on the appropriate arrangements for an independent review of the handling of a complaint, perhaps by a lay observer, and whether there should be available to a judge who is the subject of a complaint a mechanism for having the merits of the complaint and the penalty, or both, reviewed. We also invite views on whether there should be circumstances in which a member of the judiciary could be suspended from office other than in the context of a formal investigation into fitness under the proposals in Chapter 7.

Retired and Temporary office holders (Chapters 9 and 11)

We propose to simplify the current arrangements for re-employing retired judges of the Court of Session and retired sheriffs, by providing that where such an office holder retires in unexceptional circumstances, he or she would automatically be eligible to sit if called upon by the Lord President or sheriff principal. Re-employment would, as at present, be subject to any statutory restrictions associated with age.

We are also proposing to make a number of changes to the present arrangements that regulate the office of temporary judge to strengthen this important office and to achieve greater consistency with the arrangements for the equivalent post in the sheriff court, namely the part-time sheriff.

Eligibility for appointment as a judge of the Court of Session (Chapter 12)

In the final section of the paper, we invite views on whether eligibility for appointment as a judge of the Court of Session should be open to all solicitors. At present only solicitors who have had a right of audience in both the Court of Session and the High Court of Justiciary for a continuous period of not less than five years are eligible for appointment to this office. The creation of a Judicial Appointments Board, operating on principles of equality of opportunity and appointment on merit, requires us to keep under review what could amount to an artificial barrier to well qualified individuals being considered by the Board.

How to respond

Guidance on how to respond to this consultation paper and information on how we will deal with your response, and what you need to do if you wish us to keep your response confidential, are set out at the end of the paper.

Chapter 1

Introduction

1.1 This consultation is about modernising our legal system. The earlier parts of our reform programme were concerned mainly with the way the court system operated. This set of proposals is about the judges.¹

1.2 We are committed to a strong independent judiciary. Judges must be free from all influence when engaged in their judicial functions. This is of fundamental importance to all those who come before the courts, or look to the courts to protect their rights and resolve disputes. We propose later in this paper, therefore, that there should be a statutory statement of this commitment. We also propose to extend the role of the Lord President and the senior judiciary and to make changes to the way the judiciary are organised that will create a unified structure. Our proposals will strengthen the role of judges in the management and development of our court system. Judges already contribute to the development of the system. Lord Bonython's work on High Court reform, and that of Sheriff Principal McInnes on reforming summary justice, are good examples. So too is the willingness of judges to manage particular types of case, such as drug related offenders and commercial litigation. Our proposals in this paper will create a structure that we believe will allow judges scope to play a greater role in the modernisation of our court system.

1.3 The independence of the judiciary will be strengthened by developing the procedures already in place for the appointment and removal of judges. We want to ensure the way judges are appointed and removed is seen to be entirely free from inappropriate influence. This paper contains our proposals for doing this. But ensuring an independent judiciary in which there is public confidence involves more than regulating the way judges are appointed and removed. A modern society expects its judges to be equipped to deal with the increasingly complex and diverse issues that come before them. They expect judges to treat those before them courteously and to deliver judgment within a reasonable time, and they expect to have access to an effective mechanism for dealing with their complaints on those

¹ In this paper, except where the context indicates otherwise, we use the term judges to refer generally to the holders of the offices of judge of the Court of Session, sheriff principal, sheriff and part-time sheriff. A judge of the Court of Session becomes, by virtue of that appointment, a judge of the High Court of Justiciary.

occasions when standards of conduct do not meet expectations. At present these matters are largely unregulated. This may have been acceptable in the past, but today it can create uncertainty and dissatisfaction. This in turn can undermine public confidence in the judges and the legal system. The present arrangements also hinder the modernisation which the judiciary themselves wish to see in the public interest.

1.4 In business and the public service generally matters of conduct and performance are regarded as management issues. But judges need to be managed in a way that is seen to be free from external pressure or influence that undermines their independence. The role of the Executive must be carefully balanced. Functions of a management nature must, with limited exceptions, lie with the judiciary themselves. We set out in this paper proposals which we believe achieve the correct balance and will improve the management of the judiciary to the benefit of the public whom they serve.

1.5 In 2002, following public consultation, we reformed the way judges were appointed by setting up a Judicial Appointments Board. At that time we said that after some experience of operating on an administrative basis we would place the Board on a statutory footing. Since 2002 the Board has made recommendations for appointment to the offices of Court of Session judge, sheriff principal, sheriff and part-time sheriff. Ministers are expected to adhere to the Board's advice in its recommendations, unless there is a compelling reason to the contrary. Since the Board was established we have accepted all the Board's recommendations. We are now consulting on proposals to establish a statutory framework within which the Board will operate. Our proposals have been informed by the positive experience of the way the Board has operated since it was set up.

1.6 We also set out proposals for a procedure for removing a judge of the Court of Session and the Chairman of the Scottish Land Court. Provision for removal from these offices was made in the Scotland Act 1998. The 1998 Act allowed the detailed procedure to be set by Act of the Scottish Parliament and we are now consulting on our proposals for that procedure.

1.7 We have given a firm commitment to legislate on judicial appointments and the removal of judges, and in this paper we set out proposals in these areas. We are also consulting on other important proposals. We believe we have identified the main areas in which the time is now right for modernisation, but we want to hear the views of others. Where we are looking

for views on a particular aspect we pose a specific question; but we welcome comment on all of our proposals. We would find it helpful if your responses included the reasons for the position you are adopting.

1.8 This paper does not deal with tribunal appointments. When we set up the Judicial Appointments Board in 2002 we decided that it should not take on the role of appointing to the various tribunals. These are many and varied. The skills required by tribunal members are not always identical with those required by judges. Any change to the arrangements for appointing tribunal members would require careful consideration of the aspects of tribunal activity. While we are not consulting on this area, therefore, any comments that are made in response to this paper will inform development of the policy on other relevant appointments.

1.9 This paper does not include detailed proposals about justices in the district courts. Summary justice is a separate part of our programme of reform. This important area of our criminal justice system was reviewed by a committee of experienced practitioners, chaired by Sheriff Principal John McInnes QC. Sheriff Principal McInnes reported in 2004.² Having consulted on his report, we set out how we planned to take forward modernisation of summary justice in a *Next Steps* paper which we published in March 2005.³

1.10 We are committed to lay justice. Lay justices are part of the judiciary, and would be part of the unified judiciary which we discuss in this consultation paper. The principle of judicial independence applies to the justices when discharging their judicial functions as it applies to other judges. However, lay justices are a unique element of the judiciary, and the solutions for improving and developing lay justice need to be tailored to their requirements. This is recognised in the *Next Steps* paper in matters such as appointment, training and appraisal. It makes sense to leave the detailed provisions for lay justices as part of the comprehensive scheme for reforming summary justice that is being developed. However, we will ensure that any proposals to change the law that emerge from this current consultation complement those prepared to reform summary justice, and that the measures taken together strengthen the lay justice's position as a member Scotland's judiciary.

² *Summary Justice Review Committee: Report to Ministers*, <http://www.scotland.gov.uk/library5/justice/sjrcrm-00.asp>

³ *Summary Justice Reform – Next Steps*, <http://www.scotland.gov.uk/Publications/2005/03/20888/55016>

1.11 Guidance on how to respond to this consultation paper, information on how we will deal with your response, and what you need to do if you wish us to keep your response confidential, are set out in the final section of the paper entitled *How to respond and how your responses will be handled by us*.

Chapter 2

The Independence of the Judiciary

2.1 The independence of the judiciary is of fundamental importance to the protection of individual rights in a modern Scotland. Judges must be free from all influence when engaged in their judicial functions. We are fully committed to this principle and propose to strengthen our commitment with a statutory guarantee. We will commit Ministers, and all who have responsibility for matters relating to the judiciary or to the administration of justice, to uphold the independence of the judiciary. We will also create a specific duty on Ministers not to seek to influence particular judicial decisions through any special access they might have to the judiciary.

2.2 As part of the constitutional reforms in England and Wales, the Lord Chancellor has been given a statutory duty to have regard to the need to defend the independence of judiciary.⁴ The creation of this duty arises from the changes to the role of the Lord Chancellor, and it may be that we do not require a similar provision in Scotland. On one view Scottish Ministers collectively should always have regard to this fundamental constitutional principle, and special provision is unnecessary. The contrary view would favour creating the duty to ensure the principle is always in focus. The duty might be imposed on the First Minister or on Scottish Ministers collectively.

Question 1 Would a provision reflecting the commitments in paragraph 2.1 deliver all that is required by way of a guarantee of judicial independence?

Question 2 Should a duty be imposed on the First Minister or Scottish Ministers collectively to ensure judicial independence is recognised and respected within the Executive?

⁴ Section 3(6)(a) of the Constitutional Reform Act 2005 (c.4)

Chapter 3

The Lord President

3.1 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. Furthermore 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 in other jurisdictions in that it does not have responsibility for all the courts, and indeed all branches of the judiciary, within Scotland. The Lord President is not therefore a "Chief Justice" within the meaning that role is understood in many states. We do not consider this an entirely appropriate arrangement for a devolved Scotland, or one that gives the judiciary a fully effective structure within which to modernise and develop itself in the interests of those it serves. We propose therefore, subject to responses to this consultation, to confer on the Lord President in statute certain powers and responsibilities. Many of these relate to functions which the Lord President has traditionally carried out; others are new.

3.2 The intention is that the Lord President should have the necessary authority to fulfil a role as head of the Scottish Judiciary. In this role he or she would preside over all branches of the judiciary. By creating an authority over the judiciary, the Lord President would be able to influence the performance of all the courts and the development of the legal system with due regard to both the interests of justice and the broader public interest. In the following paragraphs of this Chapter, we consider the specific aspects of these new proposed powers and responsibilities, including whether the authority of the Lord President would be enhanced by his or her having a statutory responsibility for the management of the business of the sheriff courts.

Question 3 Do you agree that the Lord President should be given formal status as head of the Scottish Judiciary?

Question 4 If so, what would be a fitting title for this judicial office? (Your answer to Question 7 may influence your view.)

Administration of the courts

3.3 The Lord President has responsibility for the general supervision of the business before the Court of Session and, as Lord Justice-General, the High Court of Justiciary.⁵ He or she has responsibility for the policy governing these courts, for the deployment of the judges, and for securing the efficient disposal of the business before the superior courts. We do not propose to alter this. While the absence of any statutory statement of responsibilities appears not to be a source of difficulty in practice, we would welcome views on whether the opportunity should be taken to set out the principal responsibilities of the Lord President and Lord Justice General concerning the administration of the business of the court of Session and High Court of Justiciary. In Chapter 5 we consider the Lord President's powers to delegate administrative functions to other judges.

Question 5 Should a statutory duty be placed on the Lord President and Lord Justice General to put in place arrangements for the speedy and efficient disposal of business in the Court of Session and the High Court of Justiciary?

3.4 At present the Lord President has no responsibility for the administration of the business in the sheriff courts. That responsibility rests with the respective sheriff principal.⁶ In the following paragraphs we seek views on whether the authority of the Lord President as head of a unified judiciary would be enhanced, and as a consequence his ability to manage the administration of justice for the people of Scotland strengthened, were he or she to have a formal responsibility for the speedy and efficient disposal of business in the sheriff courts. However, in this section we proceed on the basis that the present arrangement does not change, and that this responsibility continues to rest with the sheriffs principal. In practice the Lord President will call upon the resources of the sheriff courts to assist in the efficient operation of the superior courts, in particular the High Court. The High Court makes use of sheriff court premises to house circuits around the country, and the Lord President calls upon sheriffs to give service as temporary judges from time to time. In making these calls, the Lord President consults the appropriate sheriff principal. However, the Lord President has no

⁵ Since 1837 the office of Lord Justice-General has been held by the Lord President of the Court of Session

⁶ Section 15 of the Sheriff Courts (Scotland) Act 1971 (c.58)

express authority to secure resources from the sheriff courts, and views are invited on whether such authority would be desirable.

Question 6 Should a prior claim to resources over the lower courts be recognised in statute?

3.5 In this paragraph we seek views on whether it would be consistent with the proposal to create the Lord President as head of a unified judiciary to give him or her responsibility for the administration of business in the sheriff and district courts, in addition to the superior courts. We note later in this paper (at paragraph 4.4) the potential benefits for the development and good management of our court system that a single judicial head working with a Judges' Council representing all tiers of that system would bring. It would be inconsistent with this were that judicial head not to have a statutory responsibility in respect of all the courts. The absence of such a responsibility would weaken power and influence over those courts. We propose therefore that a general responsibility to ensure the speedy and efficient disposal of business before the sheriff and district courts be conferred on the Lord President. We do not propose to alter the role of the sheriffs principal, other than to bring the exercise of their responsibilities for the administration of the sheriffdom and the conduct of sheriffs under the overall responsibility of the Lord President. A sheriff principal's management of his or her sheriffdoms and local appellate function are important elements of the public service. We intend those functions should continue. In Chapter 5 we recognise that in discharging his or her responsibilities for the administration of the business before the Court of Session and the High Court the Lord President might be supported by an administrative judge. We would see the sheriffs principal supporting the Lord President in the administration of the sheriffdoms.

Question 7 Do you agree that responsibility be placed on the Lord President to ensure the speedy and efficient disposal of business in the sheriff and district courts?

Training for the Judiciary

3.6 The Lord President has, by fairly recent convention, overarching responsibility for the training of the judiciary. Training took on new significance in 1996 with the establishment of the Judicial Studies Committee for Scotland. Although funded by the Executive, we have

always accepted that the training of judges should be in the hands of the judiciary themselves. Accordingly the Committee is chaired by a judge of the Court of Session and the Director of Judicial Studies is a serving sheriff on secondment. Training for the judiciary is a subject that receives a measure of public comment and it is important that an effective structure is in place. The present arrangement works well in practice, and we do not see a pressing need to establish the Committee on a legislative footing, although that is an option. Nor do we consider that regulations are necessary in this area of activity. Judges are expected to take part in judicial study events, and it seems to us that a Lord President with overall responsibility for the judiciary should have oversight of the arrangements for judicial training and responsibility for their effective operation. If our proposals for establishing a Judges' Council are adopted, we anticipate the Council would wish to consider whether the effectiveness of the Judicial Studies Committee would be enhanced by its becoming a sub-committee of the Council, but that would be a matter for the Lord President and the Council to consider. For the purposes of the present consultation we would propose to specify in legislation that the Lord President has responsibility for ensuring that programmes of training and guidance are provided for the judiciary.

Question 8 Do you agree that the Lord President should have overall responsibility for the training and guidance of the judiciary?

Question 9 If not, who should have this responsibility?

Deployment of the judiciary

3.7 At present the Lord President is responsible for the deployment of judges of the Court of Session but has no responsibility for the deployment of sheriffs, other than to the limited extent of assigning sheriffs who have been appointed temporary judges to act as such from time to time. The sheriff principal has responsibility for the deployment of sheriffs within his or her sheriffdom.⁷

3.8 From time to time, sheriffs seek transfer from one post to another, frequently between sheriffdoms. Transfer may be sought for professional or personal reasons. The current

⁷ See sections 15 and 16 of the Sheriff Courts (Scotland) Act 1971 (c.58)

arrangements place formal responsibility for the approval of such moves on Ministers.⁸ In practice the Minister for Justice approves such moves.

3.9 This arrangement seems to us inconsistent with the overall aim of strengthening the judiciary by allowing the senior judiciary greater powers of management over the judiciary as a whole. Accordingly we consider the time is right to transfer these functions to the Lord President. In a structure such as that proposed in this paper, the judiciary would be best placed to decide on career moves for their colleagues. We would expect the Lord President and the Sheriffs Principal to develop policies for judicial resource planning. These would probably be best managed amongst the Sheriffs Principal, with the Lord President giving approval to specific transfers. This role would have to be exercised in conjunction with that of the Judicial Appointments Board who would advertise vacancies which the Sheriffs Principal and the Lord President might decide should not be filled by transfer of a serving sheriff.

3.10 There is a further matter relating to the transfer of sheriffs on which we would welcome views. This is whether explicit provision should be made for the transfer of a sheriff on a compulsory basis, when this would be in the interests of the administration of justice. Situations when such a transfer would be appropriate are likely to be rare, but nevertheless it would seem sensible to include the possibility, if the principle is accepted, in the provisions setting out the new powers of the Lord President.

3.11 There are perhaps two situations where this exceptional step might be considered. The first is where the business of a court diminished by such an extent that the complement of sheriffs became more than required to deal with that business. We would anticipate that an adjustment to complement in such a situation would almost invariably be resolved administratively, possibly as part of wider organisational adjustments within a sheriffdom, but it would be unfortunate if a case arose where that was not possible, and there was uncertainty about the powers and responsibilities of those concerned. On one view power to transfer a sheriff in such circumstances already exists in section 14(4) of the Sheriff Courts (Scotland) Act 1971. That section provides that a transfer may be made by Ministers following consultation with the Lord President. That would seem the correct balance when

⁸ Section 14(4), *ibid*

the issue is one of the supply of judicial resources. We would propose to clarify the extent of that power in legislation.

3.12 There is another situation where the possibility of transfer might arise. This is associated with the new powers for dealing with judicial conduct discussed in Chapter 8. A sheriff principal, after careful consideration of an issue of shrieval conduct, might conclude that it would be in the interests of the administration of justice to recommend the transfer of a sheriff to another court. We would not anticipate such a conclusion to be reached in any but the most exceptional of cases. In such a situation the decision whether transfer should be made would rest with the Lord President. We would welcome views on this proposal.

Question 10 Do you agree the Lord President should have responsibility for the deployment of members of the judiciary?

Question 11 If not, what other proposals would you wish to see provided?

Question 12 Should explicit provision be made authorising the transfer of a sheriff on a compulsory basis in the interests of the administration of justice?

Question 13 If you answer yes to question 12, do you agree with our proposals, or would you wish to see other arrangements provided for?

Welfare of the judiciary

3.13 At present the judiciary comprises three branches: the judges of Court of Session, headed by the Lord President, the sheriffs principal, and the sheriffs, headed in each sheriffdom by a sheriff principal. The Sheriffs' Association represents full-time sheriffs. Issues of welfare tend therefore to be resolved piecemeal and often on an individual, local or regional basis. This is not entirely satisfactory. We consider that it is consistent with the proposal to confer on the Lord President overall responsibility for conduct, training and deployment of the judiciary, that he or she should have a general responsibility for the welfare of the judiciary, and we would propose to legislate accordingly.

Question 14 In conferring on the Lord President responsibility for the welfare of the judiciary are there any particular aspects of welfare that should be specified?

Appraisal

3.14 We are not making proposals at this stage about the introduction of any form of appraisal for the full time judiciary. We consider that a system of appraisal could contribute to the development of, and public confidence in, the Judiciary, but we recognise that any system must be effective in the eyes of the public, command the support of the judiciary and in no way compromise their independence. An appraisal system to achieve these objectives would require careful consideration and consultation with the judiciary and with others. We would expect that our proposals to confer responsibility on the Lord President for the training, deployment and discipline of a unified judiciary, once implemented, would offer a sound basis on which the benefits of appraisal could, over time, be considered and developed.

Representing the views of the Judiciary to Parliament

3.15 A corollary to creating a head of the judiciary is the authority of that office holder to represent the views of the judiciary. We consider it important that the authority of the Lord President in this regard is put beyond doubt. We propose to provide that the Lord President may submit to the Scottish Parliament written representations on matters of importance to the judiciary, or otherwise to the administration of justice. This will complement the power conferred on the Lord President to make such representations to the Westminster Parliament concerning reserved matters or matters contained in a Bill there.⁹

Engaging with the Executive on matters concerning the administration of justice

3.16 Our proposals regarding the powers and responsibilities of the office of Lord President would create, for the first time, a judicial figure with authority to lead the judiciary in the development of a single position on policy associated with the administration of justice. The Lord President would also be in a position to translate policy into action within the courts. We see this as a potentially powerful improvement to the arrangements for managing and

⁹ Section 5 of the Constitutional Reform Act 2005 (c. 4)

developing our legal system. We recognise that the effective running of our court system requires close co-operation between the Judiciary and the Executive. The Judiciary at all levels play an important role in developing the law and working to improve the way the court system operates. We see the creation of the new powers for the Lord President as offering scope for strengthening the effectiveness of this relationship. The relationship with the Scottish Court Service is especially important given the close working arrangements between court staff and judges on a daily basis. If the Lord President, with recognised authority over the judiciary, were more closely involved in the strategic work of the Scottish Court Service we believe there could be significant benefits for the system as a whole. This involvement could be both formal and informal. We would welcome views on whether any statutory provision would be desirable. We would be especially interested in thoughts on whether there would be merit in having a senior judicial representative involved in the governance of the Scottish Court Service as a member of the strategic decision making board.

Question 15 What provision, if any, should be made to facilitate the greater involvement of the Lord President in the strategic work of the Executive?

Question 16 Should there be a senior judicial representative involved in the governance of the Scottish Court Service, and, if so, which office holder should that be?

Support staff

3.17 The senior judiciary are supported in their current administrative roles by civil servants employed in the Scottish Court Service and the Scottish Executive, some of whom are members of the Government Legal Service for Scotland. No difficulties arise in practice for those working directly to members of the senior judiciary in personal or private office support arrangements. We anticipate that additional staffing will be required to support the senior judiciary, and in particular the Lord President, in discharging the additional responsibilities being placed upon them by the proposals in this paper. The present support arrangements work satisfactorily and could be adapted, in consultation with the judiciary, to provide the support that will be required to meet the additional responsibilities. This approach would have the advantages of flexibility as new responsibilities were taken on and the necessary support structure evolved.

3.18 While our view is that adapting the present support arrangements offers the most effective way to proceed during the implementation of the changes proposed in this paper, we would welcome views on whether consideration should be given to a different approach in the longer term. There is a view that where the head of the judiciary has wide ranging responsibilities across a unified judiciary and court system, the supply of civil servants from the Executive arm of the State to support the head of the judiciary is inconsistent with the principle of judicial independence. This may be more perception than reality. Civil servants are well able to recognise the sensitivities of working within structures where there are potentially conflicting responsibilities and to manage these successfully. Civil servants already work in the Lord President's Private Office and their special responsibilities are respected by their colleagues in the Court Service and the wider Executive. However, having a staff independent of the civil service would be consistent with the arrangements in the third arm of the State, namely the Parliament. Staff of the Scottish Parliament are employed by the Scottish Parliamentary Corporate Body which is independent of the Scottish Executive.

3.19 An alternative therefore would be to create a separate support structure for the Lord President and the senior judiciary which, although publicly funded, formed an organisation that was not part of the civil service of the State, although the staff would probably enjoy the terms and conditions of those employed in the civil service, and indeed some may be on secondment from the Executive. A number of the staff of the Scottish Parliament are on such a secondment from the Executive.¹⁰ Any independent support structure for the Lord President and senior judiciary would be separate from the Scottish Court Service whose functions would not change.

Question 17 What arrangements for supporting the Lord President and the other members of the senior judiciary in their new functions proposed in this paper do you consider are appropriate in (a) the medium and (b) the longer term?

¹⁰ 42 staff as at 31 March 2004: see Forward to the Scottish Parliamentary Corporate Body, Annual Resource Accounts 2003-2004. <http://www.scottish.parliament.uk/corporate/anrep-accts/accounts/accounts-04/sp-resource04-01.htm>

Chapter 4

Judges' Council

4.1 There is currently no standing body representative of the judiciary as a whole.

4.2 The Lord President is assisted by a Judges' Council. The Council, which has three members, has no legal authority and serves in a supporting and advisory role to the Lord President. Its functions are (a) to assist the Lord President and the Lord Justice Clerk with their administrative functions in both the civil and criminal fields; (b) to liaise with all judges and assist in the exchange of information and views between them and the Lord President and the Lord Justice Clerk; (c) to liaise with officials of the Court of Session and the High Court with a view to the improvement of the operation of these courts; (d) to bring to the attention of the Lord President and the Lord Justice Clerk, with such recommendations as it thinks appropriate, matters upon which the Council consider that a decision should be made by them and matters which appear to the Council to be of concern to the judges generally or to individual judges; and (e) to prepare, when requested to do so, representations to be made by the Lord President, on behalf of the Judiciary, on subjects about which the views of the judiciary have been sought by external bodies

4.3 The Sheriffs Principal meet collectively, and with Ministers, officials of the Court Service and of the Executive as required, to consider developing policy, on which their views are sought by the Executive, and matters concerning the administration of the sheriff courts. The Sheriffs' Association serves as a channel for consulting with the sheriffs in connection with the development of Executive policy, and for discussions with the Court Service on the administration of the sheriff courts.

4.4 These arrangements reflect the present disparate nature of the judiciary. The new powers and responsibilities proposed for the Lord President would unify the judiciary. But within that unified judiciary would remain different concerns, priorities and perspectives. There would seem a case for bringing these differing interests together on a regular basis. A potential strength of an arrangement that brings all branches of the judiciary together under one judicial head is that policies on issues affecting the judiciary and the operation of the courts could be developed collectively and implemented consistently. We consider therefore

there is a case for the creation of a statutory Judges' Council, chaired by the Lord President, and supported through his office. The Council would exercise its authority through the Lord President thereby strengthening his or her position in dealings with the Executive.

Question 18 Do you agree a statutory Judges' Council, chaired by the Lord President, should be established?

Question 19 If so, what should be the Council's membership and remit?

Chapter 5

Administrative responsibilities for judges of the Court of Session

5.1 This Chapter considers whether there should be a statutory role for judges of the Court of Session and High Court in the administration of the business before these courts. Responsibility for the delivery of the programme of business for these courts currently rests with the Lord President. We do not propose to remove this responsibility but we wish to recognise that the judicial and administrative burdens on the office of Lord President are now significant. Some of this flows from the establishment of the Scottish Parliament and the substantial increase in the volume of Scottish legislation affecting the courts. The proposals in this consultation paper would add to the responsibilities of the Lord President. Another consideration is that the workload of the courts is substantial and the court programme has itself been under pressure for some time. We understand that it is no longer possible for the Lord President personally to supervise the management of the day to day business of the superior courts. Until recently that function was increasingly carried out by court officials acting under the Lord President's direction. We understand that certain aspects of this function have been delegated to a judge. We welcome this development in the arrangements for the efficient management of the business in our highest courts. While the Lord President may already delegate administrative functions as he considers appropriate, we would welcome views on whether an administrative role for judges should be more formally recognised.

5.2 A role for judges in the administration of matters before the court is becoming increasingly recognised as necessary for ensuring that the rights of those involved in court proceedings are fully protected. There is a need for those charged with the administration of court business to be aware of the obligations imposed by the developing human rights jurisprudence, most notably the right to a hearing within a reasonable time. And there is a view that full regard to the rights of those involved in matters before the courts can be achieved only by direct judicial involvement in the management of the caseload and in the assessment of the competing calls on the available court time. A number of these issues can be addressed by making better use of the expertise of judges in managing the court programme and we support the Lord President's initiative in delegating administrative functions to a judge. The experience of judicial involvement in the management of business

is positive. Judicial case management is a feature of the commercial procedure in the Court of Session. In the sheriff courts judicial case management is applied in the drug and youth courts and in the commercial court in Glasgow. The early experiences of the management regime introduced into the High Court by the reforms that followed from Lord Bonomy's Report are very encouraging. Judges are well placed to take a view on what constitutes a programme of business that meets, as far as possible, the respective rights of litigants, taking account of the nature and complexity of cases before the court, the time required to ensure proper consideration of those cases and the court time available. Working together with court officials a judge with administrative responsibilities could be expected to deliver real improvements in the throughput of business. We feel therefore there is case for establishing this role more formally. This could take the form of a general power to delegate functions in support of the Lord President's responsibilities to judges, or it might allow for the creation of a role of administrative judge

Question 20 Do you agree that an administrative role for judges, to support the Lord President in discharging his duty to secure the speedy and efficient disposal of business, should be established in statute?

Question 21 If so, what functions, if any, should be prescribed for this role?

Chapter 6

Judicial Appointments

6.1 At the time of devolution, the way judges of the Court of Session, sheriffs principal and sheriffs were appointed was set out in statute for the first time. Section 95 of the Scotland Act 1998¹¹ provides that the First Minister will make recommendations to The Queen for the appointment of a judge of the Court of Session, sheriff principal and sheriff.¹² Before making the nomination, the First Minister must consult the Lord President. Where the two most senior judicial appointments are concerned, that is the Lord President and the Lord Justice Clerk, the First Minister makes his nomination to the Prime Minister who submits the formal recommendation to The Queen. However, the Prime Minister may not recommend a name that has not been nominated to him by the First Minister. And before the First Minister makes that recommendation the Lord President and the Lord Justice Clerk must be consulted, unless in either case the office is vacant. Views will be invited on whether there is a role for the Judicial Appointments Board in advising the First Minister on candidates for the two most senior posts (see paragraph 6. 34 below).

6.2 Following a consultation during the summer of 2000,¹³ we established the Judicial Appointments Board on an administrative basis in 2002. The Board was given the following remit:

- to provide the First Minister with a list of candidates recommended for appointment to vacancies for judge of the Court of Session, sheriff principal, sheriff and part-time sheriff;
- to 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;
- to undertake the recruitment and assessment process in an efficient and effective way.

¹¹ 1998 (c.46)

¹² Part time sheriffs are appointed by Ministers: section 11A(1), Sheriff Courts (Scotland) Act 1971 (c.58).

¹³ *Judicial appointments: An inclusive approach*, <http://www.scotland.gov.uk/consultations/justice/jaia-00.asp>

6.3 When announcing the setting up of the Board, we said that after a period of operating on an administrative basis the Board would be placed on a statutory footing.¹⁴ Since 2002 the Board has made recommendations for appointment to the offices of judge of the Court of Session, sheriff principal, sheriff and part-time sheriff. We have accepted all these recommendations. The Board has an equal number of lay and legally qualified members, with a lay member as the Chair. The Chair does not have any form of casting vote. We believe the balance of lay and legal membership is a particular strength of the present arrangements and we have no plans to change this.

6.4 In establishing the Board on a statutory basis, we propose to legislate on the following matters.

Title, Organisation, Remit and Guidance

6.5 The board will be called “The Judicial Appointments Board for Scotland”.

6.6 The Board will operate independently of the Executive, and have its own support staff. It will remain an advisory body only, with a duty to make written recommendations to the First Minister. Where the First Minister rejects a recommendation, he will give the Board his reasons in writing.

6.7 We do not propose to frame the Board’s remit in statute. We favour an approach that allows flexibility should the role of the Board develop and change over time.

6.8 As we have indicated the Board will operate independently. Members will be free from any interference when making decisions about which candidates to recommend for appointment. However we feel it is consistent with the principle of independence that Ministers should be able to issue guidance to the Board about the performance of its functions. There may be issues of public policy which Ministers wish the Board to take into account in its work. These may include, for example, the encouragement of diversity in the range of persons available for selection, and the identification of persons willing to make

¹⁴ http://www.scotland.gov.uk/library3/justice/jm_speech.asp

themselves available for selection. Guidance offers a means of dealing flexibly with issues of public policy, which may change in emphasis over time, whereas the structure of a statutory provision could be unduly restrictive. However it will be important that any guidance issued does not undermine the independence of decision making which we intend the Board to have. Accordingly, before issuing guidance Ministers will be under a duty to consult the Lord President. Any guidance issued will be published.

Question 22 Do you agree Ministers should have power to issue guidance about procedures for the performance by the Board of its functions?

Question 23 If so is there any area of Board activity that you would wish to see covered by a specific power to issue guidance?

Question 24 Should the Board be bound by statutory provision to follow any guidance issued by Ministers?

6.9 Later in this Chapter we seek views on whether the Board should have a role in appointing to the Inner House of the Court of Session and to the office of temporary judge of the Court of Session.

Membership

6.10 The equal balance of legal and lay membership will be maintained. The Chair will be a lay person, but with no casting vote in disputed matters.

6.11 There are alternative proposals for the number of members. The first is that the present administrative arrangement will be followed, that is a board of ten made up as follows:

- a serving judge of the Court of Session;
- a serving sheriff principal;
- a serving sheriff;
- a practising advocate;
- a practising solicitor;
- five lay members.

6.12 There is a group whose members do not fall within any of these descriptions. These are the academic lawyers, who do not practise as advocates or solicitors. The present arrangements allow academic lawyers to be considered for lay membership of the Board. While there is a question as to whether such lawyers should have any responsibility for determining the legal ability of candidates (see paragraph 6.23), their knowledge and experience generally may be entirely relevant to the task of the Board, and we would not wish to exclude the possibility of such an appointment being made. We will therefore provide that those in this group will be eligible for lay membership of the Board.

6.13 We are aware of views that membership of the statutory board should include two judges of the Court of Session: one from the Outer House, and one from the Inner House. The alternative proposal is therefore that membership of the Board should be twelve:

- two serving judges of the Court of Session;
- a serving sheriff principal;
- a serving sheriff;
- a practising advocate;
- a practising solicitor;
- six lay members.

6.14 There are a number of possible advantages in increasing membership in this way. Having two judges on the Board would provide additional assurance in the assessment of a candidate's legal ability and fitness for judicial office. Furthermore, increasing the number of legal members on a board that draws candidates from a small profession, in which candidates, especially those for the office of judge of the Court of Session, will be known, often well known, to members, offers greater reassurance of objectivity, the views of one judge being balanced by those of his or her judicial colleague. Having a judge with current experience of the first instance work of the Court and one, a more senior judge, whose role is essentially that of an appellate judge would broaden the perspectives from which candidates for the office of judge of the Court of Session could be assessed. The presence on the Board of a sheriff and sheriff principal provides this for those seeking appointment to the shrieval bench.

6.15 On the contrary are arguments that an additional judge is unnecessary as any undue affinity with a particular candidate would be tempered by the other judicial members of the board. Adding an additional judge would require to be balanced by the addition of a sixth lay member, although this might be helpful in broadening the diversity of the Board.

Question 25 Should membership of the Board include one judge of the Court of Session or two judges: one from the Inner House and one from the Outer House?

Changes to the statutory numbers by order

6.16 We propose to build in flexibility to alter the statutory number of members should the workload of the Board warrant this. Situations may arise, for example, when the Board is asked to deal with a large number of appointments, and we would not wish that process to be hampered owing to limitation on membership. We anticipate a reduction in the membership being less likely. A fall in the workload of the Board would simply result in a reduction in the commitment on the members. We propose therefore to take power to alter the statutory membership of the Board, permanently or temporarily. Any such power would be exercised by statutory instrument, a draft of which had been approved by the Scottish Parliament. The terms of any instrument would ensure the equal balance of lay and legal membership was maintained.

Arrangements for making appointments to the Board

6.17 We propose that the Board itself will be appointed partly by nomination and partly by public advertisement. All appointments will be made by Scottish Ministers. Appointment of the Court of Session judge, or both judges if the twelve member option is preferred, could be made on the recommendation of the Lord President; alternatively the judges could be elected by their respective peer groups. The judges of the Inner House would elect one of their number; the judges of the Outer House doing likewise. If this second option were adopted the result would be that none of the members of the Board would be a nominee of any office holder. This could enhance public confidence in the Board's independence. Appointment of the sheriff principal would be on the recommendation of the Sheriffs Principal collectively, through their convener for the time being. Vacancies for the sheriff, the advocate, the solicitor and the lay members would be publicly advertised. A selection panel would be

established by Ministers to interview candidates for appointment to the Board. The process would adhere to the Code of Practice for Ministerial Appointments in Scotland issued by the Commissioner for Public Appointments.¹⁵

6.18 The first appointments to the Board were for a period of three years; subsequent appointments and renewals have been for two years, in anticipation of the Board's moving onto a statutory basis. Experience is that a three year term is right and we would propose that the term of appointment will be for a period of three years, with the option of one renewal for up to a further three years. The term of renewal would be fixed by Scottish Ministers, after consultation with the Chair of the Board, and would have regard to the need to avoid a significant proportion of the membership demitting office at the same time.

Question 26 Should the judge or judges appointed to the board be nominated by the Lord President, or elected by their respective peer groups?

Question 27 Do you agree with a proposed term of appointment of three years, and with the arrangements for renewal?

Question 28 If you do not agree, what term of appointment, and arrangements, if any, for renewal would you wish to see in place?

Arrangements when a judicial member retires during term of appointment to Board

6.19 We will also welcome views on whether any special provision is required in the event of retiral of judicial members from their full time office during their term of appointment to the Board. We recognise that it could be disruptive to the functioning of the Board if such a member were required to demit membership of the Board immediately on his or her retiral from the Bench. On one view the member could simply continue to serve on the Board until the expiry of the term of appointment. Where that period was short, say up to six months, this might be an entirely satisfactory arrangement. A longer period that resulted in the retired judicial office holder making appointments to a Bench that he or she had left some time

¹⁵ <http://www.publicappointments.org/>

before may be less satisfactory. If it were considered that a time limit should be placed on the continuing service of such a judge, six months would seem right.

Question 29 Do you consider that provision should be made restricting the continuing membership of a judicial member of the Board on his or her retirement from full time office?

Question 30 If so, do you agree with our proposal or what other arrangements would you wish to see in place?

Disqualification

6.20 Any member wishing to apply for any post that is the subject of an appointment exercise being conducted by, or under the auspices of, the Board must resign from the Board before submitting an application for the post.

Resignation

6.21 A member may resign from his or her membership of the Board at any time.

Fees and expenses of members

6.22 Members will be entitled to payment of such fees and expenses as Ministers may determine.

Responsibility of legally qualified members

6.23 The legally qualified members of the Board will have the responsibility for determining that the legal ability of individual candidates is adequate for the purposes of the judicial office applied for. On one view the legally qualified members should include only the judicial members of the Board and the two practising lawyers. This we understand is the approach currently taken by the Board. Another view recognises the expertise of any academic lawyer on the Board and would not exclude him or her from the assessment of legal abilities. We have an open mind on this, and would invite views.

Question 31 Do you agree that only the judicial members and two legal members of the Board should have a duty to determine whether the legal ability of a candidate is adequate for the judicial office applied for, or should any academic lawyer on the Board participate in this process?

Question 32 If you do not agree with either option in Question 31, what arrangements should there be for assessing the legal ability of candidates?

Arrangements in the event of absence of a member owing to ill health or other cause

6.24 Occasions may arise when a member of the Board is unable to attend to Board business owing to ill health, incapacity or other temporary cause of significant duration. We would propose to take power to fill such a vacancy on a temporary basis when that was necessary to maintain the functioning of the board. A request to make a temporary appointment would be made by the Chair of the Board, or in the event that the Chair himself or herself was absent, the most senior judicial member. The arrangements for filling the vacancy would be discussed with the Commissioner for Public Appointments. Before making a temporary appointment, Ministers would be under a duty to consult the Chair of the Board, or the senior judicial member as the case may be, and, when the temporary appointment related to one of the judicial members of the Board, the Lord President, before making an appointment.

6.25 The temporary appointment would be for a period of up to six months, and Ministers would have power to extend the appointment to the conclusion of a specific appointment exercise which had not been concluded when the six month period expired. If the member whose absence was being covered by the temporary appointment was still absent at the expiry of the six month period, the member would be susceptible to removal under the proposals discussed in paragraph 6.27 below. On removal the procedure for filling a substantive vacancy would begin.

Question 33 Do you agree that provision should be made for the appointment of a temporary member to cover long term absence of a member?

Question 34 If so, are you content with our proposals or what other arrangements would you wish to see in place?

Conduct of Board Members

6.26 Society's confidence in its judges begins with its having confidence in the appointment process. We are committed to ensuring the highest standards from those who sit on our public bodies and in establishing the Board on a statutory footing we propose to require the Board to draw up a code of conduct for its members based on the model code of the Standards Commission for Scotland.¹⁶ This will ensure the public can have the highest confidence in the way the Board conducts itself.

6.27 Provision will be made authorising Ministers to remove any member from the Board if they are satisfied that the member:

- has failed without reasonable excuse to discharge the functions of his or her membership for a continuous period of six months,
- has been convicted of an offence,
- is an undischarged bankrupt, or
- is otherwise unfit to hold membership of the Board or unable to discharge the functions of membership.

6.28 Before removing a member Ministers will be required to consult the Chair of the Board, and where the member is one of the judicial members, the Lord President.

Question 35 Are there any changes you would wish to see made to the list of proposed grounds for unfitness?

Confidentiality

6.29 The Board's proceedings will be conducted in private. All papers concerned with applications for appointment will be held by the Board in confidence. The Board will be

¹⁶ <http://www.standardcommissionscotland.org.uk/>

responsible for its own policy concerning the retention and disposal of Board papers. In addition to these practical arrangements, we are proposing to include in the Board's statutory framework a positive duty of confidentiality, actionable in the event of breach. Those who may wish to seek appointment to judicial office need to be confident that knowledge of any application they may make, and information that comes to the notice of the Board through its consideration of any application, will not be disclosed. This is especially important in the professional context within which the Board is operating. We understand there is a perception that should it become known that an individual has applied for a judicial appointment, that in itself could have a detrimental effect on that individual's legal practice. And were such knowledge to be complemented by the fact of non-appointment, the consequences could be more significant. We need to ensure able candidates are not dissuaded from applying for office owing to concerns about the confidentiality of the process. We propose therefore to impose a statutory duty of confidentiality on those who give and obtain information about an individual within the context of the Board's activities. We note this approach has been adopted in England and Wales.¹⁷

Question 36 Do you agree a duty of confidentiality should be imposed on those who give and obtain information about an individual within the context of the Board's activities?

Annual Report

6.30 Under the current administrative arrangements, the Board produces an annual report which is submitted to Ministers and laid before the Scottish Parliament.¹⁸ We propose that this should be a requirement of the statutory framework.

Complaints

6.31 The present Board consider that a complaints process should be put in place. This would be open to any candidate who had a complaint about the way the Board had applied its procedures during the appointments and interview process. The complaints process would not be a mechanism for appealing against the decisions of the Board, but a means of exposing

¹⁷ Section 139 of the Constitutional Reform Act 2005 (c.4)

¹⁸ <http://www.judicialappointmentsscotland.gov.uk/judicial/files/B43245%20-%20JAB%20Ann%20Rep.pdf>

issues about the way the Board operated. Where a complaint was well founded, lessons could be learned and the Board's processes developed and improved. Organisations grow and improve through learning from the views of those who have used their services, and we would see an arrangement under which the Board investigated complaints as a positive way of securing continuous improvement of the appointments process. We would propose therefore to create a duty on the Board to establish a complaints procedure.

6.32 Establishing a complaints procedure to be operated by the Board raises the question of independent review. A complainant, aggrieved by the way his or her complaint has been handled by the Board, should have a way of asking that the process be reviewed by someone independent of the Board. This would not be an opportunity to appeal, but a means of exposing deficiencies in the process.

6.33 On one view there is already an independent body who could consider the kind of complaint we envisage falling under the complaints procedure. This is the Scottish Public Services Ombudsman.¹⁹ We are aware that in England and Wales a separate Ombudsman, to be known as the Judicial Appointments and Conduct Ombudsman, is being established. The arrangements in England and Wales are different from those in Scotland. Firstly, the appointments scheme established under Part 4 of the Constitutional Reform Act 2005²⁰ is broader in scope than that proposed for Scotland, and, of course, there are considerably more appointments made in England and Wales, which is a much larger jurisdiction. Secondly, under the scheme south of the Border the Ombudsman is also to have a role in matters of judicial conduct. The relatively modest number of appointments made by the Board in Scotland is unlikely to generate a significant number of grievances, and it must be questioned therefore whether establishing a separate ombudsman for this specialist area would be a justifiable burden to add to public expenditure. On balance therefore we favour allowing the Scottish Public Services Ombudsman to provide the independent review. A complaint alleging that a member of the Board had breached the Board's code of conduct would fall to the Commissioner for Standards: see paragraph 6.26 above.

¹⁹ <http://www.scottishombudsman.org.uk/>

²⁰ 2005 c.4

Question 37 Do you agree that there should be a procedure to deal with complaints about the way the Board applied its procedures during the appointments and interview process?

Question 38 If so, do you agree that the Board should set up a complaints scheme and that independent review should fall to the Scottish Public Services Ombudsman?

Offices of Lord President and Lord Justice Clerk

6.34 The arrangements for appointing to these offices are set out in section 95 of the Scotland Act 1998.²¹ 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. Before nominating persons for such appointment, the First Minister must consult the Lord President and the Lord Justice Clerk, unless in either case the office is vacant. Section 95 does not impose any other requirement on the First Minister before he makes his nominations, although sub section (5)(a) of that section provides that he shall comply with any such requirements that are imposed by any enactment. A question that arises is whether the opportunity of legislation about judicial appointments should be taken to require the First Minister to establish a panel to advise on candidates for selection before nominating for appointment to these posts.

6.35 We do not propose to extend the remit of the Board to include these two posts. The proposed membership of the Board includes a serving judge from each tier to which the Board makes recommendations for appointment. We believe this is a strength of the proposals as the assessment of candidates can be informed by the experiences of a judge serving at the level to which the candidate aspires. It is unlikely that any of the Board will hold, or have held, judicial office at the highest level, so another arrangement is required for assessing candidates for the two highest judicial offices. When the Lord Cullen of Whitekirk announced his intention to retire from the office of Lord President, the First Minister appointed a panel to consider expressions of interest in appointment to this post, to meet candidates and to provide the First Minister with a report on the suitability of each person for

²¹ 1998 (c.46)

appointment. The panel comprised two senior judicial figures, who were not members of the Judicial Appointments Board, and the Chair and a second lay member of the Board.²²

6.36 Our preliminary view is that establishing such a panel as a statutory requirement for the First Minister to follow would strengthen the appointment process. The panel would function under the auspices of the Judicial Appointments Board, and be chaired by the Chair of the Board, or a lay member of the Board on the Chair's nomination. The second member would be a lay member of the Board. We would propose that the panel should have two further members drawn from the senior judiciary. There are a number of options for the judicial membership. We outline these below, and invite views.

6.37 The judicial membership of the panel would be influenced by the view taken on a number of issues of principle. We have proceeded on the basis that a person would be disqualified from membership of a panel if he or she expressed interest in selection for the post. There are two other considerations. The first is whether it would be appropriate for the panel to include the current holder of the office for which a successor was being sought. The second is whether it would ever be appropriate for membership to include a person holding a judicial office lower in rank to that office. On the first of these considerations, our feeling is that it would not be appropriate for the current holder of the office to be a member of the panel. We recognise that practical knowledge of the post would not be irrelevant, but the panel's remit is focused on the future and, on balance, we feel that this favours disqualifying the current office holder. We note that this approach is followed in England and Wales.²³ On the second issue, a situation where, say, an Inner House judge sits on a panel and expresses views on the suitability of certain of his fellow judges for appointment to the office of Lord President or Lord Justice Clerk seems not entirely satisfactory. There may be less objection to the Lord Justice Clerk's sitting on a panel concerned with the post of Lord President. The Lord Justice Clerk would be eligible to sit on the panel only if he or she were not a candidate for the post. Having no personal interest in appointment to the post, the Lord Justice Clerk's focus would be on the future development of the justice system. And the office is recognised as senior to that of the other judges. However, an external observer of the process might still question the appropriateness and complete objectivity of an arrangement in which the second most senior judge had a potential influence over the appointment of the most senior judge.

²² SE News Release, 15 July 2005: <http://www.scotland.gov.uk/News/Releases/2005/07/15110736>

²³ Section 71(14)(a) of the Constitutional Reform Act 2005 (c.4)

6.38 The judicial membership for a panel concerned with the post of Lord Justice Clerk is in some respects the easier. We would propose that the senior Scottish Lord of Appeal in Ordinary should be a member of the panel along with the Lord President. If either were unable to participate, or the office vacant, the second Scottish Lord of Appeal in Ordinary should take the place. Provision would be required to deal with a situation where it was not possible to secure members from among the Scottish Lords of Appeal in Ordinary and the Lord President. Provision might be made to appoint a retired holder of high judicial office, although this raises similar issues to those discussed earlier on the eligibility of the current office holder. It may be that the most senior Inner House judge, who had no interest in appointment to the post, provides the last resort. An alternative to this would be a judge elected for the purpose by the body of Court of Session judges. On another view the likelihood of its being impossible to constitute a panel from among the two Lord Lords and the Lord President is, in practice, remote. On this view all that might be required is a discretionary power as to the constitution of the panel in such circumstances. We welcome views.

6.39 The judicial members of a panel concerned with the office of Lord President would, for the reasons we have outlined above, comprise at least one of the two Scottish Lords of Appeal in Ordinary. The other judicial member might be the other Scottish Lord of Appeal in Ordinary, or another senior judicial figure. The earlier comments on who might substitute if it were not possible to constitute a panel are again relevant. Where the Lord Justice Clerk of the day had expressed no interest in being selected for the office, he or she might be an appropriate appointment of last resort. However, it may be sufficient merely to provide a discretionary power as to the constitution of the panel where the Scottish Lords of Appeal were unavailable. We welcome views.

Question 39 Should provision be made for a panel to advise the First Minister on the suitability of candidates for selection to the office of Lord President and Lord Justice Clerk?

Question 40 If so, what provisions should be made to regulate the membership of the panel (a) concerning the office of Lord President, and (b) that of Lord Justice Clerk?

Judges of the Inner House of the Court of Session

6.40 Section 2(6) of the Court of Session Act 1988²⁴ provides that appointments to the Inner House of the Court of Session be made by the Lord President and the Lord Justice Clerk after such consultation with judges as appears to them to be appropriate in the particular circumstances. The consent of Ministers is required, but this is not withheld when they are satisfied that the state of business in the Inner House requires the vacancy to be filled.²⁵

6.41 Judges appointed to the Inner House need to have the necessary skills and attributes for fulfilling an essentially appellate role. The present arrangement provides a mechanism for assessing this. Assessment and appointment lie in the hands of the judiciary, the Executive's involvement being restricted to considerations of workload. However, appointment to the Inner House brings a permanent increase in salary, and is therefore more than a mere deployment; it has the quality of a promotion to higher judicial office. It could be argued therefore that the current arrangements lack the elements of equality of opportunity and transparency of process found in other judicial appointments. We recognise the importance of the involvement of the Lord President and Lord Justice Clerk, as the presiding judges in the two Divisions, in the selection process. Placing these appointments within the remit of the Judicial Appointments Board does not therefore seem appropriate. However, we would welcome views on whether selection for promotion to the Inner House should be informed by broader consideration than presently provided for.

6.42 One option would be to constitute a panel to consider applicants for appointment to any vacancy in the Inner House which Ministers have agreed should be filled. The panel would be under the auspices of the board and chaired by the Chair of the Board, or his or her nominee. Membership would include the Lord President and the Lord Justice Clerk and a lay member of the Board. We would welcome views on whether a Court of Session judge who was a member of the Board and who wished to be considered for appointment to the Inner

²⁴ 1988 (c. 36)

²⁵ Section 2(8), *ibid*

House would be required to resign from the Board, or whether another arrangement would be appropriate in the circumstances of an Inner House appointment.

Question 41 Should appointments to the Inner House of the Court of Session be (a) within the remit of the Board, or (b) informed by a panel under the auspices of the Board?

Question 42 If a panel under the auspices of the Board is favoured, what would be the membership of the panel?

Question 43 If a judge of the Court of Session who is a member of the Board wishes to be considered for appointment to the Inner House, should he or she require to resign from the Board, or would another arrangement be acceptable in the circumstances?

Temporary Judge of the Court of Session

6.43 In Chapter 11 we propose a number of changes to the statutory arrangements for this judicial office. We include in that chapter discussion on whether recommending for selection to this office should fall within the remit of the Judicial Appointments Board.

Chapter 7

Removal from office

7.1 This section deals with the detailed provisions for removing from office a judge of the Court of Session and the Chairman of the Scottish Land Court.²⁶ A power to remove these judicial office holders, and general provisions as to how this should be done, are contained in section 95 of the Scotland Act 1998.²⁷ In 1999 the Westminster Parliament passed a statutory instrument²⁸ regulating 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. We propose that these transitional provisions should be replaced by primary legislation of the Scottish Parliament.

7.2 Any procedure to remove a judge must be framed in such a way as to ensure the independence of the judiciary is not compromised. Legislation of the Scottish Parliament must be compatible with the European Convention on Human Rights. The following proposals respect these requirements.

Tribunal

7.3 Provision will be made for the Lord President or, exceptionally, the Lord Justice Clerk, to request the First Minister to constitute a tribunal to investigate and report on whether a judge or Chairman is unfit for office by reason of inability, neglect of duty or misbehaviour. The First Minister will be obliged to constitute a tribunal when asked to do so by the Lord President. The First Minister will also have power to constitute a tribunal in such circumstances as he or she thinks fit, although the First Minister will be required to consult the Lord President before doing so. Where the Lord President is unavailable, or is himself or herself the person whose fitness is in question, the First Minister will be required to consult the Lord Justice Clerk.

²⁶ The Chairman of the Scottish Land Court has the same rank and tenure as a judge of the Court of Session.

²⁷ 1998 (c.46)

²⁸ The Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999; (SI 1999/1017)

7.4 The tribunal will comprise four members appointed by the First Minister with the agreement of the Lord President. Two will be members of the judiciary; one will be an advocate or solicitor of ten years standing; and one a person who is not, and never has been, an advocate or a solicitor. The chair will be the senior judge, qualified in accordance with section 95(9)(b) of the Scotland Act 1998.²⁹ One of the judicial members will be of the same level of seniority as the judge whose fitness is to be considered by the tribunal. The Chair of the tribunal will have a casting vote.

7.5 We welcome views on whether there is a need to set out the procedure which the tribunal should follow. That the tribunal must carry out its task in a way that is compatible with human rights jurisprudence is beyond doubt. On one view therefore there may be advantage in conferring on the tribunal a discretion to determine the appropriate procedure to follow in the particular circumstances of each case. On the other hand, it may be desirable in a matter of such importance as the potential removal of a judge, that the procedures to be followed should be set out in statute, or in regulations made under broad statutory authority. Furthermore, providing the tribunal with statutory authority to invoke certain procedural mechanisms to assist with the efficient and effective conduct of its inquiry may also be desirable. Regulations seem to us to be more appropriate than prescribing procedure in primary statute.

7.6 We would propose therefore to confer statutory authority on the Lord President to make regulations to govern the conduct of proceedings by the tribunal. Regulations would deal with matters including:

- (a) how a judge should be advised of the issue of fitness to be investigated
- (b) how he or she should answer
- (c) how, and by whom, the matter would be investigated

²⁹ The chair of the tribunal would be a member of the Judicial Committee of the Privy Council who holds, or has held, the office of Lord Chancellor of Great Britain, Lord of Appeal in Ordinary or judge of the Court of Session. A judge of the High Court of Justice or Court of Appeal in England and Wales or Northern Ireland would also be qualified for appointment. (The list of qualifying offices will change when section 40 of, and paragraph 100 of Schedule 9 to, the Constitutional Reform Act 2005, (jurisdiction of the Supreme Court in the United Kingdom) come into force.)

- (d) the time limits for the various stages of the tribunal process, and how these might be extended
- (e) the form of report that would be prepared for Ministers
- (f) what records would be made.

7.7 Provision would also be made regulating the summoning of witnesses and the recovery of documents, and for the payment of such fees and expenses to members of the tribunal, and to any investigator appointed, as Ministers may determine.

Question 44 Do you agree that the procedures to be followed by the tribunal should be set out in regulations made by the Lord President under a general authority in primary statute?

Question 45 If so, what provisions regulating the procedure to be followed by a tribunal to examine fitness for office, should be prescribed?

Suspension from Office during investigation

7.8 We propose to make provision for the suspension of a judge or Chairman pending the outcome of the tribunal's investigation. There are considerations about when suspension would be justified and by whom suspension should be ordered. We propose that when the Lord President requests the First Minister to establish a tribunal, the Lord President should have power to suspend the judge or Chairman from office pending the outcome of the inquiry. When the First Minister constitutes a tribunal at his or her own hand, he or she would not have power to suspend the judge or Chairman without the agreement of the Lord President, or where that office was vacant, the Lord Justice Clerk.

7.9 The power to suspend will be available only in limited circumstances. The basis for removal of a judge from office is unfitness owing to inability, neglect of duty or misbehaviour. Suspension pending determination of unfitness by a tribunal established for

that purpose would be appropriate therefore only in circumstances where the judge had already undergone a process of determination, by an independent and impartial tribunal, that had established facts that, in the view of the Lord President or First Minister as the case may be, pointed reasonably to unfitness. We propose therefore that the power to suspend should be available only when a judge has been convicted of a criminal offence.

7.10 A judge or Chairman suspended under this provision would remain suspended until the First Minister directed otherwise, which he would be required to do on receiving a report from the tribunal that the judge was not unfit for office. Suspension from office would not affect payment to the judge or Chairman of his or her salary.

Question 46 Do you agree with the proposed arrangements for suspending the judicial office holder while an investigation into fitness is being conducted?

Standardising the arrangements for investigation into fitness for office

7.11 At present there are separate arrangements for investigating alleged unfitness for the office of sheriff principal and sheriff,³⁰ and a separate procedure again for investigating part-time sheriffs.³¹ Allegations of unfitness of a sheriff principal or sheriff are investigated jointly by the Lord President and the Lord Justice Clerk, while those against a part-time sheriff are examined by a three person tribunal. These arrangements are inconsistent with those we are now proposing for a judge of the Court of Session. We consider the four person tribunal to be preferable and we propose therefore to take the opportunity to bring a common approach to the investigation of questions of fitness. We will make the necessary amendments to apply the four person tribunal to all judges. In the case of a tribunal into fitness of a part-time sheriff we would propose that the tribunal be chaired either by a judge of the Court of Session or a sheriff principal.

³⁰ Section 12 of the Sheriff Courts (Scotland) Act 1971 (c.58)

³¹ Section 11C, *ibid*

Question 47 Do you agree that the arrangements for investigating questions of fitness for office of sheriff principal, sheriff and part-time sheriff should be changed to a four person tribunal, with membership fixed on the same basis as that proposed for the tribunal to investigate fitness for office of judge of the Court of Session, except in the case of a part-time sheriff where the judicial chair will be either a judge of the Court of Session or a sheriff principal?

Question 48 If you do not agree that this would be the correct approach, what arrangements would you wish to see provided for investigating questions of fitness for office of sheriff principal, sheriff and part-time sheriff?

Chapter 8

Discipline

8.1 Any consideration of the arrangements for dealing with issues of misconduct by judges must recognise that judges are not employees. They are public office holders, appointed by, or under the authority of, The Queen, and constitutionally independent of the Parliament and the Executive. An essential element of their position is the freedom from influence which they enjoy when carrying out their functions as a judge. This independence is fundamental to the successful operation of the justice system in a democratic society. The arrangements for managing the conduct of judges must therefore respect that principle.

8.2 At present the Scottish Judiciary operate within a looser framework of terms and conditions of service than many other groups in the public service. There are few statutory provisions for dealing with unacceptable conduct. We consider that the current arrangements are generally unsatisfactory. At one extreme there are provisions for a tribunal to investigate the fitness for office of a judge of the Court of Session³² or a sheriff.³³ Such an investigation has as its purpose an assessment as to whether the office holder is unfit to continue to hold office. No sanctions exist for any less serious, but significant, conduct of a nature that would attract disciplinary action, short of dismissal, in other parts of the public service.

8.3 While it is important that arrangements are in place to remove judges when circumstances require it, we believe that it is equally 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. Judges themselves accept that something requires to be done to address the present deficiency. We propose therefore to make provision for disciplinary action which the senior judiciary might take against any judicial office-holder appearing to them to be guilty of inappropriate conduct.

³² Section 95 of the Scotland Act 1998 (c.46); SI 1999/1017

³³ Section 12 of the Sheriff Courts (Scotland) Act 1971 (c.58)

Defining “inappropriate judicial conduct”

8.4 We do not propose to define what is meant by inappropriate judicial conduct, although we will make it clear that failure by a judge to perform work associated with his or her judicial function would fall within the term: for example, failing to produce a written judgment within a reasonable time. What is inappropriate conduct in a particular case is a matter that we consider should be left to the senior judges to determine. We believe this approach, being free from influence by the Executive, will maintain and strengthen the independence of our judges.

Question 49 Do you agree that inappropriate judicial conduct should not be defined in statute, other than to include a provision that makes it clear that failure to perform work associated with the discharge of judicial functions is included?

Question 50 If not, how would you define “inappropriate judicial conduct”?

8.5 The proposals in this chapter, and those in Chapter 7 about removal from office are intended to provide for the first time a comprehensive scheme for dealing with issues of judicial conduct.

Disciplinary powers

8.6 The specific proposal is that a judge can be given formal advice, a formal warning or a reprimand, for disciplinary purposes. As one aim of these actions is to draw problems to a judge’s attention at an early stage, in the hope that the conduct will not be repeated or escalate, formal advice could amount to a requirement to undertake an aspect of judicial studies or training. We anticipate that occasions will arise when a judge might be given informal advice about his or her conduct, without any complaint being made, and we would not wish to exclude this possibility. Occasions will also arise when the conduct of a judge is found to be such that his or her fitness for office is called into question. Such a question may arise on the basis of a single incident, or a course of conduct, including failure to comply with earlier warnings or advice. In such cases the appropriate response would be to report the judge to the Lord President for him or her to consider whether a formal inquiry into fitness

should be commenced. We discuss in paragraph 3.12 the possibility of recommending a sheriff for transfer following a disciplinary matter.

8.7 An important question is where should the authority lie for exercising disciplinary powers. This must lie with the judiciary. No Minister or official, however senior, should be in a position to issue any disciplinary penalty or advice to a member of the judiciary. On one view the power should rest with the Lord President as Scotland's senior judge; on another, the role of the sheriff principal needs to be taken into consideration where conduct of a sheriff is involved. The sheriff principal is responsible for the efficient administration of business in his or her sheriffdom, and may, under existing legislation, give directions of an administrative nature to sheriffs.³⁴ In practice a sheriff principal already receives complaints from court users about the conduct of sheriffs. There is therefore considerable logic in vesting in the sheriff principal at least some of the disciplinary powers which are envisaged. This would strengthen the managerial position of the sheriff principal in an appropriate way, and provide a means of dealing locally and quickly with complaints arising in the sheriff courts. We believe this approach would serve the local court user well.

8.8 Some sheriffs have commissions to sit in all sheriffdoms. These sheriffs are known informally as floating sheriffs. While each floating sheriff has a base court, we consider, for the reasons given earlier, that it would serve the public better if any matter concerning conduct were dealt with by the sheriff principal for the sheriffdom in which the conduct issue arose. The sheriff principal dealing with a disciplinary matter would be under a duty to advise the sheriff principal of the sheriff's base court. This would allow any pattern of conduct to be identified, and appropriate action taken. We would propose a similar approach in respect of any sheriff who sits in more than one sheriffdom.

8.9 Part-time sheriffs have authority to sit in every sheriffdom.³⁵ We would propose therefore that any issue concerning a part-time sheriff should be dealt with by the sheriff principal for the sheriffdom in which the matter of conduct arises. Consideration would require to be given to a scheme for co-ordinating complaints against part-time sheriffs to ensure that any pattern of conduct could be identified. We would see this as a matter for the

³⁴ Section 15 of the Sheriff Courts (Scotland) Act 1971 (c.58)

³⁵ Section 11A(4) of the Sheriff Courts (Scotland) Act 1971 (c.58)

Lord President to consider on assuming the broader responsibilities for the judiciary proposed in this paper.

Question 51 Do you agree that a sheriff principal should have responsibility for dealing with issues of conduct concerning sheriffs, including floating sheriffs and part-time sheriffs, arising within his or her sheriffdom?

8.10 In paragraph 7.11 we have proposed a change to the present arrangements for the investigation of questions of fitness for the office of sheriff principal and sheriff. These will remove from the Lord President and Lord Justice Clerk the duty to investigate such matters personally. Freeing the two most senior judges from this obligation, with its potential for conflict with other disciplinary responsibilities that might be thought appropriate for those offices, allows us more easily to create a comprehensive scheme for dealing with judicial discipline in Scotland. We outline our proposals in the following paragraphs.

8.11 On initial consideration, the Lord President would be the obvious authority to deal with disciplinary matters concerning judges of the Court of Session and sheriffs principal. However this would not necessarily be the correct approach if the scheme for dealing with judicial conduct were to include provision for reviewing the way in which the disciplinary procedures had been conducted, and that reviewing function were conferred upon the Lord President. A review by the Lord President of his own handling of an issue would lack the quality of independence.

8.12 In paragraph 8.24 we discuss whether there should be a process to reconsider the merits of a complaint or the penalty, or both. The following paragraphs consider the arrangements for reviewing the handling of a complaint. We consider it would enhance public confidence in the scheme if there were a route by which a judge who had been subject to the scheme, and any person who had raised a conduct issue that had been considered under the scheme, could have the way in which the process had been conducted reviewed. The purpose of such a review would be to determine whether there were any lessons that could be learned from the experience which could improve and develop the way conduct issues were handled. Such a review procedure would be consistent with other aspects of the public service.

8.13 If such a review function were to feature, a question arises as to who should exercise this function? In England and Wales an independent ombudsman, with additional functions concerning judicial appointments, has been provided for.³⁶ But in comparison with Scotland that is a large jurisdiction with a significantly greater number of judges. The number of complaints to be handled is therefore much greater. In Chapter 6 we observed that the modest number of judicial appointments made in Scotland raised a question whether it would be an appropriate use of public funds to establish an independent ombudsman to review the processes of the Judicial Appointments Board. We suggested that the appropriate arrangement for complaints about the operation of those processes was to add the Board to the bodies within the jurisdiction of the Scottish Public Services Ombudsman. This does not seem to us to be the correct approach to reviewing the application of disciplinary processes by the senior judiciary. We consider that to confer this function on the Ombudsman would not sit at all easily with the constitutional position of the judiciary.

8.14 The options therefore are (a) creating a separate review function independent of the judiciary, or (b) constructing the scheme in such a way that the review function remains within the judiciary.

8.15 Given the relatively small number of cases which we anticipate would be referred for review, remembering this is not an appeal, but a review of the administration of the processes, we are not convinced that the public expenditure associated with establishing and maintaining an independent ombudsman would give the public best value for that expenditure.

8.16 When taken as a whole, the proposals in this paper make significant changes to way the judiciary are managed. One is to confer on the Lord President formal authority as head of the Scottish Judiciary (see Chapter 3). We anticipate that in this new role, possibly with the support of a statutory Judges' Council (see Chapter 4), the Lord President would wish to oversee the way in which the new powers for managing the judiciary were operating in practice, developing these in light of that experience. There would seem therefore to be a case for removing the Lord President from having a direct role in dealing with issues of conduct and allowing him or her to assume the responsibility for reviewing grievances about

³⁶ Section 62 of the Constitutional Reform Act 2005 (c 4)

the way an issue of conduct had been handled. As the Lord President would not decide the merits of any conduct issue, as the review process considers only the way the matter was handled, his or her involvement in any future investigation into fitness of a judge would not be compromised.

8.17 If the Lord President were to take this reviewing role, responsibility for dealing with issues of conduct concerning judges of the Court of Session and sheriffs principal would be given to the Lord Justice Clerk. Provision would be required for occasions when the office of Lord Justice Clerk was vacant, and when, for exceptional reasons, the Lord Justice Clerk was unable to deal with a particular issue. We would propose that in such circumstances the most senior Inner House judge would deal with the matter, or nominate another Inner House judge, with that judge's consent, to do so.

8.18 However, there are two potential objections to an arrangement which gives the responsibility for reviewing the handling of complaints against the judiciary to the head of that judiciary. The first is that a scheme of discipline which lies wholly within the hands of the judges themselves, and lacks any opportunity for independent scrutiny, may not command public confidence. The second is that removing from the head of the judiciary personal responsibility for disciplining judges is contrary to the standards set out in the Latimer House Guidelines.³⁷ These provide that all disciplinary processes, short of removal, should be conducted by the chief judge of the courts. This approach is followed in England and Wales, where sanctions short of removal are administered by the Lord Chief Justice.³⁸

8.19 Against these considerations, an alternative arrangement would be to confer responsibility for the scheme of discipline on the Lord President, as the head of the judiciary, with power to delegate the exercise of the various functions within that scheme to such members of the judiciary as the Lord President considered appropriate. To ensure the process had public confidence, a mechanism for independent review of the way complaints against the judiciary were handled would be required.

³⁷ The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth, 1998 (updated 2002), annexed to the Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, 2003.
<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744>

³⁸ *Concordat*, paragraph 81; <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>

8.20 Earlier in this Chapter we explained why we did not favour creating a separate Ombudsman. We noted that this was the approach being taken in England and Wales, and concluded that what might be necessary in a larger jurisdiction would be over elaborate for our more modest needs. We also concluded that, owing to constitutional considerations, there was no role for the Scottish Public Services Ombudsman.

8.21 An alternative arrangement would be to provide for the appointment of a lay person, of suitable standing, to participate in the review arrangements that we anticipate the Lord President will incorporate into the discipline scheme which he or she will devise after the new powers are conferred upon that office. That person would provide independent observation of the process to ensure the handling of the complaint had been fair and objective. The lay observer, as he or she might be styled, would have powers to participate in the review, make suggestions as to how the matter be handled and to report any issues about the handling of a specific case, or about the complaints process generally, to the Lord President and the Minister for Justice. This approach has some similarities with that taken during the round of appointments to the rank of Queen's Counsel in 2005. For that round an independent observer was appointed by the First Minister to overlook the process.³⁹ This approach could be developed to allow a complainant to ask the lay observer to review the handling of the complaint, with power to refer to the Lord President for reconsideration. The lay observer would not, however, have power to review the merits of the decision reached on the complaint: in other words, the lay observer would not have an appellate role. We would welcome views on what arrangement is thought desirable to ensure public confidence in the handling of complaints against the judiciary.

Question 52 Do you agree responsibility for all disciplinary procedures concerning the judiciary, short of removal, should lie with the Lord President, who would have power to delegate exercise of those powers to such judges as he considered appropriate?

Question 53 Do you agree that there should be a mechanism for dealing with any grievance about the way in which an issue of conduct had been handled, but without reviewing the merits of the decision reached?

³⁹ SE News Release, 20 December 2004; <http://www.scotland.gov.uk/News/Releases/2004/12/20095717>

Question 54 If so, should this review responsibility lie with (a) the Lord President, (b) an ombudsman created for this function, (c) a lay observer, or (d) some other arrangement for independent review?

8.22 We do not consider it necessary for the judge exercising disciplinary authority to be required to consult Ministers before exercising that authority. Ministers have a legitimate interest when a judge appears guilty of conduct of such seriousness that it brings into question the judge's fitness for office. The arrangements for the removal of judges recognise this, and give Ministers power to set up a tribunal to investigate the question of fitness. Leaving the management of less serious issues of conduct with the senior judiciary seems to us to be the correct balance.

Procedures

8.23 We do not propose to specify in detail the procedures to be followed by the senior judiciary when dealing with an issue of conduct. Such issues will vary in nature and in degree of seriousness, and we consider allowing the senior judges flexibility of approach is to be preferred. The procedure to be followed must be compatible on all occasions with the requirements of human rights law. However we would welcome views on whether it is thought that some broad provisions might assist in the handling of issues without undue delay, with the appropriate degree of formality, and with certainty as to the powers and duties of those involved. For example, we would wish to confer a discretion on the senior judiciary to decline to investigate a complaint where it was unsupported by any evidence, or was manifestly vexatious or trivial. Judges must decide on a range of difficult and emotive issues. They must pass sentence on those convicted, and decide between competing sides in civil litigation. Those involved in court proceedings, willingly or as result of the actions of others, react in different ways when the judge issues his or her decision. Some will feel deeply aggrieved by the outcome and seek to attach some blame to the judge personally. There is a need to ensure that the formality of an investigation into a complaint against a judge is reserved for cases where there is evidence of neglect of duty or misconduct on the part of that judge. There might also be advantage in the interests of fairness and certainty if the right of a judge to respond to any complaint is complemented by provisions regulating how this might be done and the consequences of failure. We recognise that there is a contrary view in favour

of leaving the detailed procedure to be prescribed separately, either by statutory instrument or by the Lord President, and we would welcome views.

8.24 In earlier paragraphs we considered the arrangements for reviewing the handling of a complaint. In this paragraph we consider whether there should be a mechanism for reviewing the investigation of the complaint and the penalty imposed. In effect this would be an appeal. While we acknowledge that under our proposals it would be for the Lord President to determine the detailed arrangements, our initial thoughts are that complaints, other than those which raise an issue of fitness and fall to be considered by a four person tribunal, would be dealt with by a sheriff principal or judge allocated by the Lord President. The single judge or sheriff principal would consider the complaint and, subject to any procedures that may be prescribed, conduct such inquiry as he or she considered necessary to arrive at an outcome. The outcome may involve issuing a disciplinary penalty. On basic principle it would seem that the judge being disciplined should be able to have the matter reviewed.

8.25 If the principle that some form of review should be available is accepted, a question arises as to how formal a procedure is required. We would welcome views generally and especially on whether review should be available in minor matters where the penalty amounted only to formal advice. On one view, discretion could be left with the Lord President to determine the appropriate arrangements for review. However, there may be advantage in setting out a framework in primary legislation. In the following paragraph we canvass some options. An important consideration seems to us to ensure a proper balance between the rights of those judges who are the subject of attention under the conduct scheme, while avoiding a disproportionately elaborate review scheme.

8.26 At its simplest, review of the decision of the single judge to whom the initial complaint was referred could be undertaken by a single, more senior judge, appointed by the Lord President. Alternatively two judges, one more senior to the judge who investigated the matter initially and one of the same judicial rank as the judge who is the subject of the complaint, could review. Being of the same judicial rank, this second judge would be able to bring to the review current experience of facing the same issues as those faced by the judge against whom the complaint had been made. The reviewing judge or judges might conduct their own investigations, or proceed on the papers alone. Membership of the review panel could be broadened to include lay representation, perhaps in the form of the lay observer mentioned in

the context of the procedure for reviewing the handling of complaints. However, a panel of two judges and one lay observer would lack balance. In England and Wales a review body can be set up on an *ad hoc* basis to review serious matters that have been the subject of judicial investigation. That body comprises two judges and two lay members.⁴⁰ While this might be an appropriate arrangement in serious cases that might raise questions as to the fitness for office of the judge concerned, it seems excessive as means of review available in all cases. Our initial thoughts are that where the penalty imposed is less than a referral to the Lord President to consider constituting a tribunal to investigate continuing fitness for office, review should be limited to reconsideration by two judges. In cases where the outcome of the initial investigation is to refer the matter to the Lord President to consider continuing fitness for office, a tribunal similar to the English *ad hoc* tribunal would seem a model to follow. In the previous paragraph we asked for views on whether any form of review should be provided for in minor cases where the outcome amounts to no more than formal advice.

Question 55 Do you agree that the judge with responsibility for dealing with an issue of conduct should have a discretion to reject a complaint where it is unsupported by evidence or is manifestly vexatious or trivial?

Question 56 Should a procedure for investigating issues of conduct (a) be set out in statute, (b) be set out in regulations made under statutory authority, (c) be determined by the Lord President or (d) left to the discretion of the judge with responsibility for dealing with the issue?

Question 57 If some specification is favoured, what matters should be included?

Question 58 Should a procedure exist for reviewing the merits of a complaint and any penalty imposed?

Question 59 If so, what review arrangements would you consider adequate?

⁴⁰ *Concordat*, paragraph 99; <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>

Temporary Suspension from Office

8.27 There is one other aspect of judicial conduct on which we would seek views. This is whether a power to suspend a member of the judiciary from office, other than in the context of a formal investigation into fitness, is desirable. And if such a power should be created, with whom the authority to suspend should lie.

8.28 Our proposals in Chapter 7 for the removal of judges include provision for suspension from office while a formal investigation into fitness is being carried out where the judge has already been convicted of a criminal offence. However, there may be situations where it would be premature to set up a tribunal, but to allow a judicial office holder to continue to perform his or her duties would risk undermining public confidence in the judiciary. This could be the case, for example, where criminal proceedings are taken against a member of the judiciary. It might be considered contrary to the public interest for that judge to carry out his or her judicial functions during the currency of those proceedings. This would be especially so were the matter to proceed to trial and the judge be convicted and sentenced.

8.29 We propose that the power to suspend in these circumstances should rest with the Lord President. Before suspending from office, the Lord President would be bound to consult Ministers, the Lord Justice Clerk and, where criminal investigations or proceedings were ongoing, Lord Advocate in his capacity as head of the prosecution service. Suspension would continue until removed by the Lord President, again following consultation with the First Minister, the Lord Justice Clerk and, when he or she had been consulted in the first instance, the Lord Advocate. Suspension would not affect payment of salary.

8.30 We also propose that the Lord President should also have power to suspend a judge against whom a finding of unfitness has been made by a tribunal established to investigate that matter, during such time as the judge is the subject of a motion to the Scottish Parliament under section 95(7) of the Scotland Act 1998.

Question 60 Should provision be made for the suspension of a judicial office holder other than in the context of a formal investigation into fitness?

Question 61 If so, do you agree with the proposed grounds on which suspension could be ordered, and that power to suspend should lie with the Lord President?

Confidentiality

8.31. The existence of a scheme for dealing with complaints about the judiciary contributes to the public's confidence in the judiciary. But a balance needs to be struck as to the amount of information about the use of the system that is made public. There is a need to protect the reasonable expectations of privacy of the complainant and the judge whose conduct has been called into question, and to avoid undermining confidence in the judiciary by creating a perception that the use being made of the complaints system is indicative of widespread failings within the judiciary. We propose therefore that while a complainant will always be told the outcome of his or her complaint, and the nature of any disciplinary action taken against the judge, as a general rule there will be no public comment about whether or not a particular judge has been subject to disciplinary action. There will be an exception from disclosure under the Data Protection Act and the Freedom of Information Act.

8.32 However, there will be an exception to this general prohibition on publicity. The Lord President and the Minister for Justice may agree in a particular case that public confidence in the judicial system requires that the fact a judge has been the subject of disciplinary action or has been cleared following an investigation should be made public. We will provide accordingly.

Chapter 9

Re-employing retired judges and sheriffs

9.1 At present, any sheriff who retires from full-time office must apply to the Judicial Appointments Board for appointment as a part-time sheriff if he or she wishes to continue in the public service as a sheriff. The Board have represented that different means should be found to re-engage the services of a sheriff who has retired from the Bench. Legislation already allows for the Lord President, with the approval of Ministers, to appoint retired judges so that they can give assistance to the Court of Session and the High Court.⁴¹

9.2 We see no reason why a person who has held full time judicial office in the Court of Session or the sheriff court, and has retired from that office in unexceptional circumstances, should not be eligible to be called upon by the Lord President or a sheriff principal to sit from time to time when assistance is required to deal with the business before the court. There will be no right to be re-employed, merely an eligibility to sit, if willing to do so. We do not see a need for the prior approval of Ministers. A budget would need to be agreed between the Executive and the Lord President's officials and those supporting the sheriffs principal to meet the planned costs of using retired office holders.

9.3 We propose therefore to adjust the present provisions regulating retired judges and create provisions for re-employing retired sheriffs. Any judge or sheriff accepting re-employment would be subject to the arrangements for discipline.

Question 62 Do you agree with the proposals for re-employing retired judges and sheriffs?

Question 63 If not, what adjustments would you make to what is proposed?

⁴¹ Section 22 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 (c.73)

Chapter 10

Lord Justice Clerk to fulfil duties of Lord President in certain circumstances

10.1 The role of the Lord Justice Clerk is largely unregulated by statute. In practice the Lord Justice Clerk acts as the head of the Court in the absence of the Lord President, but there is no provision expressly authorising the Lord Justice Clerk to discharge the functions of Lord President when that post is vacant, or the office holder is unable to discharge those functions owing to temporary incapacity. In view of the number of additional functions we propose to confer on the Lord President by statute, this uncertainty as to the extent of the Lord Justice Clerk's authority becomes more unsatisfactory. We would welcome views therefore on whether a provision authorising the Lord Justice Clerk to discharge the functions conferred on the Lord President when that post is vacant or the office holder temporarily incapacitated would be desirable.

Question 64 Should the Lord Justice Clerk be given statutory authority to discharge the functions of Lord President and Lord Justice General when that combined post is vacant, or the office holder is unable to discharge his or her duties owing to temporary incapacity?

Question 65 If so, are there any functions of the Lord President or Lord Justice General which should be excluded?

Chapter 11

The office of temporary judge

11.1 Section 35(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990⁴² gives Ministers a power to appoint temporary judges after consulting the Lord President. Such appointments are made when it seems expedient to Ministers to do so. 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.⁴³

11.2 Paragraphs 5 to 11 of Schedule 4 to the 1990 Act regulate what might be termed conditions of service. There are provisions regarding the period of appointment, remuneration, the age beyond which appointment is restricted or prohibited, and provisions allowing a temporary judge to continue to practise or hold office on the shrieval bench. The office of temporary judge has been the subject of judicial consideration.⁴⁴ While these cases have established that a temporary judge is an independent tribunal for the purposes of article 6 of the European Convention on Human Rights, improvements can still be made to support the independence of this judicial office.

11.3 While the Executive would wish to reduce its reliance on temporary judicial resources, a need for flexibility and resilience will always require some supplementary resource. The provisions that regulate temporary judges differ from those regulating the other judicial office whose holders provide assistance from time to time in the sheriff courts, namely the part-time sheriff. There should be, so far as is possible, a standard approach to issues that are common across the judiciary, or sections of it, especially within the context of the unification which the proposals in this paper, taken as whole, will achieve. Put briefly, part-time sheriffs are appointed by Ministers, on the recommendation of the Judicial Appointments Board. Appointment lasts for five years and the office holder is entitled to reappointment at the end of that period except in circumstances set out in the statute. Provision is made for a tribunal

⁴² 1990 c.40

⁴³ Paragraph 7 of Schedule 4, *ibid*

⁴⁴ *Clancy v Caird* 2000 SC 441; *Kearney v HMA* 2005 SLT 74 . (The case of *Kearney* has been appealed to the Judicial Committee of the Privy Council.)

to investigate any question of fitness for office,⁴⁵ although we propose a change to this as part of standardising the approach to investigating questions of fitness for office: see paragraph 7.11. Further and detailed provisions, which include limitations as to numbers of part-time sheriffs and provisions regarding the number of days on which they sit, are set out in sections 11A to 11D of the Sheriff Courts (Scotland) Act 1971.⁴⁶ In the following paragraphs we describe the changes we would propose to make to the statutory arrangements governing the office of temporary judge of the Court of Session.

Appointment

11.4 At present the Judicial Appointments Board has no role in the appointment of temporary judges. The Board have represented that the office of temporary judge should fall within their remit, given that they already make recommendations for the appointment of permanent judges. We consider that there is a case for the office of temporary judge being within the remit of the Board. However, there are contrary views. The current arrangements allow for the making of appointments quickly to meet the operational requirements of the court. There is therefore a need to consider whether the time and formality properly devoted to the appointment to a full time post is consistent with temporary appointments made on the grounds of expediency. There are also practical considerations in a small jurisdiction where the field for appointment as temporary judge overlaps in large measure with that of the senior Bar, on whom a duty lies to ensure cases before the courts are presented timeously and to the standard required by the Court. Those who might apply for a temporary post, and be appointed, might not necessarily be available for service when the need arises, without detriment to the progress of cases through the Court. Such factors can be taken into account in the context of a more informal process.

11.5 However, later in this Chapter we propose that those appointed to the office of temporary judge should be entitled to reappointment, unless defined circumstances of age, misconduct or certain other matters applied. Such a change would weaken any distinction

⁴⁵ Section 11C of the Sheriff Courts (Scotland) Act 1971 (c. 58)

⁴⁶ 1971 (c. 58) As inserted by section 7 of the Bail, Judicial Appointments etc. (Scotland) Act 2000 (asp 9)

between temporary and permanent appointments. There would seem therefore to be a case for adding the office of temporary judge to those within the remit of the Judicial Appointments Board, and we would welcome views.

Question 66 Should recommending for appointment to the office of temporary judge of the Court of Session fall within the remit of the Judicial Appointments Board?

11.6 Those appointed temporary judges would form a pool from which the Lord President could draw to meet operational needs. We would anticipate close liaison between the Board and the Lord President to ensure the pool was maintained at an appropriate level to meet operational requirements. We do not propose to set a statutory limit on the number of temporary judges. There is limited scope for the deployment of temporary judges and their use is under the control of a single authority, the Lord President. There needs to be flexibility in numbers to create at any time a sufficient pool to remove any tension between the responsibility of the same group to provide both representation before the Court and also judicial assistance, which was mentioned in paragraph 11.4. A budget for the remuneration of temporary judges would continue to be agreed annually between the Lord President's officials and the Executive.

Tenure

11.7 A temporary judge would be appointed for a period of five years. He or she would be able to resign at any time. Resignation would not prevent a person applying to the Board at a later date for appointment as a temporary judge. A temporary judge would be included within the arrangements for judicial discipline which we discuss in Chapter 8, and those for investigation into continuing fitness for office and removal which we outline in Chapter 7. A temporary judge could be removed from office only on the recommendation of a tribunal which has investigated a question of his or her continuing fitness on grounds of incapacity, neglect of duty or misbehaviour. The tribunal would be established and conduct its investigation in the same manner as in the case of a permanent judge of the Court of Session.

11.8 At the end of the five year appointment, the temporary judge would be automatically re-appointed for a further five years, unless (a) he or she declined re-appointment, (b) the Lord President recommended to Ministers that the appointment should not be renewed, or (c) the

temporary judge had not sat for at least a total of 50 days in the five year period. This approach would be followed at the end of each successive five year re-appointment. However, as with the existing arrangements for temporary judges, no appointment would extend beyond the date on which a person reached the age of 70, unless, on recommendation of the Lord President, Ministers considered it desirable in the public interest to retain the services of the temporary judge and to exercise their power to appoint for periods of up to one year and not extending beyond the day on which the temporary judge reaches the age of 75.⁴⁷

11.9 We believe these changes offer further support to the independence of the office of temporary judge and strengthen its role within the judicial resources available to the Lord President. We welcome views on what is proposed.

11.10 We will also welcome views on whether the description temporary judge continues best to describe the office. Establishing a more formal appointment process, if that is accepted, and providing for automatic re-appointment except in defined circumstances, suggest that the nature of the office is far from temporary. Only the period during which a temporary judge sits is truly temporary, but during that time he or she is discharging a role that is no different from that of a full time judge. The office holder is in reality deputising for a full time judge, and we would propose that the office should be re-named a deputy judge.

Question 67 Do you agree that the title of the office presently known as “temporary judge” should be changed to “deputy judge”? If you do not agree, what should the office be called?

⁴⁷ See sections 26 (4) to (6) of the Judicial Pensions and Retirement Act 1993 (c. 8) as applied by paragraph 5(2) of Schedule 4 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

Chapter 12

Eligibility for appointment to the office of judge of the Court of Session

12.1 Eligibility for appointment to the Court of Session Bench is regulated by a number of statutory provisions. For more than two Centuries, eligibility was regulated by article xix of the Union with England Act 1707.⁴⁸ Only two classes of lawyer were eligible for appointment: advocates of five years standing, and Writers to the Signet of ten years standing who had passed an examination in civil law before the Faculty of Advocates two years before appointment to the Bench. In 1990 eligibility was extended to sheriffs principal and sheriffs who had served as such for five years, and to solicitors who had had rights of audience in both the Court of Session and the High Court for a continuous period of five years.⁴⁹

12.2 Establishing an independent judicial appointments board, which proceeds on the principles of equality of opportunity and selection on merit, means we need to keep under review the continuing relevance of set eligibility criteria. Very few solicitors have rights of audience in both the Court of Session and the High Court; many experienced and able solicitors have, for various reasons, not sought such rights. A very significant proportion of the legal profession, therefore, is excluded from seeking consideration by the Judicial Appointments Board. We wish to avoid there being artificial barriers to well qualified and experienced lawyers being eligible to apply for the post of a judge of the Court of Session.

12.3 We consider there is a case for broadening the rules of eligibility to include all solicitors. The Judicial Appointments Board provides a fair, objective and rigorous mechanism for ensuring the best qualified candidates are recommended for appointment. Candidates have to demonstrate the required level of knowledge, experience and skills to satisfy the Board. We have an open mind about the period of practice that would be appropriate before an application could be made. A person is not eligible to apply for the office of sheriff principal or sheriff unless he or she has practised as an advocate or a solicitor for ten years.⁵⁰ It might be considered that a greater period should be set for those seeking

⁴⁸ (c.7)

⁴⁹ Section 35 of, and paragraphs 1 and 2 of Schedule 4 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

⁵⁰ Section 5 of the Sheriff Courts (Scotland) Act 1971 (c.58)

appointment to the Supreme Court, and different eligibility periods set for those with rights before the one of the constituent courts, and those without such rights. We welcome views.

Question 68 Should eligibility for appointment to the post of judge of the Court of Session be extended to all practising solicitors?

Question 69 If you agree, what qualifying period of practice should be set? Should different periods be set for those solicitors with rights of audience and for those without such rights?

Summary of Questions

The Independence of the Judiciary

Question 1 Would a provision reflecting the commitments in paragraph 2.1 deliver all that is required by way of a guarantee of judicial independence?

Question 2 Should a duty be imposed on the First Minister or Scottish Ministers collectively to ensure judicial independence is recognised and respected within the Executive?

The Lord President

Question 3 Do you agree that the Lord President should be given formal status as head of the Scottish Judiciary?

Question 4 If so, what would be a fitting title for this judicial office? (Your answer to Question 7 may influence your view.)

Question 5 Should a statutory duty be placed on the Lord President and Lord Justice General to put in place arrangements for the speedy and efficient disposal of business in the Court of Session and the High Court of Justiciary?

Question 6 Should a prior claim to resources over the lower courts be recognised in statute?

Question 7 Do you agree that responsibility be placed on the Lord President to ensure the speedy and efficient disposal of business in the sheriff and district courts?

Question 8 Do you agree that the Lord President should have overall responsibility for the training and guidance of the judiciary?

Question 9 If not, who should have this responsibility?

Question 10 Do you agree the Lord President should have responsibility for the deployment of members of the judiciary?

Question 11 If not, what other proposals would you wish to see provided?

Question 12 Should explicit provision be made authorising the transfer of a sheriff on a compulsory basis in the interests of the administration of justice?

Question 13 If you answer yes to question 12, do you agree with our proposals, or would you wish to see other arrangements provided for?

Question 14 In conferring on the Lord President responsibility for the welfare of the judiciary are there any particular aspects of welfare that should be specified?

Question 15 What provision, if any, should be made to facilitate the greater involvement of the Lord President in the strategic work of the Executive?

Question 16 Should there be a senior judicial representative involved in the governance of the Scottish Court Service, and, if so, which office holder should that be?

Question 17 What arrangements for supporting the Lord President and the other members of the senior judiciary in their new functions proposed in this paper do you consider are appropriate in (a) the medium and (b) the longer term?

Judges' Council

Question 18 Do you agree a statutory Judges' Council, chaired by the Lord President, should be established?

Question 19 If so, what should be the Council's membership and remit?

Administrative responsibilities for judges of the Court of Session

Question 20 Do you agree that an administrative role for judges, to support the Lord President in discharging his duty to secure the speedy and efficient disposal of business, should be established in statute?

Question 21 If so, what functions, if any, should be prescribed for this role?

Judicial Appointments

Question 22 Do you agree Ministers should have power to issue guidance about procedures for the performance by the Board of its functions?

Question 23 If so is there any area of Board activity that you would wish to see covered by a specific power to issue guidance.

Question 24 Should the Board be bound by statutory provision to follow any guidance issued by Ministers?

Question 25 Should membership of the Board include one judge of the Court of Session or two judges: one from the Inner House and one from the Outer House?

Question 26 Should the judge or judges appointed to the board be nominated by the Lord President, or elected by their respective peer groups?

Question 27 Do you agree with a proposed term of appointment of three years, and with the arrangements for renewal?

Question 28 If you do not agree, what term of appointment, and arrangements, if any, for renewal would you wish to see in place?

Question 29 Do you consider that provision should be made restricting the continuing membership of a judicial member of the Board on his or her retirement from full time office?

Question 30 If so, do you agree with our proposal or what other arrangements would you wish to see in place?

Question 31 Do you agree that only the judicial members and two legal members of the Board should have a duty to determine whether the legal ability of a candidate is adequate for the judicial office applied for, or should any academic lawyer on the Board participate in this process?

Question 32 If you do not agree with either option in Question 29, what arrangements should there be for assessing the legal ability of candidates?

Question 33 Do you agree that provision should be made for the appointment of a temporary member to cover long term absence of a member?

Question 34 If so, are you content with our proposals or what other arrangements would you wish to see in place?

Question 35 Are there any changes you would wish to see made to the list of proposed grounds for unfitness?

Question 36 Do you agree a duty of confidentiality should be imposed on those who give and obtain information about an individual within the context of the Board's activities?

Question 37 Do you agree that there should be a procedure to deal with complaints about the way the Board applied its procedures during the appointments and interview process?

Question 38 If so, do you agree that the Board should set up a complaints scheme and that independent review should fall to the Scottish Public Services Ombudsman?

Question 39 Should provision be made for a panel to advise the First Minister on the suitability of candidates for selection to the office of Lord President and Lord Justice Clerk?

Question 40 If so, what provisions should be made to regulate the membership of the panel (a) concerning the office of Lord President, and (b) that of Lord Justice Clerk?

Question 41 Should appointments to the Inner House of the Court of Session be (a) within the remit of the Board, or (b) informed by a panel under the auspices of the Board?

Question 42 If a panel under the auspices of the Board is favoured, what would be the membership of the panel?

Question 43 If a judge of the Court of Session who is a member of the Board wishes to be considered for appointment to the Inner House, should he or she require to resign from the Board, or would another arrangement be acceptable in the circumstances?

Removal from Office

Question 44 Do you agree that the procedures to be followed by the tribunal should be set out in regulations made by the Lord President under a general authority in primary statute?

Question 45 If so, what provisions regulating the procedure to be followed by a tribunal to examine fitness for office, should be prescribed?

Question 46 Do you agree with the proposed arrangements for suspending the judicial office holder while an investigation into fitness is being conducted?

Question 47 Do you agree that the arrangements for investigating questions of fitness for office of sheriff principal, sheriff and part-time sheriff should be changed to a four person tribunal, with membership fixed on the same basis as that proposed for the tribunal to investigate fitness for office of judge of the Court of Session, except in the case of a part-time sheriff where the judicial chair will be either a judge of the Court of Session or a sheriff principal?

Question 48 If you do not agree that this would be the correct approach, what arrangements would you wish to see provided for investigating questions of fitness for office of sheriff principal, sheriff and part-time sheriff?

Discipline

Question 49 Do you agree that inappropriate judicial conduct should not be defined in statute, other than to include a provision that makes it clear that failure to perform work associated with the discharge of judicial functions is included?

Question 50 If not, how would you define “inappropriate judicial conduct”?

Question 51 Do you agree that a sheriff principal should have responsibility for dealing with issues of conduct concerning sheriffs, including floating sheriffs and part-time sheriffs, arising within his or her sheriffdom?

Question 52 Do you agree responsibility for all disciplinary procedures concerning the judiciary, short of removal, should lie with the Lord President, who would have power to delegate exercise of those powers to such judges as he considered appropriate?

Question 53 Do you agree that there should be a mechanism for dealing with any grievance about the way in which an issue of conduct had been handled, but without reviewing the merits of the decision reached?

Question 54 If so, should this review responsibility lie with (a) the Lord President, (b) an ombudsman created for this function, (c) a lay observer, or (d) some other arrangement for independent review?

Question 55 Do you agree that the judge with responsibility for dealing with an issue of conduct should have a discretion to decline to deal with a complaint where it is unsupported by evidence or is manifestly vexatious or trivial?

Question 56 Should a procedure for investigating issues of conduct (a) be set out in statute, (b) be set out in regulations made under statutory authority, (c) be determined by the Lord President or (d) left to the discretion of the judge with responsibility for dealing with the issue?

Question 57 If some specification is favoured, what matters should be included?

Question 58 Should a procedure exist for reviewing the merits of a complaint and any penalty imposed?

Question 59 If so, what review arrangements would you consider adequate?

Question 60 Should provision be made for the suspension of a judicial office holder other than in the context of a formal investigation into fitness?

Question 61 If so, do you agree with the proposed grounds on which suspension could be ordered, and that power to suspend should lie with the Lord President?

Re-employing retired judges and sheriffs

Question 62 Do you agree with the proposals for re-employing retired judges and sheriffs?

Question 63 If not, what adjustments would you make to what is proposed?

Lord Justice Clerk to fulfil duties of Lord President in certain circumstances

Question 64 Should the Lord Justice Clerk be given statutory authority to discharge the functions of Lord President and Lord Justice General when that (combined) post is vacant, or the office holder is unable to discharge his or her duties owing to temporary incapacity?

Question 65 If so, are there any functions of the Lord President or Lord Justice General which should be excluded?

Strengthening the office of temporary judge

Question 66 Should recommending for appointment to the office of temporary judge of the Court of Session fall within the remit of the Judicial Appointments Board?

Question 67 Do you agree that the title of the office presently known as “temporary judge” should be changed to “deputy judge”? If you do not agree, what should the office be called?

Question 68 Should eligibility for appointment to the post of judge of the Court of Session be extended to all practising solicitors?

Question 69 If you agree, what qualifying period of practice should be set? Should different periods be set for those solicitors with rights of audience and for those without such rights?

How to respond and how your response will be handled by us.

Responding to this consultation paper

We are inviting written responses to this consultation paper by **3 May 2006**.

Please send your response to:

John Anderson
Scottish Executive Justice Department
Hayweight House
23 Lauriston Street
Edinburgh, EH3 9DQ

e-mail: JudicialBillTeam@scotland.gsi.gov.uk

If you have any questions, or would like any part of this consultation paper translated into another community language, please contact John Somers on 0131 221 6896.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Executive consultation exercises, can be viewed online on the consultation web pages of the Scottish Executive website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the respondent information form enclosed with this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. The respondent information form is reproduced as page 78.

All respondents should be aware that the Scottish Executive are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public (see the respondent information form), these will be made available to the public in the Scottish Executive Library by 31 May 2006. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library.

You can make arrangements to view responses by contacting

the SE Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next ?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decisions on the legislation we will bring forward in the 2006-07 session of the Scottish Parliament. We aim to issue a report on this consultation process in the Autumn of 2006.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to David Stewart, Head of Judicial Appointments and Finance Division, Scottish Executive Justice Department, Hayweight House, 23 Lauriston Street, Edinburgh, EH3 9DQ.

Registering to receive information about other consultations

The Scottish Executive now has an email alert system for consultations ([SEconsult: http://www.scotland.gov.uk/Consultations/seConsult](http://www.scotland.gov.uk/Consultations/seConsult)). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

RESPONDENT INFORMATION FORM

STRENGTHENING JUDICIAL INDEPENDENCE IN A MODERN SCOTLAND

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual go to Q2a/b and then Q4
- (b) on behalf of a group/organisation go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

- 2b. *Where confidentiality is not requested*, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation *will be* made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your response to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes

No

THE SCOTTISH EXECUTIVE CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many varied types of consultation. However, in general, Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Executive encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Executive web site enabling a wider audience to access the paper and submit their responses⁵¹. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Executive consultation papers and related publications (eg, analysis of response reports) can be accessed at: [Scottish Executive consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

⁵¹ <http://www.scotland.gov.uk/consultations>

© Crown copyright 2006

This document is also available on the Scottish Executive website:
www.scotland.gov.uk

Astron B44488 02/06

Further copies are available from
Blackwell's Bookshop
53 South Bridge
Edinburgh
EH1 1YS

Telephone orders and enquiries
0131 622 8283 or 0131 622 8258

Fax orders
0131 557 8149

Email orders
business.edinburgh@blackwell.co.uk

