

## **Justice Committee**

### **Scottish Civil Justice Council and Criminal Legal Assistance Bill**

#### **Written submission from Scottish Women's Aid**

#### **Foreword**

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women's Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women's Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

#### **Introduction**

We support the proposals to introduce contributions to the criminal legal aid scheme. For a long time, women have complained of the injustice, a position supported by SWA, in the apparent ease by which a perpetrator of a criminal offence involving domestic abuse, stalking or harassment can obtain criminal legal aid to defend his case, while the woman experiencing this abuse or intimidation finds it more difficult to access civil legal aid to secure legal means of protection from this criminal behaviour because she has to pay contribution to her legal aid costs, a situation recently acknowledged by the Cabinet Secretary for Justice.

However, the focus of our response is Part 1 of the Bill which sets up the Scottish Civil Justice Council ("SCJC") and we are restricting our comments to this.

The proposed functions of the SCJC in the Bill go far beyond the existing remit of the existing Sheriff Court and Court of Session Rules, through the SCJC being given additional powers to:

- keep the civil justice system under review;
- provide advice and make recommendations to the Lord President on the development of and changes to the civil justice system; and
- provide advice on any matter relating to the civil justice system as the Lord President may request.

In carrying out its remit, the SCJC must keep the needs of those who use the civil justice system to the fore. To achieve this, it must ensure that the needs of all relevant parties, meaning litigants, potential litigants or users of other justice services, not simply lawyers, judges or court staff, are taken into account and that they are actively consulted and involved in this process. However, we believe, that in its current form, the Bill does not accomplish this.

In view of this, we believe that the following areas of the Bill require attention:

- The proposed duty on the SCJC to promote methods of resolving disputes which do not involve the courts is inappropriate – **section 2**
- The deficiencies in the proposed make-up of the SCJC membership in relation to a lack of court-user representation and a lack of transparency and clarity on how appointments to the SCJC and its subcommittees– **sections 2 and 6**
- The lack of any duty or requirement placed on the SCJC to undertake meaningful and public consultation with court users and bodies having an interest in the civil justice system - **section 3**
- A lack of transparency and clarity in how the Court of Session will exercise their powers and process in relation to accepting, rejecting and modifying rules proposed by the SCJC - **section 4**
- The need for clarity and transparency on the role of the Lord President - **sections 4 and 11**

SWA welcomes the opportunity to provide written comment on these important proposals. We wish to be considered to provide oral evidence to the Justice Committee on the matters we have raised in relation to Part 1 of the Bill setting up the SCJC.

## **Section 2 - Functions of the SCJC**

The Bill states that the SCJC's functions are to not only to review the practice and procedure followed in civil proceedings in the Court of Session and Sheriff Courts, and to draft rules governing their procedure, but also to provide advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system. This is a considerable widening of the remit and responsibility of the existing Rules Council.

We have two main concerns in relation to the principles which will govern the functions of the SCJC, namely the promotion of ADR and the lack of any statement to the effect that in carrying out its functions, the SCJC must keep the needs of those who use the civil justice system to the fore and that the needs of all relevant parties using the courts, as detailed above, will be taken into account, actively consulted and involved in this process.

## **Principle that the SCJC should have the need to improve the operation of the civil justice system for all users**

Simply giving the SCJC the power to “*consult such persons as it considers appropriate*” and “*co-operate with, and seek the assistance and advice of, such persons as it considers appropriate*” does not meet this obligation. The SCJC is obliged to ensure that it proactively takes the needs of all interested parties, particularly court users, into account and this should be stated as a founding principle and one of the functions at its core.

## **Promotion of dispute resolution as a founding principle of the SCJC**

Of equal concern for us, is the statement in the Bill that in carrying out its functions, the SCJC “*must have regard to*” certain principles which include that “*methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.*”

In our view, this particular duty is beyond the acceptable remit of a body originally tasked with making governing rules of court and recommendations on practice and procedure followed in civil proceedings in the Court of Session and Sheriff Court.

It is not for the SCJC to “promote” any procedure over another as this immediately creates a bias in favour of that procedure and an expectation that this procedure will be used as a first step in every case, despite the caveat of “*where appropriate.*”

The Scottish Government, for cost-cutting reasons and to decrease the amount of business going before the courts, is looking to promote alternative dispute resolution, including arbitration, conciliation and mediation across all civil court “disputes” as the first option in “dispute resolution.” There is no indication as to how the SCJC will identify which disputes are “appropriate” for non-court involvement and we are very apprehensive that family law cases involving domestic abuse will be swept into the “appropriate category.”

Firstly, domestic abuse not a “*dispute*” and it must be recognised that the woman and the abuser are not simply having a “disagreement”, have not “fallen out” and have not become “entrenched in their positions”. A clear distinction must be made between persons litigating because of a dispute and women, children and young people experiencing domestic abuse who are seeking protective orders, or an order regulating an abuser’s opportunity for contact and residence of the children. Quite simply, they are certainly not involved in what could be lightly referred to as a “*dispute*” or have a “*problem*” which can be “*sorted out*” or “*easily resolved*” by negotiation; the issue is much more serious and determines their right to live in safety and their protection from abuse.

The accepted position across many jurisdictions is that mediation is wholly incompatible with protecting the interests of women, children and young people experiencing

domestic abuse<sup>1</sup>. Despite this, we are aware that inappropriate referrals occur already; advisers with no understanding of domestic abuse have directed them towards the process and women have engaged in mediation at the behest of their lawyer because it has been suggested that if they do not do so, the courts will regard them as unreasonable, obstructive or hostile should they refuse to attend and that this may have implications for the eventual outcome of child related actions.

Domestic abuse is not a matter which can be solved by the parties discussing their respective positions, allowing the other to consider the other's position and reaching an agreed settlement. It is reprehensible to even expect that a woman experiencing domestic abuse should be asked to consider the abuser's position. The very nature of domestic abuse and the abuse of power makes it unsuitable as a practice which involves the parties having to, and sometimes being ordered to, reach an agreement. The abuser may have spent many years ensuring that his partner does not have a voice, and is punished for expressing any opinion contrary to his wishes. Therefore it is extremely unlikely, and unreasonable to expect, that the woman will be able to overcome years of fear to be able to voice what she wants in the best interests of her own and her child's safety and welfare, in the presence of a man who has silenced, intimidated and coerced her.

This inherent power balance means that women may be manoeuvred into a position which is not in her best interests and may prejudice both her safety and that of the child and there is also nothing to stop an abuser forcing/persuading the woman to enter into mediation, simply to continue to perpetrate the abuse and wield power over her.

Women's experiences, and the research, show that women have been assaulted after attending mediation and that the mediation process has had to be halted because of the aggression of the abuser.

Further, it should be understood that cases where domestic abuse is present are not going to be "resolved" by Alternative Dispute Resolution ("ADR"), mediation, referral to counselling, parenting classes or anger management. Domestic abuse is not a matter for "resolution" as it not due to the behaviour of all of the parties concerned, but of the determined and persistent behaviour of one of the parties. Consequently, in this situation, the authority and presence of the court and a Sheriff or judge is the only way to convey to abusers that their behaviour will not be tolerated and that women, children and young people are fully entitled to the intervention of the full weight of the law to protect them and bring about their safety.

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<sup>1</sup> Johnson NE, Saccuzzo DP and Koen WJ (2005). Child Custody Mediation in Cases of Domestic Violence : Empirical Evidence of a Failure to Protect; *Violence Against Women* 2005 11: 1022

Bryan, P. (1992). Killing us softly: Divorce mediation and the politics of power. *Bluff Law Review*, 40, 441-523.

Grillo, T. (1991). The mediation alternative: Process dangers for women. *Yale Law Review*, 100, 1545-1581

Hart, B. (1990). Gentle jeopardy: The further endangerment to battered women and children in custody mediation. *Mediation Quarterly*, 8, 326-327.

Regrettably, it is the experience of women using our services, a position reflected in both domestic and international research, that neither the courts nor mediation have served women experiencing domestic abuse well, as a consequence of judiciary and mediators lacking an awareness and understanding of the dynamics and effects of domestic abuse on women and particularly on children relating to contact and residence.

It is therefore important that a distinction is kept to the fore between what the Bill and other discussion and consultation papers refer to as civil “*disputes*” and cases involving domestic abuse when considering how best the law and the courts can protect women, children and young people.

### **SCJC rule-making process**

Our final issue relates to the rule-making process itself and the need for clarity on the development of rules and a radical rethinking of how they are constructed. Since the rules relating to practice and procedure are intended not only for the use of the court service, lawyers and the bench but also litigants, they must be clear and easily understood

The Bill should clarify this because a balance needs to be struck to avoid rules either being couched in oversimplified language, so that they are ambiguous and ineffective, or being too technical and full of jargon. A balance is therefore needed and the functions of the SCJC should extend to the production of an equivalent of an explanatory note which might be required for particularly technical matters.

### **Section 3- Powers of the SCJC**

This section states that, in pursuance of its functions, the SCJC “*may consult other persons as it considers appropriate and may co-operate with, and seek the assistance and advice of, such persons as it considers appropriate.*”

Given that the SCJC’s remit is to be considerably expanded beyond simply producing amendments to rules and procedure, as it does now, consultation is a vital and key element, if not the cornerstone, of its foundation. The fact that the power to consult, and who to consult with, is discretionary and not mandatory will result in the work of the SCJC being neither suitably informed by relevant interests nor subject to appropriate scrutiny by court users and those who represent their interests.

Women, children and young people experiencing domestic abuse are often overlooked in reforms to civil law, mainly because civil cases are regarded as “disputes” between the parties and the focus is, therefore, on “dispute resolution” which, as we have explained above, does not, in any way, take the dynamics and impact of domestic abuse into account.

To ensure that their voices are heard, the Bill must, therefore, contain a general obligation on the SCJC to consult and work with other organisations and individuals, including court users, with an interest in the civil justice system

Such engagement will be necessary to ensure the work of the SCJC, particularly the function of keeping the system under review, is suitably informed by all relevant interests, including court users, through the opportunity to comment on proposals and their annual plan. The SCJC must be transparent, accountable and subject to appropriate scrutiny and this also involves placing a duty on the SCJC that their work, including the introduction of new court rules, is appropriately communicated to the public and relevant parties.

This is particularly important given the imbalance in the proposed membership; of the proposed 20 members of the SCJC, only 2 are specified as representing court users. In this situation, there is little opportunity for the recommendations of the SCJC to be subjected to an appropriate degree of the scrutiny by those who use the courts and are subject to any changes to the civil justice system.

If there is no obligation on the SCJC to consult the public and external organisations who have experience and understanding of these matters, then the SCJC will not be able to consider all the positive, negative and , perhaps, unforeseen, consequences of any proposals, and, thus, court users will not have confidence in these decisions.

#### **Section 4 - Court of Session to consider rules**

This section states that the Court of Session must consider any draft civil procedure rules submitted to it by the SCJC and may approve the rules, with such modifications as it considers appropriate, or reject the rules.

However, the Bill does not set out any criteria governing these decisions and setting out the basis when and why the Court of Session would or would not accept a rule. This must be clarified on the face of the Bill, possibly by stating that the Court or the Lord President will produce criteria, reasons and guidance for this matter.

We would suggest that there may be a potential conflict of interest regarding the role of the Lord President in relation to this duty since the SCJC must have regard to guidance issued by the Lord President, who also has overall control of the Court of Session, and the judicial members of the SJCJ are also members of the Court of Session.

#### **Section 6 – Composition of the SCJC**

We note that the SCJC is to have not more than 20 members and is to be comprised of the Lord President, the Chief Executive of the Scottish Court Service, the principal officer of the Scottish Legal Aid Board, a member of the Scottish Government, at least 4 judges, at least 2 practising advocates, at least 2 practising solicitors, at least 2

*“consumer representative members” and “up to 6 other persons considered by the Lord President to be suitable to be members of the SCJC. “*

### **Non-lawyer members**

Our first concern relates to the composition of the SCJC; the proposals are such that the SCJC only has two “non-lawyer” members, the “*consumer representative members*,” representing the interests of the general public and court users. This is completely insufficient, given the wide-ranging powers of the SCJC and is far from appropriate in terms of representing the needs and views of the varied and broad spectrum of court-users.

Two non-lawyer members afford little opportunity for the recommendations of the SCJC to be subjected to an appropriate degree of the scrutiny by those who use and are subject to any changes to the civil justice system. These “*consumer representative members*” are in an absolute minority in terms of the constituency they represent and it is debatable as to whether they will at all be in a position to meaningfully influence the work of the SCJC. These members will carry little or no weight and, unfortunately, appear nothing more than a token gesture to demonstrate public representation on the SCJC.

We would also add that this matter is not addressed by the fact that the Lord President has the power to appoint up to 6 other persons considered by the Lord President to be suitable to be members of the SCJC, as there is no guarantee that any of these would be consumer representatives. Even if 6 were to be appointed, this would still leave representation of court users at 8 out of 20.

To ensure transparency, accountability and public confidence in the decisions and proposals of the SCJC, we suggest that a least half should be individuals or members of organisations representing court users. It is not in the interests of justice that the SCJC be dominated by those who are not using the system and non-lawyer members will provide much-needed understanding of the issues that are important to those involved in the system who are neither lawyers nor judiciary.

In terms of the how the proposed reforms to civil law and procedure will be dealt with by the SCJC, having equal representation from non-lawyers on the SCJC will be vitally important in ensuring that the position of women, children and young people experiencing domestic abuse is, as we have highlighted above, not ignored. Further, given the issues raised by the ***B v G [2012] UKSC 21*** case and the debate this has provoked on the need for reform to the system, this non-lawyer involvement will be particularly relevant in terms representing the experiences, views and needs of children involved in civil procedures, insight which is often unheeded in the development of law and process.

### **“Consumer representatives” as the sole non-lawyer members**

Secondly, we are concerned about the intention to specifically appoint “*consumer representative members*” and the fact that the Bill specifically identifies these people as “*requiring experience and knowledge of consumer affairs and knowledge of the non-commercial legal advice sector*”. This clearly suggests that the preferred persons will have a background in consumer affairs, thus effectively excluding membership of the SCJC to anyone other than the Citizens’ Advice Bureau or generalist advice providers, and completely ignoring the issue of family law.

The SCJC must have members representing family court users. There have been significant changes to child and family law over the last few years and any future discussions within the SCJC on reforms to family law and procedure must be carried out with appropriate representation and input from those using the family courts, which will include these SCJC representatives actively ensuring that women, children and young people experiencing domestic abuse, and children generally, have a voice. We would like to discuss this matter further with the Scottish Government as these proposals develop.

### **Appointments process**

Finally, while the Bill provides that the Lord President will set up an appointments process for the non-judicial members that the Lord President appoints, there is no statement that a similar process will be set up by the Lord President for the judicial members.

This represents a clear conflict of interest and may impede the decision-making ability of these appointees, given that the Lord President is head of the judiciary in Scotland and these appointees will be accountable to him.

It also does not follow accepted good practice in public appointments and the membership should be decided by an independent panel, following the process for other public appointments.

### **Section 11- Chairing of Meetings**

In addition to having the power to appoint the majority of the SCJC members, including the judicial members, the Bill proposes that the Lord President also chairs the SCJC.

Again, we do not consider that this is appropriate, given, firstly, that the judicial members are accountable to the Lord President as head of the judiciary in Scotland. Further, the SCJC will be providing a public function, looking at both rules and policy and is a body tasked with keeping the system under review. The Lord President is responsible for implementing these decisions, which raises a conflict of interest.

The Chairmanship of the SCJC would not be problematic were it to solely have responsibility for reviewing the rules of practice and procedure; however, it is not workable for the SCJC's wider application.

Therefore, while the SCJC should, and must, be accountable to the Lord President there should be flexibility in this role and that it should be chaired by an independent, lay person.

### **Section 13- Committees**

We support the proposal that the SCJC has the power to establish committees to assist them in their functions and decision-making but would emphasise that this is not a substitute for our recommendation above that least half of SCJC's members should be individuals or members of organisations representing court users.

Such committees would benefit from having non-SCJC members and the Bill should make provision for their appointment, particularly for the involvement of non-lawyers, since such persons with expertise relevant to the specific topics will be of great assistance to the SCJC and its committees

Again, the Bill does not address the process by which committee members will be appointed. Therefore, an obligation should be placed on the SCJC, in the legislation, that they produce and publish a publicly accessible process

Scottish Women's Aid  
27 July 2012