

response to proposals for a judiciary (Scotland) bill

May 2007

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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Introduction

The Scottish Consumer Council welcomes the opportunity to respond to the Scottish Executive's proposals for a Judiciary (Scotland) Bill. The purpose of the Scottish Consumer Council is to make consumers matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change. Accordingly, we have an interest in the appointment, management and removal of the judiciary from the perspective of the consumers who need to use Scotland's courts.

In March 2006, we responded to the Scottish Executive consultation paper *Strengthening Judicial Independence in a Modern Scotland*. We broadly welcomed the proposals in the paper, but expressed our disappointment that there was no mention of introducing a code of conduct for judges and sheriffs, which had been discussed in an earlier consultation paper in 2000.¹ We were also disappointed that, while the consultation paper discussed issues relating to discipline, there was no direct mention of introducing a complaints procedure to deal with complaints from the public about the way in which they are treated by sheriffs and judges.

We broadly welcome the provisions of the proposed Judiciary (Scotland) Bill as set out in the current paper, but we continue to have concerns about these same issues, as discussed in more detail later in this response. We do not intend to comment on every aspect of the paper, but only those which we consider to be of particular relevance from a consumer perspective.

The issues discussed in the paper

CHAPTER 2 THE INDEPENDENCE OF THE JUDICIARY

We are aware that some have expressed concerns that the Executive's proposals will detract from judicial independence, but we do not believe that this will be the case. We welcome the statutory reinforcement of the long established principle of independence of the judiciary, which is of great constitutional importance.

While we believe that it is fundamental in a democracy that judges have complete independence in their decision-making, we do not accept that this need for independence has any bearing on the way in which a judge or sheriff conducts him/herself in reaching those decisions. Judges and sheriffs are public office holders, paid for by the public purse. In order to ensure that they are receiving value for money, the public is entitled to expect them to be held to

¹ *Judicial Appointments: an inclusive approach*, Scottish Executive, 2000

account, in the same way as others providing a public service should be publicly accountable. This is further discussed below in relation to Chapter 8.

CHAPTER 3 THE LORD PRESIDENT

We broadly welcome the proposed statutory responsibilities which are to be given to the Lord President as head of the judiciary. It is important, however, that sufficient resources are made available to allow the Lord President to carry out these responsibilities in an effective manner.

We wish to reiterate one point which we made in our response to the 2006 consultation. While the draft bill confers responsibilities on the Lord President to represent the views of the judiciary to parliament and to lay before parliament written representations on certain matters, it is not clear to us what mechanisms will be put in place to ensure that the Lord President is accountable to the Scottish Parliament for the efficient running of the courts. While the draft bill allows the Lord President to express his or her views to parliament, it is unclear whether the parliament may reciprocate by expressing its views to the Lord President.

CHAPTER 6 JUDICIAL APPOINTMENTS

One of our primary concerns is to ensure that consumers have adequate access to justice, including access to the courts, where disputes cannot be resolved by some less formal means. If those using the courts are to have real access to justice, it is essential that court processes are fair. If court processes are to be fair, and just as importantly, seen to be fair, there must be a transparent and open system for appointing judges and sheriffs. We therefore welcomed the establishment of the Judicial Appointments Board, and we are very pleased that it is now to be put on a statutory footing.

We welcome the statutory commitment to ensuring that the Board continues to have a non-lawyer chair, as we consider that this helps to lessen any public perception that the whole appointments process is controlled by the legal fraternity. We are also pleased that the current situation, where the Board is made up of equal numbers of non-lawyer and legal members, will be enshrined in statute. As the original consultation paper on judicial appointments in 2000 recognised, it is important that judges and sheriffs have an appreciation of how the workings of the courts will be regarded by the public, including those members of the public who have to go to court for any reason.

While we agree that merit must always be the primary criterion for appointment, we are particularly pleased that the draft bill places a statutory duty on the Board to have regard to the need to encourage diversity in making judicial appointments. It is essential that those who sit in judgement reflect so far as possible those within the community they serve, and we therefore took the view

in our response to the 2006 consultation that this was so central to the Board's remit that it should be set out in statute. We are very pleased that this has been recognised. This duty reflects that of the Commission for Judicial Appointments in England and Wales under the Constitutional Reform Act to have regard to the need to encourage diversity in the range of people available for appointment.

We are aware that considerable work is being done by both the Department of Constitutional Affairs and the Commission for Judicial Appointments in England and Wales towards increasing diversity among the judiciary, including changing the statutory criteria for eligibility, and we believe that Scotland should follow a similar approach. One key issue that the Commission is looking at is how to encourage and support candidates who may have the potential to become judges, once they have acquired greater experience. We think this might also usefully be considered in Scotland, and we are pleased to see that the Board recently hosted a meeting with the Commission and its Northern Ireland counterpart to discuss ways of widening the range of potential candidates. We see this as an important step forward.

We are disappointed that the draft bill provides that judge and sheriff members of the board will be nominated for appointment by the Lord President or the collective sheriffs principal respectively. As we said in our response to the 2006 consultation, we believe that all members of the board should be treated in an equal fashion, including the way in which they are appointed. If the other members are required to apply for the position and are appointed according to Nolan rules, we can see no good reason why the judicial members should not be required to go through a similar process.

CHAPTER 7 REMOVAL FROM OFFICE

In the same way as a transparent procedure for *appointing* judges and sheriffs is essential for public confidence, there must also be an equally clear and open procedure for *removing* them, should this prove to be necessary. At present there are no clear guidelines as to the circumstances in which the removal processes for judges, sheriffs and sheriffs principal should be invoked. We therefore welcome the proposals in the draft bill to establish an independent tribunal, including a non-legal member, which should help to ensure openness in the procedure.

As we noted in our response to the 2006 consultation, we consider that the present procedure for removal of sheriffs and sheriffs principal, which provides for removal by the First Minister, following a joint investigation by the Lord President and Lord Justice Clerk, should be reconsidered in terms of its transparency and objectivity. Setting up an independent tribunal along similar lines to that for judges would be a considerable improvement on the current situation.

While the present procedures for removal of both judges and sheriffs refer to the office holder being ‘unfit for office by reason of inability, neglect of duty or misbehaviour’, there is no guidance as to the circumstances in which these might apply. We note that the draft bill repeats this wording, and provides no explanation as to what this means. We would therefore suggest again, as we did in our 2006 response, that clear guidance on this would be extremely useful, and would help to increase transparency in the process.

CHAPTER 8 CONDUCT

While we do not believe that there is at present a widespread problem with complaints about judicial conduct, we agree that there is a need for a more structured process for dealing with those complaints which do arise, to ensure that there is public confidence in the judicial system. We have previously expressed concern that there is currently no clear mechanism for regulating the conduct of sheriffs and judges, beyond the drastic and very rarely invoked measure of removing them from office.²

We would like to see a fair, open and accessible complaints procedure for making a complaint about treatment by, or the conduct of, a judge or sheriff, should this be necessary. This might be based on the model of the Office for Judicial Complaints, which was set up in April 2006 to handle complaints about the personal conduct of judicial office holders in England and Wales. A Judicial Appointments and Conduct Ombudsman was also established in that jurisdiction at the same time. The ombudsman’s role includes investigating complaints about the handling of such complaints, in addition to complaints about the judicial appointments process.

We must reiterate two major concerns which we raised in our response to the 2006 consultation paper. Firstly, there is again no direct mention in the current paper of any intention to introduce a code of conduct for judges and sheriffs, which was discussed in the 2000 consultation paper. We believe that introducing such a code of conduct, to be overseen by the Lord President and Sheriffs Principal respectively, would be a very positive step forward. Such a code could set out clearly what is expected of judicial office holders, and would provide a starting point for making decisions as to whether a judge or sheriff has failed to conduct him/herself in an appropriate manner.

Secondly, we are concerned that again the focus of the paper, and of the draft bill, is solely on disciplining the judicial office holder. Presumably, disciplinary procedures can be triggered by a complaint from a member of the public, but there is no mention of how the complaint might be dealt with from the perspective of the complainer, who may be extremely aggrieved and upset about the way in which the judge or sheriff has behaved or handled their case. There is no

² *Response to Judicial Appointments: an inclusive approach*, Scottish Consumer Council, 2000

suggested mechanism for any form of redress to the complainer. While we accept that judges are immune from suit, provision might be made for other suitable forms of redress, such as compensation for distress or inconvenience, an apology, an explanation as to what went wrong, or an assurance that the same thing will not happen again to someone else.

While we entirely accept that the judiciary must have independence in making legal decisions, this should not mean that they cannot be held to account for their conduct where necessary. Sheriffs and judges are public office holders, and should be accountable for their behaviour towards the public. As the recent Scottish Executive report *Modern Laws for a Modern Scotland* states:

*'Civil justice is a public service. The public is entitled to expect that the services provided by the different parts of the civil justice system deliver value for money. They are also entitled to expect that they meet reasonable expectations based on other, more difficult to measure values, such as treating people fairly and with respect, and being accessible.'*³

There would, of course, require to be some mechanism to identify litigants who were complaining because they were unhappy with the outcome of their case but had no reason to complain about the service they had received or the conduct of the judge. There would also need to be a transparent procedure for filtering out any frivolous or vexatious complaints, with provision for independent review. However, we believe that these difficulties can be dealt with: the priority should be to ensure that a clear and accessible complaints procedure exists, to deal with any valid complaints which do arise.

CHAPTER 12 THE SCOTTISH COURT SERVICE

We welcome the suggestion that the Scottish Court Service should be overseen by a non-executive board. It is important that all of the main stakeholder groups with an interest in the courts should be represented on the proposed board, including members of the public who use the courts. Such people might include party litigants, jurors and witnesses. We welcomed the recommendation made in the final report on the agency review of the Scottish Court Service that the agency should engage and consult with users and stakeholders, and we hope that this will extend to representation on the board. The agency review report also recommended that there should be greater transparency in decision-making at Board level. The inclusion of non-lawyer and non-judicial members on the Board would greatly assist in ensuring this aim.

We recommend that the proposed board of the Scottish Court Service should have at least equal numbers of legal and non-lawyer members, and should be chaired by a non-lawyer. This would follow best practice, and would be in keeping with similar bodies within the justice field, such as the Judicial

³ *Modern Laws for a Modern Scotland: a report on civil justice in Scotland*, Scottish Executive, February 2007, at paragraph 3.9

Appointments Board and the new Scottish Legal Complaints Commission, both of which are/will be chaired by a non-lawyer. Moreover, much of the work involved will be at an operational/management level, and may not necessarily require legal expertise. In any case, it is clear that the Lord President will have many other new demands on his time in his new role as the formal head of the judiciary.