

the Scottish Justice



Issue 9: Winter 2010

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AGM 2010

The AGM was held on the 30 October there was a good turnout at Edinburgh Sheriff and Justice of the Peace Court where the unveiling of the Ensigns Armorial took place.

Three of the office bearers are unchanged with Philip Murray and Rodger Neilson returned as Chairman and Vice Chairman respectively while Stuart Fair remains in post as Treasurer. Susan Kirkwood retired as Secretary after three years and Johan Findlay was elected unopposed. The SJA recorded its thanks to Susan for her hard work over the years.

There was only one motion agreed which is an alteration to the Constitution. This motion was to the effect that no one may stand as a member or remain a member of the Executive if their 70th birthday falls between the two AGMs. This allows the sheriffdoms to elect members who will be able to serve for the full year.



Editorial Comment

by Johan Findlay

With Winter well and truly here it is a good time to produce the Scottish Justice and look back over the year and events.

All organisations within the UK are facing the prospect of making serious financial savings and the courts are not immune to this. Justices and all judicial officers received a letter from the Lord President asking us to understand and to co-operate with the cuts which will be announced over the next few months. We are facing financial challenges quite different from anything within living memory and all options must be explored. It is now nearly a year since the final sheriffdom was unified and we can say that it has been a very positive process overall and we are well placed to face the challenges.

The Judicial Office has worked on a website which is now live and can be found at <http://www.scotland-judiciary.org.uk>. This website is public and has a summary of cases and features a 'Day in the Life ...' of each of the judicial officers.

This issue of the Scottish Justice contains articles from a wide variety of people and places. The past chairman of the Magistrates Association has given us her comments on her time in office and the changes that we all face. Many of you will remember Cindy speaking at the JSC conference at Dundee.

The Scottish Government has responded to the Civil Courts Review and lay justice is to continue as before but the government do intend to appoint District Judges as a third tier of judiciary. An article has been written about the possible consequences of this using a broad brush financial overview.

The Government's response is very welcome and it is a great relief to have that confidence placed in the lay justice. The Summary Justice Reforms have indeed brought about important and effective changes to the work of justices but we will continue to have to prove ourselves in an increasingly professional world. Many justices say 'we are cheap' because we are not salaried but as the article will show we are not the cheap option.

However, the benefits of sitting as a lay judge are wide ranging – deliberative democracy is a vital feature of the criminal justice system whereby ordinary people are used in juries and as lay judges to make decision in fact. The more the man in the street truly knows and understands about the law the more inclusive he feels. Today we have 'knowledge' from the Internet and many of us have heard accused people tell us they saw it on the 'net so it must be right. It is not enough though to simply be 'lay' – Justices have to be as professional as possible on the bench.

A very helpful memo has been produced in relation the Cadder case by Catriona Sagar, Legal Adviser in North Strathclyde.

Sheriff Frank Crowe who was the Director of Judicial Studies at the time of the many refresher courses has returned to the shreival bench in Edinburgh but has taken time to write a short article about Ewan Hawthorn a Justice of the peace in Edinburgh but who also worked at the JSC developing the manual for justices. Frank tells us where Ewan's studies have now led.

Justices have many interests and one of the SJA Executive members, Andy Leven, has written about one of his very serious interests as a Director of the Glasgow Centre for Inclusive Living. I am delighted that Andy has produced this article

The Judiciary and Courts (Scotland) Act has created a system to enable complaints to be made against judicial officers. In England a Judicial Complaints Office was established in April 2006. Their latest Annual Report states that during 2009/2010, they received a total of 1,571 complaints, an increase of 18% on the 1,339 received during 2008/2009 and the highest number since the office was established.

In England and Wales there are 3,600 members of the full and part time judiciary, approximately 29,000 Magistrates *continued on p4* ▶



Civil Courts Review

Following the publication in 2007 of Civil Justice: a case for reform by the Civil Justice Advisory Group the Lord Gill, the Justice Clerk was invited to conduct a Review of the Scottish Civil Courts. This Civil Courts Review was published in October last year. A main aspect of the Review is to improve accessibility of the Civil Courts to the Public and the improvement in the efficiency of processing Civil business. From a Civil Law perspective, Lord Gill certainly sets out to create real improvement and his recommendations have much to be commended. In terms of overall workload, however, Lord Gill noted that a review of civil justice would not be effective unless the balance of Criminal work was also taken into account due to the impact that changes to the criminal workload have at the expense of civil work. As a consequence of re-balancing both Civil and Criminal workloads, the review has implications for summary criminal workload.

Much work has been going on in the background since the review was published with various groups looking at the implications and costs of the changes involved and on 11 November 2010, the Scottish Government gave their response. The following issues only deal with Justices and Criminal Law workload but it is well worth reading the entire response to appreciate the context.

District Judge

A significant proposal is the establishment of a lower professional Judge known as a District Judge. Not dissimilar to Stipendiary Magistrates, such a Judge will be legally qualified and appropriately experienced. Such a proposal effectively establishes a form of career structure for Professional Judges in Scotland as it is envisaged that District Judges may well progress to the shrieval bench within the natural progress of career progression. Although primarily introduced to meet a real Civil workload requirement the Review anticipates that expected volumes of Civil work may only take up approximately 30% of the District Judge's workload.

Justices of the Peace

The Response notes that Lord Gill indicated had he been starting from first principles he would have had purely professional judges but appreciated the effects of Summary Justice Reform and the improvement in the training and appointment of lay justices and while the Review had considered giving justices some civil work it concluded that ...'lay justices may not possess the legal skills necessary to conduct these cases.'

The SG has responded favourably to justices and at Para 145. 'The Scottish Government agrees that lay justices should be retained for the kind of criminal cases currently dealt with in the JP court. It also accepts the force of the Review's arguments concerning civil jurisdiction, but is prepared to consider further whether there are particular kinds of low value civil cases which might be appropriate for JPs.'

Justices are faced with yet another 'wait and see' situation and may once again face a serious challenge given the proposal that at least 70% of the new District Judge's time will be taken up by Summary Criminal work. This has the potential to significantly reducing the workload within the JP Court.

Cost of Lay Justice v District Judge

In times of austerity it could be assumed that the proposal to appoint a number of District Judges would be unworkable given the likely salary level. Assuming an average salary of £102,921 which is equivalent to District Judges in England and Northern Ireland (The salary for Sheriff is £128,296) plus 20% employer costs we would have an outlay of approximately £1.482m assuming the appointment of 12 District Judges (2 per Sheriffdom). If the exposure was 70% summary criminal workload it would be fair to apportion approximately £1.037m as a comparative annual cost.

Given such an additional significant recurring cost, one could be excused for assuming that the cost of Lay Justice may well be far

less than the proposed District Judge response in the Civil Review. However, if we fully consider the aggregation of some of the following cost components of Lay Justice, the assumed differential cost saving in favour of Lay Justice looks a shade hollow:-

Cost	Assumption	Exposure
Sheriffdom Legal Adviser	Salary plus employer on costs x 6	£324,000
Legal Adviser	Salary plus employer on costs x18 min	£648,000
JP Travel and Subsistence Expenses		£175,000
JP Training Committees and Appraisal Scheme		£30,000
JP Training including JSC		£150,000
Scottish Justices Association Grant		£25,000
Grand Total		£1,352,000

Given the above broad assumptions (these figures are "finger in the air guesstimates" although as a typical Accountant, I do fear that the reality is actually higher) we can see that Lay Justice would be £0.315m or 30% more than the District Judge option - based on the appointment of 12 District Judges. This differential could be even greater if we add potential additional overheads in managing and administering Lay Justice outwith the scope of Legal Advisers although we could, in probability, cancel out recruitment costs. This positive differential in favour of the Professional Judge feels counter intuitive. Although the above comparison is a broad "belt and braces approach" it is a sobering thought that the assumed comparative cost saving which Lay Justice offers might not, in fact be credible against other options. Obviously where more than 15 District Judges were created the differential may swing the other way – but my point is that Lay Justice cannot automatically be assumed to be always the cheaper option.

Future Direction

In recent years there has been a shift in legal thinking on the efficacy of Lay Justice against the backdrop of the strengthening entrenchment of Human Rights within Public Law and Criminal Procedure. This is especially acute where we have the rather unique position (the only known single lay judge in Europe) of a Lay Judge being both the finder of fact and the sentencer, in other words the power of verdict and sentence – all rolled up together in a single judge! Should the Single Lay Judge be repugnant to Article 6 enthused Jurists, the alternative of a blanket treble bench across Scotland has the same value for money allure to the "cold grey suited Accountant (in me)" as the prospect of making good returns on an investment in Scottish Football! In short, such an option has the real capacity to widen the cost differential in favour of the District Judge and would have comparative negative implications for the effective discharge of Court business.

Should the last bastion assumption of apparent economy be removed by other options that embrace a full professional judiciary, it is possible to foresee that the arguments for the retention of Lay Justice will be constrained to representative justice which is founded on narrow political grounds rather than any emerging legal principles. With the added dimension of a shifting level of business arising from direct measures diversion from prosecution the only constant within the equation will be change. In the face of these challenges it is obvious that Lay Justice will continue to have to prove its worth and, indeed, commit to continuous further improvement. Whilst the Scottish Government has acknowledged the value of Lay Justice, by referring to the improvements that have been successfully put into place post McInnes through Summary Justice Reform and indeed embraced by Justices, it remains to be seen whether the Scottish Government will be able to sustain its position in the face of unprecedented fiscal constraints.

Stuart W Fair LLB, CPFA, FCCA, JP. Stuart is Treasurer to the Scottish Justices Association, Senior Consultant to the Chartered Institute of Public Finance and Accountancy and a Tutor in Law at Strathclyde University Law School.

The Scottish Government response can be found at: <http://www.scotland.gov.uk/Publications/2010/11/09114610/0>.
The Civil courts Review can be found at <http://www.scotcourts.gov.uk/civilcourtsreview/>.

Glasgow Centre for Inclusive Living



Formerly a Glasgow City Housing Manager I am a committed and enthusiastic Justice of the Peace and have now served for eight years.

Part the time spent on the Bench, I am a member of the Executive of the Scottish Justices Association and also a member of the Justice of the Peace Advisory Committee for the Sheriffdom of Glasgow and Strathkelvin. But I still find time to pursue other interests including a deep personal commitment to supporting the Independent Living Movement through another role as a Director of the Glasgow Centre for Inclusive Living.

Chief Executive, Etienne d'Aboville describes Independent Living as being ... 'about disabled people having control over their lives, not necessarily doing everything by themselves; after all, none of us really does that - we are all interdependent on each other in all sorts of ways. Even if you fix your own car, or bake your own bread - do it yourself dentistry is not generally recommended! GCIL is a Disabled People's Organisation - a 'DPO' for short. We set out to challenge the barriers that prevent disabled people from doing the ordinary things that most non-disabled people take for granted: from simple things like meeting a friend for lunch, to getting a job or finding accessible housing.'

It was the housing link that brought me into contact with GCIL through a role with Glasgow City Council Housing

Department's Community Care section, and latterly transferring to the Glasgow Housing Association, using my professional qualifications as a Quantity Surveyor and Estimator to help with their sheltered housing programme. I had always enjoyed contacts with GCIL and was impressed with their work they do. Taking early retirement I spoke to them about becoming involved and was offered a director's post. I had a heart attack six months after I retired and registered myself as disabled, so I reinforce their ethos of being run by disabled people.

My involvement keeps me abreast of developments in the field and of course made me even more conscious of how I relate to disabled people, which is basically about always trying to remove the barriers which prevent people fulfilling their potential.

My twin interests came together when the Judicial Appointments Board who were responsible for the process for appointing new justices held a seminar with disabled people. Knowing of my work in this field, the then chairman of the SJA asked me to attend for the SJA and I was able to give information and advice from the point of experience. I hope that led to some changes making the process of applying to be a JP more accessible for disabled people, in terms of the Appointments Board better understanding the issues, and in areas like advertising appointments over a wider spectrum of the media.

I am a very committed member of our Board, and professional experience of accessible housing issues has been particularly valuable. Over the years, GCIL has developed a range of key services that challenge the barriers that disable people face. For example, GCIL enables over 250 disabled people in Glasgow (and nearly 100 in East Dunbartonshire) to manage their own support systems using direct

payments, a type of funding arrangement from the Social Services that goes under the heading 'self-directed support'. We prefer not to use the more familiar term 'care' as it is too passive. Self-directed support is all about putting disabled people in the driving seat, it's not about being 'looked after'. Self-directed support is not for everybody. But with the right support in place, it's something so many more disabled people could be using to improve the control they have over their lives.

Over the years, disabled people have identified a number of issues which are the keys to Independent Living. Self-directed support is one. Others include accessible housing, employment, transport, advocacy (including self-advocacy), access to good information and so on. There are thirteen in all. GCIL has focussed on four main areas: self-directed support, housing, employment and training. It only takes one important element to be missing, like living in an accessible house, for disabled people's life opportunities to be severely curtailed.

But does it really matter if disability organisations aren't controlled by disabled people as long as they are effective and provide the right kind of services? There is room for a wide range of organisations to campaign for change or provide the services we may need but it is really important that disabled people have their own voice. Three-quarters of the Board of Directors, and three-quarters of the staff of 25, are disabled people themselves and it makes a difference by changing the relationship with our service users. GCIL would not be the same kind of organisation if it was not user-led. Collectively, the Independent Living Movement has achieved much more by working together and sharing our experience than we could have done individually. And that includes pioneering innovative solutions such as self-directed support that are now becoming part of mainstream social policy.

Andy Leven

For more information about GCIL, contact:

GCIL, 117-127 Brook Street, Bridgeton, Glasgow G40 3AP. Tel: 0141 550 4455,

Email: info@gcil.org.uk, Website: www.gcil.org.uk.





The Judicial Office for Scotland



We are now seven months on from the Lord President becoming Head of the Judiciary and the Judicial Office coming into existence. Your main contact from the Judicial Office in recent months will have been the draft Judicial Conduct Rules that the Lord President issued for consultation. Consultation closed on 22 October and the Lord President will be considering the responses received before making the Rules. As I write this he has yet to see the responses, so if you will forgive me I will not say more now until he has had time to consider them. The intention is that the Rules would be made by the end of this year and brought into effect as soon into the New Year as we can. The interim

procedures seem to be working well enough as an interim measure and we have not so far received many complaints that required more than preliminary consideration: most complaints tend to be about the judicial decision made. I hope to be able to let you know more about the Rules in the next edition.

As you will know since the 1st of April judicial training, including the training of Justices of the Peace, is the responsibility of the Lord President. The provisions that governed your training continue in force until such time as the Lord President considers it necessary to make changes. The Judicial Studies Committee, which the Lord President reconstituted on 1 April with a new governance framework and with him as its President, has a particular responsibility for advising him on matters concerning judicial training in addition to delivering training. Two of your colleagues serve on the JSC, and the governance arrangements provide that there will always be two justices who are members. The Chairs of the Training Committees approached me early in the summer to arrange a meeting at which they could discuss how well the present arrangements have worked since they were introduced in 2007, and whether there was best practice that could be shared. It was clear from the first meeting that the opportunity for the Chairs of the Training and Appraisal Committee to meet and share experiences was valuable, and we are to meet again early in November. It is so important that we find ways of ensuring that every justice is able to benefit from things that work well (accepting of course that the geographical diversity of Scotland might mean that something that works well in Glasgow and Strathkelvin, might be more challenging in Grampian Highland and Islands).

I have also taken the opportunity to attend two training events (as it happens both occurring in the last week): the annual training conference for Justices held in

Clydebank, and the training day for the Glasgow and Strathkelvin Justices. I also sat in on a discussion on sentencing at Clydebank, and when to exercise a power to deal with misbehaviour in the court by contempt. You all know too well how finely balanced some of these decisions are, and it was particularly helpful to me to listen as the group discussed possible disposals that tried to punish the offending, but looking also at ways of dealing with the underlying behaviour.

At both events I sat in on discussions where your colleagues were considering issues of judicial ethics and conduct. The examples encouraged discussion on subjects such as when to declare an interest and withdraw from hearing a case; how to deal with inappropriate behaviour by a colleague; and how to guard against a perception that you are using your judicial office to gain preferential treatment or some other advantage. There was a very real awareness of the importance of not allowing anyone to cast doubt on one's impartiality or competence to act fairly by an ill-judged action or word. The Principles of Judicial Ethics sent out to all Justices and other judicial office holders in April, are there to help point the way. If you are ever in doubt about a matter the main thing is to seek advice. You have access to your legal advisor and Sheriffdom Legal Advisor, or the Sheriff Principal, or another sheriff. You are also welcome to contact the Judicial Office (0131 240 6672), and I would encourage you to do that if you ever feel that you would welcome guidance on a matter not covered in the Principles.

Steve Humphreys
Director of the Judicial Office

Judicial Office
for Scotland



Editorial Comment *continued from Page 1*

and 7,000 Tribunal members so complaints are proportionately very low. However, 28 judicial office holders were removed from office, 25 of these were magistrates. Examples of possible personal misconduct might be the use of insulting, racist or sexist language in court, or inappropriate behaviour outside the court such as a judge using their judicial title for personal advantage or preferential treatment. The Judicial Council is preparing a procedure for dealing with complaints and of course this includes justices.

Finally, I would like to wish our readers a Merry Christmas and a very Happy New Year.

Johan Findlay, Editor

Number 16 Bus Shelter

A New Zealand judge has decried the use of unusual names for children. A nine year old girl whose parents had given her the name of Tallulah Does The Hula From Hawaii asked the judge to allow her to change her name. Other bizarre baby names that were blocked by New Zealand registration officials before they could be bestowed upon a child include Yeah Detroit, Keenan Got Lucy, Sex Fruit, Number 16 Bus Shelter, Violence and 4Real. Twins' names allowed were Benson and Hedges but not Fish and Chips.

Contribution Speech



The Lord President took the opportunity of the opening of the legal year for the Court of Session to review the year that had just passed and to look forward at the year to come. It is his intention to deliver such a speech at the beginning of each legal year.

Looking to the year ahead he acknowledged the challenging circumstances that face the public sector as its funding is reduced in coming years. He said

“The path that lies before us as we enter this legal year, and the years beyond, is one which will require all our skills to pass along successfully. It will require everyone involved in the justice system to re-examine the way in which the administration of justice is conducted.

We cannot compromise the essential principles that ensure, in the words of

Article 6 of the European Convention of Human Rights “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. But over time in any system arrangements that may have been necessary or sensible at their inception become out-dated. Some become shibboleths whose necessity is beyond discussion.

Turning to the ways in which the judiciary could make a particular contribution he considered the problems caused by ineffective hearings

“We have to find ways of reducing what is known in the system as ‘churn’. That is the inability for cases cited for hearing to take place through the absence of a witness or other party, lack of preparedness of one party to proceed, or some other inefficiency that prevents cases proceeding. The use of the term ‘churn’ rather disguises what it really is: an unacceptable waste of taxpayers’ money which adds little to the administration of justice but rather hinders its swift application.

The judiciary, the profession, the Crown, the Police and all other justice agencies have an obligation in my view, to do all in their power to avoid this waste. I expect all of them to play a part in seeking to reduce waste within the system and I encourage my judicial colleagues to question robustly requests for adjournments that do not appear to be merited beyond an inability to prepare to proceed in time, or to have witnesses ready to give their testimony.”

The Lord President also took the opportunity of the opening of the legal year to welcome the seven new Queen’s Counsel (six Advocates and a Solicitor Advocate) recently appointed.

Whilst the times are challenging, he reminded that Court of past practice of the Court, in order not to leave people with a too rose-tinted view of past practice. To see what he said you will need to read the full version of the speech at <http://www.scotland-judiciary.org.uk/Upload/Documents/OpeningoftheLegalYear2010.pdf>

Lay Judges and Justices in Europe International Symposium

Berlin 17th -19th July 2010
attended by Philip Murray.

This symposium was designed to further the co-operation and collaboration of

the European organisations of lay Judges and Justices. The first Symposium was held in Helsinki in 2009 which looked at national approaches by lay people participating in the legal system as justices and shared experiences with counter participants across Europe. Those countries taking part were Scotland, England and Wales, Spain, Sweden, Finland, Austria, and Germany.

The proposal and conclusion of the Berlin Symposium:

To form a European organisation for voluntary lay persons involvement in the judiciary and draw up a charter for volunteer lay involvement by European citizens in

judiciary which would incorporate the European catalogue of core values and the rule

of law. In order to provide public information, the Finish organisation has set up a web site, which they will maintain and expand with the support of other organisations with links to other lay justice websites. It is proposed to document the involvement of voluntary lay persons in the Judiciary in Europe, and create measures to achieve our objectives. Germany (Federal Association) will prepare by the end of 2010 an initial first draft of a “Charter for volunteer lay involvement in jurisdiction”. It is proposed if at all possible to formally sign the charter in London in 2011.



A Different Time And A Different Place



Judicial Studies Committee Annual Training Weekend for Justices of the Peace

After running their previous conferences in August in the West Park Hall, Dundee, this year the JSC Annual Conference for justices was held in late October in the Beardmore Hotel and Conference Centre in Clydebank. As the justices

of North Strathclyde had previously discovered, the facilities of this venue are ideal with an excellent auditorium for plenary sessions and first class rooms for group sessions. Deputy Director of the JSC, Sheriff Alistair Thornton told me at the end of the weekend that the hotel staff could not have been more helpful in meeting all requests. The excellent venue, no doubt, played its part in ensuring a quality and enjoyable weekend of training.

On the Friday evening, after a welcome extended by Sheriff Principal Kerr of North Strathclyde, we were invited to consider "What makes a good judge?" with a presentation by Sheriff Max Hendry, Kirkcaldy and illustrative contributions from Sheriff Andrew Cubie, Glasgow.

The first speaker on Saturday was Sheriff Tom Welsh, Director of Judicial Studies. His talk entitled "On Dealing with the Unexpected in Court" provided fresh insights into

how we might react to and deal with possible contempt of court. Later in the morning, Sheriff Thornton brought home to his listeners the need to take seriously the whole concept of judicial ethics.

"Case Management: Delay and the Effect on the Justice System" was the title of the afternoon talk by Sheriff Simon Fraser, Dumbarton. Sunday morning's speaker was Professor Amina Memon who recently moved from Aberdeen to be Professor of Psychology, Royal Holloway College, University of London. She gave an interesting and even challenging presentation on "Assessing Witnesses".

If the speakers had the opportunity to stimulate our thinking, then the various group sessions allowed us to be tested to see what we were learning and would be able to apply in future to our work on the bench. The team of legal advisers who facilitated the groups over the weekend had

their hands full in leading these challenging but most worthwhile sessions. Thanks to the excellent materials prepared by the JSC, including the "actors" used in filming court situations, and the hard work put in by the facilitators, everyone present was able to benefit greatly from the training experience.

Finally, it was most encouraging to have present for the whole weekend one of the Senators of the College of Justice, Lord Brodie who is Chairman of the Judicial Studies Committee. His presence and contribution certainly enhanced the weekend and encouraged us all to realise how seriously the JSC takes its remit to play its part in the training of Justices of the Peace. At the end of this weekend, almost 60 justices went home believing they would be the better for having had the opportunity to attend and enjoy this year's JSC Annual Training Conference.

Rodger Neilson
SJA Vice-Chairman

Sheriffdom of Grampian, Highland and Islands



Photograph by Ian Rhind JP

On 1 October 2010 in a ceremony conducted by Sheriff Principal Sir Stephen Young in the historic Inverness Castle which houses Inverness Sheriff Court, 16 new Justices of the Peace were installed to sit in the sheriffdom of Grampian, Highland and Islands. Each of the new JPs was invited in turn to swear the oaths or affirm in the presence of invited friends and family. Also present was the Lord Lieutenant of Inverness-shire. All but one of the justices, who have been appointed to serve in courts as far apart as Wick and Aberdeen, stayed long enough to be caught on camera with the Sheriff Principal.



Memo to Justices

by Catriona Sagar, Legal Adviser in North Strathclyde

Cadder V. Her Majesty's Advocate [2010] UKSC 43

Background

You will probably all have read in the newspapers about this case, in relation to which a judgement was issued by the Supreme Court on 26th October 2010. It is a ground breaking case for Scots criminal law.

Peter Cadder was convicted of two assaults and a breach of the peace at Glasgow Sheriff Court in 2009. He appealed his conviction and took his case to the UK Supreme Court arguing his right to a fair trial under Article 6 of the European Convention on Human Rights had been breached because the evidence in his case included answers provided to questions asked by police in an interview conducted without legal advice.

He based his appeal on a case previously heard at the European Court of Human Rights, *Salduz v. Turkey*, in which the European Court ruled that access to a lawyer is part of the fundamental right to a fair trial and that incriminating statements made during police interrogation without access to a lawyer should not be led in evidence.

In Scotland a 6 hour detention period was provided for by legislation. As a matter of practice, and contrary to the position in England, police officers in Scotland had generally declined to allow suspects access to legal advice during this period.

The Supreme Court have now ruled in *Cadder* that this contravenes an individual's right to a fair trial, even taking into account other protections offered to suspects in Scotland including the short detention period, the right to silence and the requirement for corroboration.

The Effect of Cadder

The decision will have the following effect in Scotland:-

All suspects now have the right to the advice of a solicitor whilst detained. The *Cadder* judgement appears to imply that a solicitor should be personally present at the police station before questioning takes place – advice via the telephone is not thought to be sufficient.

As a practical measure to allow solicitors to attend in person the period of detention without charge has risen.

It is anticipated that a high volume of appeals will be generated. Although the Supreme Court was clear that closed cases should not be reopened, the ruling will be applied to all live appeals and current and pending cases.

The country's legal aid bill will be significantly increased.

Whilst currently no negative inference can be drawn from an accused person exercising their right to silence this may now change as a result of *Cadder*.

As confessions in the absence of a solicitor cannot now be relied on there is doubt as to whether the rule of corroboration, a cornerstone of Scots law, will survive.

Law Reform

The *Cadder* decision did not come as a complete surprise and interim guidelines had been issued to defence solicitors during the summer in anticipation of the judgement.

Almost immediately after the decision was released, Ministers announced plans to change Scots law with emergency legislation, and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was passed on 27 October.

According to this legislation, the period of detention without charge has risen from 6 hours to 12 hours, with the potential to increase this to 24 hours in some circumstances.

In an attempt to limit the number of appeals, a time limit has been placed on the right to lodge a Bill of Advocation or Suspension. These must now be lodged within three months of the final disposal of the case, although the High Court can choose to grant an extension where appropriate. In addition, the Scottish Criminal Cases Review Commission, which investigates possible miscarriages of justice, must have regard to the need for finality when deciding whether to refer a case back to the High Court and the High Court has the power to veto a reference in the interests of justice.

Legal aid provisions have also been reviewed, removing the means test for individuals in detention and providing universal access to all suspects.

Senior Judge Lord Carloway has been asked to look into all matters arising from *Cadder* including the right to silence and the rule of corroboration, and will report to government within months.

Working arrangements will require to be put in place in relation to defence agents who are now effectively "on call" at all times of day and night. A duty rota has been suggested but this may be more problematic in remote locations.

Application to the JP Courts

You will probably be aware of a number of Devolution Minutes lodged in your own courts pending an outcome of the *Cadder* decision.

On a practical level, the Crown is likely to desert these cases which cannot be proven without recourse to submissions made without advice of a solicitor. In relation to all other cases, *Cadder* must be followed and the Crown will require to proceed to trial without this evidence.

If you are in any doubt about anything presented to you in Court in relation to *Cadder*, you should consult your Legal Adviser.



Scotland Falls into Line on

I am delighted to reproduce an article by Maggie Scott, QC, a leading Counsel on Criminal Appeals, commenting on the 'legal journey' of the Cadder case which has merited so much recent attention and has wide ranging implications.

Maggie Scott has been a QC since 2002 and called to the bar in 1991. Previously she was a solicitor in Glasgow and prior to that worked for Release in London and the GLC. She has an MA from Edinburgh and LL.B. from Strathclyde. She acted for Mr Megrahi and Tommy Sheridan and was also involved in the T C Campbell Ice Cream Wars case, HMA v Galbraith which altered the law on diminished responsibility and Holland and Sinclair the Privy Council cases on dock identification and disclosure of Crown witnesses previous convictions and current cases. She acts for Nat Fraser whose case is to call in the Supreme Court next year. Editor.

The Response to Cadder v HMA

The decision in Cadder v HMA is one which should be welcomed. It has secured the basic right to legal advice before police interview and provided protection against self-incrimination. It is a right which most Scots – or at least those whose knowledge about police stations comes from watching 'The Bill' on TV - have assumed already existed. It has finally brought Scotland into line with all other European countries – albeit we are the last jurisdiction to do so. We have now had corrected an embarrassing omission in our criminal procedure – what is there not to like ?

Press reports of the response to the decision from some legal sources and politicians suggest a response which is at best begrudging and at worst openly hostile. Most of all I have been dismayed by the response of Scottish Ministers – as stated in Parliament and in press statements. In seeking to justify emergency legislation the First Minister and the Justice Minister have portrayed the position as

one which is unfortunate, one which tips the balance against the prosecution of crime and worst of all as stemming from unwelcome interference by London judges. This response does not bear proper examination.

The starting point is the application of the European Convention of Human Rights. Those who disapprove of the incorporation of Convention rights into our legal and criminal justice system can properly claim this is the root of the 'problem'. But those of us who approve of and seek the development of Convention rights within our legal system and those lawyers (including prosecutors and judges) who have to apply the Convention, have to recognise and embrace the consequences. There are two things it is important to appreciate about the Convention. First, it only guarantees minimum rights within signatory states. That is the basic rights within any criminal justice system which are necessary to secure a fair procedure or trial. Secondly the Convention and the European Court of Human Rights is concerned only with procedural fairness – such as the right to a fair trial. It is not concerned with the substantive criminal law as such.

In the constitutional settlement under devolution, Convention rights were placed at the heart of the constitution, in that under the Scotland Act the government was deprived of power to act in any way which was not compatible with Convention rights. So, for example, Scottish legislation which is contrary to basic Convention rights will be rendered null as being beyond the power of the parliament. This is something which Scots ought to be proud of. It does not – as seems to be suggested – place us in any disadvantage to the rest of the UK. Rather it robustly secures human rights within our governmental structure. Under the Human Rights Act which applies throughout the UK, legislation which is contrary to Convention rights cannot be struck down in the same way (as beyond the powers of Westminster parliament) but it must be interpreted in a way which secures human rights and if this is not possible, any such legislation falls to be declared as incompatible with the Convention rights. At the end of the day the practical result is much the same – any such legislation will require to be addressed and 'fixed' to secure Convention rights.

Within this structure concerns have been raised about the effect of the Scotland

Act provisions upon the Lord Advocate and the prosecution of crime. Whilst the Lord Advocate remains a member of the Scottish Government, s/he cannot act in any way in the prosecution of crime which is not in keeping with Convention rights. But in practical terms this is not really any different to the requirement upon the prosecution which arises under the Human Rights Act and applies throughout the UK – if the DPP in England acts in a way which infringes Convention rights any such action is unlawful. Claims that the Lord Advocate has acted in a manner which breaches the right to a fair trial, or claims that the prosecution anywhere in the UK has breached the right to a fair trial, are ultimately adjudicated by the UK Supreme Court (UKSC). In this way the application of human rights and standards of procedural fairness are harmonised throughout the UK.

That is the constitutional scheme we have adopted and it needs to be understood in order to examine some of the claims or complaints being made post- Cadder.

It is not the UKSC decision in Cadder which is unfortunate, but the failure to recognise and remedy the unfairness in our procedures before now, which is unfortunate.

The provision of a basic right to legal advice before police interview has nothing to do with 'balancing' competing rights. It seems to be suggested by the Justice Minister that the provision of this right takes something away from the prosecution and police. What is that exactly? The power to question an uninformed and unprotected suspect and gain incriminatory evidence behind the closed door of the police station? Allowing a suspect access to legal advice does not prevent the police from conducting an interview – it only protects against unfair questioning or interview. There is a real danger here that once the provision of this right is viewed as taking something away from the prosecution, it thereby entitles the prosecution to remove some other existing right or protection – tit for tat. This is a dangerous and unjustified approach.

Most importantly, in the light of this decision, Scottish Ministers have muttered darkly of interference by London in our Scottish criminal justice system. The Scottish judiciary in submissions to the Calman Commission have already complained of such. The Advocate General



Human Rights

has now been asked to consider the position and to report in a matter of a few short weeks, absent any proper time for consultation. I fear such misplaced - albeit high placed - muttering is becoming a full campaign to somehow, anyhow, cut off the route to the Supreme Court created under the Scotland Act. This needs to be strongly resisted.

The Supreme Court decision in Cadder was entirely predictable, if not inevitable, in view of the decisions on the issue by the European Court of Human Rights. That being so, what is called into question is not the decision of the Supreme Court, but the earlier decision of 7 Scottish judges which wholly failed to enforce the right to legal advice. The decision of the Scottish Appeal Court in its interpretation of the requirements of the European Convention was simply, in the words of Lord Hope of Craighead, not tenable. The question that is raised here is how did the Scottish judges get it so wrong? The answer, in my view, is rooted in a repeated refusal by Scottish judges in criminal matters to engage with and accept the consequences of the application of Convention rights. An example of this arose in Cadder where the Scottish Appeal Court refused to entertain an application for leave to appeal to the Supreme Court. Leave was subsequently granted by the Supreme Court itself. Accordingly the real concern here is the failure of the Scottish court to follow and apply human rights under the Convention – in this instance unlike the rest of Europe.

The decision of the Supreme Court concerns the specific issue of Convention rights that was raised. As I have indicated the Convention is only concerned with issues of procedural fairness – it and the Supreme Court are not concerned with and do not ‘interfere’ with the substantive criminal law in Scotland. The jurisdiction of the Supreme Court is restricted to the application of human rights (raised as devolution issues) under the Scotland Act. Further, in respect of procedure or practice it is only where the act of the Lord Advocate is involved that a devolution issue arises. Again an example arises in Cadder itself where a complaint was raised that the judge misdirected the jury on the identification evidence in the trial. This complaint was refused leave and not considered - because it did not properly raise a devolution issue. It is quite wrong to suggest that the Supreme Court ‘interferes’ with the jurisdiction of the Scottish Appeal

Court in regard to substantive criminal law.

The Justice Minister also seeks to justify his criticism of ‘interference’ by the Supreme Court, by reference to the proud and ‘admired’ system of criminal justice in Scotland. Unfortunately in recent years the Scottish criminal justice system, notwithstanding the requirement of corroboration, has lagged behind other comparable jurisdictions in both its development of the criminal law and in respect of procedural rights. Examples include our failure to introduce proper disclosure of information to the defence; our narrow and restrictive approach to appeals; our failure to develop an pro-active judicial role in the protection of the fairness of trials; our failures to provide adequate safeguards regarding identification evidence and, as evidenced in this case, our failure to fully embrace and properly implement Convention rights in criminal cases. It is my experience that we are no longer so admired internationally. In any event, as I have said, the development of Scots criminal law remains in the hands of the Scottish Appeal Court, it is only where there has been procedural unfairness that the Convention applies and the Supreme Court has the option of review.

The Justice Minister further complains of a ‘small industry’ of lawyers who take cases to London. I must, presumably, declare myself a member of same. This is only because I consider it my duty to pursue my clients constitutional right to appeal to the Supreme Court to enforce his/her human rights. I have regrettably found it necessary to take the long road to London on a number of occasions, because of the failure of the Scottish courts to secure those rights. The very fact of this complaint highlights the misplaced hostility involved here.

In fact, the decision in Cadder demonstrates the need to have Scottish access to the Supreme Court in order to properly protect human rights. If such access is denied then the Scottish people – alone within the UK – will be truly disadvantaged.

Maggie Scott QC

Editor: I am grateful to both the Scotsman and to Ms Scott for permission to publish this article which first appeared in the Scotsman 8 November 2010.

Local Forums For Justices

A pilot scheme for holding local forums for justices has taken place in Dumbarton and the sheriffdom of SSDG and with a successful outcome. SCS agreed to pay travel to these meetings but not loss of earnings.

Justices serving Dumbarton JP court have reached agreement with Scottish Court Services on holding local meetings on issues relevant to their court. Terms of Reference for consultative meetings of justices have been approved by David Forrester on behalf of SCS. They will be shared with Sheriffdom Business Managers to allow them to consult with their Sheriffs Principal as a possible way forward to allow justices from other courts to meet. Although some “tweaking” may be required to meet local circumstances, the model is one with which SCS has expressed satisfaction. SJA members wishing to explore holding their own meetings of justices may wish to obtain a copy of the approved Terms of Reference from David Grainger, grainger4@ntlworld.com

The forums in the south part of SSDG were very informal but being a rural area they met in the middle where there was to a training night. However, meeting for 30-45 minutes prior to a training meeting was less than desirable and the conclusion was that we would meet on a 3 monthly basis but not in conjunction with training. For many people it was impossible to get to the meeting at 6.30pm. The forum was open to all justices across the sheriffdom and only justices attend the meeting and any problems which are raised are taken to the Sheriffdom Legal Adviser and if necessary can go to the Sheriffdom Business Manager and then on to the Sheriff Principal. This ensures that an issue has been discussed and agreed to be raised as a problem by the justices.

The SSDG justices did not use the Terms of Reference above but had a very informal method of choosing a chair who took any notes and undertook to inform the LA of any problems.

Forums are an excellent method of justices being able to meet informally. However, we are all tasked with making savings where possible and the forums will have to prove to be effective and value for money in the long run.



Challenges from lack of Change

A view from south of the border



Cindy Barnett Past Chairman Magistrates Association

I last visited Scotland in the summer of 2008. This is of course a terrible admission, an even worse introduction to an article in this newsletter, and I expect many of you to stop reading at this point! However, please bear with me so that I can thank all of you for giving me the opportunity for that visit – I was invited to talk to you, at your Annual Justices Conference, in my capacity as Chairman of the Magistrates' Association of England and Wales. You gave me a very warm welcome, I enjoyed the trip immensely and it is a real pleasure to have the chance of writing this article now.

Thinking back over my time first as Deputy Chairman (2002-2005) and then Chairman of the Association (2005-2008) I can remember all too clearly that there were immense changes to the structure of the courts, the organisation of government and of course to legislation. At about the exact moment that I was elected as deputy chairman two huge pieces of legislation dropped through everyone's letterbox – shortly before Christmas – with an urgent need to get a detailed response together by early January. That set a pattern that continued without much let-up for the whole of the six years, and I know that little has changed since I finished my term of office. The work was immensely rewarding, but

of course there were negative as well as positive points that came up during the six years, and experience from those years may well be of interest today. Judicial independence, sentencing powers and resourcing of the courts were principal recurring themes.

I am sure that everyone, if asked, would acknowledge the importance of a judge being totally impartial. Magistrates sit in court as judges, but have a dual role as members of the judiciary and members of our local communities. This seemed at times to confuse both the media and a range of outside bodies who thought it right to "advise" us on sentencing! Time and again I remember patiently explaining that we were not employed by a government department or anyone else – that we were not told what to do in court – and above all that we would never impose any sentence in order to fulfil a target. We were questioned in other ways because various people genuinely did not understand certain fundamental points - that we sentenced in accordance with the law and on the basis of the information before us in court, and that we had to consider people's means when assessing financial penalties and costs. All levels of court can be criticised, of course, but it was lack of understanding of our judicial role that led to this type of pressure on our independence. A separate concern related to our principal legal advisers, our Justices' Clerks. They guide us on the law and deliver our training, yet under unified administration of the courts they now have both an administrative and a judicial role. They are civil servants and line managed within Her Majesty's Courts Service (HMCS) but, through legislation, they have guaranteed independence when exercising their case management powers in court or advising magistrates (and they extend this guaranteed independence to all our legal advisers in court). We exerted a great deal of pressure to ensure safeguards for this independence, and were delighted that the judicial route to our training was placed beyond question when the Judicial

Studies Board took on responsibility for the legal training of Justices' Clerks and all legal advisers. Unfortunately, the number of Justices' Clerks has dropped dramatically over recent years and the connection between individual magistrates and their principal legal adviser is becoming more remote – a continuing worry.

Moving on to sentencing powers, a lot of work went on during my term preparing for the new sentence of custody plus – powers of sentencing up to 12 months but with the majority of that time being under supervision in the community rather than in custody. For a variety of reasons a decision was taken at the last moment (after training had begun) to stop implementation of that piece of legislation, but debate has continued since over our having extended custodial powers. Ironically, a major concern running alongside all this was a reduction in our workload because of the rise of out of court disposals. Simple cautions, conditional cautions, fixed penalties, penalty notices for disorder – the list seemed never ending and the numbers rose dramatically. While the pendulum is swinging the other way at present, there can be no doubt that many matters have moved out beyond the court under the guise of being "minor and less serious". I stick to the principle that diversion of genuinely minor matters is entirely acceptable, but sentencing must remain a matter for the courts. There was a suspicion then that one reason for diversion was related to finance, and that brings me to my final issue – resourcing of the courts.

Money is always a difficult issue. It is certainly so at present and we are all aware of an overarching need to make savings. It is however with slight weariness that I look back to the beginning of 2007 and the Magistrates' Association focus on what we termed "Cutting Costs – Jeopardising Justice". At the time I set out what we were doing in these terms – "publicising each and every way in which justice is being ill-served because of inadequate resources". Neither then nor now is it our business to finance the courts, but who is better placed than we are to point out the effects on the delivery



Ewan Hawthorn JP



On 16 July 2010 Ewan Hawthorn, a Justice of the Peace of Lothian and Borders was admitted to the Faculty of Advocates.

Ewan will be well known to all Justices of the Peace from his spell as a legal assistant with the Judicial Studies Committee when he helped organise the successful series of Refresher and Induction Courses in 2007 and 2008 and the Annual Conferences of 2008 and 2009. Ewan also carried out the lion's share of the work in preparing the Justices of the Peace Bench Book, Signing Manual and Legal Advisers' Manual.

As many of you will know Ewan is already well qualified with a BSc in Biological Sciences as a graduate at Edinburgh University in 1985 to which he added a Bachelor of Arts with Honours in Mathematics at the Open University and a Master of Science in Mathematics in 1990. Ewan pursued a career in academia and was a mathematics tutor at Napier and Edinburgh Universities. He also lectured at the Open University.

Ewan has been a Justice of the Peace in Edinburgh since 1995. Through his work as a Justice of the Peace he became interested in the study of law and graduated in law at Edinburgh University. Ewan is the first legal assistant to be able to use his time at the Judicial Studies Committee to count towards a bar apprenticeship which is a necessary prerequisite for becoming an advocate.

In November 2009 Ewan started his training as an advocate-which is called "devilling". After a spell of lectures and examinations which he passed with flying colours, Ewan shadowed two experienced advocates-who are now both Queen's Counsel before he was called to the Bar.

Ewan's family and friends were able to attend the ceremony in the Advocates' Library at Parliament House when Ewan was the first of six new advocates to be admitted to the Faculty. Shortly after this ceremony before the Dean and other office bearers of the Faculty of Advocates, Ewan was presented in court before Lady Clark, one of the Court of Session judges, and took the oath as advocate.

Since then Ewan has made a number of court appearances on his own account and assisting more senior advocates. In addition however, Ewan continues to sit as a Justice of the Peace when "resting" between engagements.

Frank Crowe
Sheriff at Edinburgh

of justice? To quote again from the same article:- "We have no axe to grind, no salary to protect, no career worries to hold us back. But as members of the public, as well as magistrates, we see the many ways in which the system is strained to the limit – and the degree of time and effort that we freely give to our role shows our passionate commitment to justice in our courts being as swift as possible but above all fair and impartial". A year later, and I was expressing the same concerns as budgets tightened further – and here we are at the end of 2010 with ever-increasing financial pressure in every conceivable sector. It occurred to me that those principal themes and indeed many other well known points can be looked at under just two headings:- Are we properly valued? Are we properly supported? I think I would give a "yes", but a qualified "yes" to both those questions.

We are unquestionably both valued and supported by the more senior judiciary. The changes since 2002 have meant that the magistracy as a whole has been more fully integrated into what is described as the judicial family (and I know there have been similar developments in your own jurisdiction). We do however need to continue educating others as to our judicial identity, and our essential dual role which is such an important link between society and the delivery of justice. We need to retain the support of our Justices' Clerks, and build support for an increase rather than decrease in our jurisdiction. On the question of practical and financial support, the position is far from perfect but in that the courts are not alone. What is vitally important is to be aware of the effects of "efficiency savings" (or whatever term is used) on justice itself – and as I have said we are well placed to highlight these and should be properly consulted during the necessary discussions. Challenges such as these were current throughout those six years I have described, and remain today. But one thing is certain – in this role of ours we are used to challenges!

Driver Blames Dyslexia

A 40-year-old speed merchant, who was clocked doing 103mph in a 60mph zone, has blamed dyslexia for his extravagant speed.

A driver was reported as "weaving in and out of traffic as he sped along the A27 between Falmer and Hollingbury in East Sussex" and was "smoking a cigarette and gesticulating

at other drivers while passing their vehicles".

In Hove Crown Court, the prosecutor said: "He told the police officer that he did not understand the speed dial because he was suffering from dyslexia." However, the Recorder was "sceptical" about this defence, and slapped Cook - who admitted dangerous driving - with a three-year driving ban. He also ordered him to take an extended driving test.



Justices of the Peace Annual General Conference

This year's Annual Conference took place from Friday, 22 to Sunday, 24 October 2010 at The Beardmore Hotel & Conference Centre, Clydebank. 61 Justices of the Peace (JPs) from all six Sheriffdoms attended though some experienced rather challenging journeys due to a serious accident on the A9.

When planning this event, invitations were sent out to the JPs who had not attended a national training event in the previous two years. The intention of the Judicial Studies Committee (JSC) is to vary the timing of the Annual Conference as well as the venue in order to afford JPs the flexibility and convenience to attend at a time that suits their personal and business commitments. All JPs should attend a national training event once every five years but it is never possible to avoid all local holidays.

Plans are nearly finalised regarding the venue and the date of the 2011 Annual General Conference which will be announced shortly. We will again be inviting JPs who have not yet been to the Annual Conference in 2008-2010. This year's event was well received by participants who found it to be a valuable opportunity to meet fellow JPs and share experiences in an informal environment.

Representatives from each of the Sheriffdom Justices' Training Committees attended this year. That establishes and maintains an important and vital link between national and local training delivery.

The Conference

The Conference covered a wide range of topics from judicial skills of presiding in court, contempt of court, working with Legal Advisers, sentencing, case management, assessing witnesses, judicial ethics, diversity and conduct including an unscripted police intervention of a real life application to one of the delegates for a search warrant. Practical law at its highest!

The focus of the conference was on facilitator led, small group sessions. These sessions comprising a number of practical exercises were led by the nine facilitators representing legal and practical experience gleaned across the Sheriffdoms. Their work was much appreciated as justice is

not about 'one size fits all' and experiences across Scotland enhanced the training provided in these groups.

Training included scenarios from the recently filmed DVD on Case Management & Behaviour in Court showing that cases do not always proceed in court quite in the way that a person might always anticipate. Dealing with the unexpected generated much debate and discussions about interesting experiences that JPs had encountered in their years of service. We must thank both Judy Tolley and Sue Cook, JPs from Lothian & Borders for their time in assisting us with the filming of the DVD.

The session on 'Case Management: Delay and the effect on the Justice System' delivered a key message for delegates to take back which reflects changing times for the courts in managing 'churn'. Effective case management in reducing delay from the bench is required. 'Summary justice is intended to be summary. A Trial Diet is not a dress rehearsal.' [Dempster v PF Dumbarton 7 April 2010]

The purpose of the training is to discover what does work and what may not work in dealing with particular and challenging situations that do arise in court. There are no prescribed ways of doing things. The Annual Conference provided delegates with an opportunity to discuss and practice skills that assist in performance of judicial duties and builds on the JPs' extensive knowledge. The buzz at dinner demonstrated that JPs were taking the opportunity to network and share experiences and concerns with fellow JPs.

Feedback on the Conference from those who took the time was much appreciated by the Directing Team at the JSC. Comments that help us to develop and improve our training for the future are extremely valuable. It was rewarding to meet so many committed and enthusiastic delegates and extremely gratifying to hear remarks such as in 'over 20 years in attending conferences that it was the best that I have been to.'

Judicial Studies Committee

Judicial Studies Committee



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