

## **Justice Committee**

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

#### **Written submission from Citizens Advice Scotland**

Citizens Advice Scotland and its member bureaux form Scotland's largest independent advice network. CAB advice services are delivered using service points throughout Scotland, from the islands to city centres.

Citizens advice bureaux in Scotland helped clients with almost 550,000 new issues in 2009/10 – almost 1,500 new issues for every day of the year. Over 270,000 clients brought new issues to a bureau over the year.

In 2009/10, Scottish bureaux achieved a financial gain of almost £116million for clients based on funding of £14.8million (including £6.8million in core funding). This means that CAB clients were better off by £17 for each £1 of core funding given to bureaux.

#### **General Comments**

Citizens Advice Scotland (CAS) welcomes the establishment of a Scottish Civil Justice Council (SCJC) as a body ensuring the effective operation of the civil justice system.

As an organisation who represents clients in the civil justice system we have commented only on the civil provisions of the Bill. In 2011/2012, there were 5,500 representations made by Citizens Advice Bureaux on behalf of clients including Bureaux staff and legal clinics. The Citizens Advice Mediation project successfully mediated over 80% of the cases referred to them by the Sheriffs in Edinburgh Sheriff Court. These referrals represent 90% of the civil business in Edinburgh Sheriff Court.

#### **Key Points**

Citizens Advice Scotland believes that:

- The policy function of the SCJC should be of primary importance over rule making functions. We see the SCJC as a policy and research body integral to the success of the reforms and operational model the Making Justice Work Programme (MJWP) is working towards
- It will be crucial that there is a body to take strategic oversight of civil justice for end-users, the judiciary and the system as a whole during the reforms and then afterwards to the end of maintaining a sustainable civil justice system
- The Council should promote accessibility to individuals seeking justice as its primary audience through clearly written procedural rules, in plain English and free from legal jargon

- Alternative dispute resolution (ADR) should be promoted at the earliest possible stage and consideration of resolution methods other than courts should be enshrined in legislation from the establishment of the SCJC, not added to the remit as the priorities in the civil justice landscape change with the implementation of the MJWP
- The powers of the Council should be less discretionary and the Council should be required to exercise certain powers
- The SCJC should be required to report to the Scottish Ministers as well as the Scottish Parliament and Scottish Ministers should be required to take note of such policy
- Membership of the Council should represent a more equal and legislated balance of judiciary and practitioners from all tiers of the new civil justice landscape envisaged in the MJWP: there should be equal representation of Courts, administrative justice and ADR from the inception of the Council
- The criteria for lay and consumer members should be legislated and the balance of judges/practitioners and stakeholders should be more equal
- As the consumer champion going forward and in light of the civil justice work carried out by the Scottish Association of Citizens Advice Bureaux, CAS should have a place as a member of the SCJC
- The appointment process for membership of the Council should be in line with the public appointment process

## **Provisions of the Bill**

### **Section 2: Functions of the Council**

We support the functions of the SCJC as set out in the draft Bill. We believe that a significant aspect of s2(1)(a), keeping the legal system under review, should be through a research and policy function. Achieving a coherent, accessible and sustainable civil justice system is the fundamental spirit of the Gill review and the MJWP. This ethos of sustainability should be the core driver of the work of the SCJC.

The encompassing civil justice system envisaged as the product of the Gill reforms will shine new emphases on the branches of the civil justice system, spanning traditional and alternative dispute resolution methods. This process will not be immediate however and while the Gill reforms impact, the civil justice landscape will be changeable.

It will be crucial that there is a body to take strategic oversight of civil justice for end-users, the judiciary and the system as a whole.

In the short term, this means embedding the fundamental principles of access to justice in all tiers of the new system. These principles should mean that end-users access a justice system that is accessible in all aspects; in physical access, in cost and in clear procedural rules. Another major aspect of accessibility of the system will be in an assurance of coherence – ensuring that the fallback is not traditional court mechanism but alternative resolution methods are promoted and the policy intentions of the MJWP are adhered to.

Effective operation of this new system will require a body to assure the principles of accessible justice are guaranteed to users at all tiers of a coherent system, where each tier understands and appreciates the contribution of the others. In this remit it will be essential for equal consideration to be given to each aspect of the civil justice system from the traditional court system to wider administrative justice and alternative dispute resolution

In the long term, CAS believes the role of the SCJC should continue to be a predominantly policy role. CAS also believes that alongside this role, the SCJC should have a research function with the overarching purpose of maintaining the ethos of the MJWP through continual review.

The principles underpinning the MJWP should ensure a civil justice system which is fit and accessible for the users of today, both judiciary and end-users. It is vital that the changes of the coming years are not allowed to settle and glacially. This will lead to a situation where another major review will become necessary in 10 or 15 years. The spirit of Gill is to empower an accessible, useable and sustainable system which should be the spirit of the SCJC.

### ***Functions***

We believe that the policy and research function should be the primary purpose of the SCJC and the rules-making function should stem from this as a subsidiary function. This policy and research function should be with the purpose of maintaining an accessible, user-focused system and should be sufficiently resourced financially and in statutory authority: the policy work should have the power to consult widely and to appoint expert contributors to specific pieces of work.

CAS welcomes the inclusion of the principle of s2(3)(d) that alternative dispute resolution methods should be promoted where appropriate but we feel this speaks to wider and more fundamental changes in the civil justice system which should be more vocally acknowledged in the legislation. We believe that the wider civil justice system, including administrative justice and ADR, should be actively considered within the policy remit as being integral to the new civil justice landscape.

The remit of s2(1)(a) should therefore be considered to have two branches: review of the legal system as it relates to users, and review of the landscape of the legal system including how the tiers of the civil system interact.

In maintaining access to justice as framed in the Gill review and the MJW programme, users are rightly at the centre of considerations. We would regard litigants as the primary user audience: those individuals seeking justice. Through the

in-court advice projects, Citizens Advice has experience of the common difficulties faced by those individuals in accessing the legal system.

Maintaining accessible justice which puts individual users at the core of the process is a desirable aim and should continue to actively inform any framework for reform or continuous review. The pursuit of civil claims is an important public service outlet in a society where rights are valued. The public are significantly more likely to access the civil justice system in pursuance or defence of their rights than the criminal justice system and problems with accessibility should not prohibit this.

End-users should be able to access a system which is accessible in location, in cost and in clarity of procedural rules. An important part of accessibility in the new landscape will also be coherence of the system, where each tier understands, appreciates and promotes the benefits of the others from ADR to the Court of Session. Such oversight will ensure a functioning overall system and the SCJC should be responsible for the monitoring of this functionality.

The emphasis on cohesion should be in place from the outset of the SCJC and equality of each tier should be included in legislation (see membership below). If equality is not represented as an ideal from the outset, there is a danger that functions the SCJC may subsequently require will not be treated with the importance they deserve, for example the administrative justice functions which may come to the SCJC from the potential abolition of the Administrative Justice and Tribunals Council.

A definition of 'the civil justice system' should be clear from the outset of the legislation. Expressly including ADR and administrative justice as equal priorities in the functions of the SCJC should ensure a cohesive, accessible and sustainable civil justice system which will be empowered to be flexible to the necessary changes of the civil justice landscape.

To ensure the functions of the SJCJ are effective, we do not think that sections 2(1)(d) and (e) of the proposed remit of the SCJC should be limited to providing advice and making recommendations to the Lord President on the development of, and changes to, the civil justice system. We consider the remit should extend also to advising the Government (who retain the ultimate policy responsibility in the civil justice field) on these matters. We believe this should be enshrined in the legislation.

### ***Principles***

Overall, CAS support the principles which are highlighted as the guiding principles to which the SCJC should have regard. However, we do feel that the principles could be clarified.

s2(3)(a) and (b) outlines the principle that the civil justice system should be fair, accessible and efficient, with clear procedural rules. These are principles which CAS believe should undoubtedly underpin the work of the SCJC but there should be clarity here as to the intended audience. CAS believes that these principles should be executed with litigants or potential litigants as the primary audience and legislation should reinforce this. The balance of fairness, accessibility and efficiency

should never be to the detriment of end-users and procedural rules should be in plain English with no difficult legal terminology or jargon.

s2(3)(c) outlines that practice and procedure should be similar in all civil courts which is positive to the end of consistency but CAS believe this should not automatically imply that lower courts learn from the Court of Session. When citizens seek to exercise their civil rights through the civil justice process, traditions and formalities of court processes can be prohibitive factors in accessing justice. The success of the Tribunal system and the rising success of ADR, which both harness more informal routes to civil justice redress, present principles which the Court of Session (CoS) and Sheriff Court could learn from in their approach to administering civil justice. Any harmonisation should not be to the detriment of losing proportionality of the level of justice each tier represents, but in pursuit of third tier civil claims, the level has more in common with tribunals than the SoC and lessons should be applied accordingly. We would be concerned if the level of formality in the SoC were to be extended to other courts and processes.

CAS agree that alternative dispute mechanisms should be promoted (s2(3)(d)) but we would go further to require these to be promoted at the earliest possible stage. The experience of the Citizens Advice Edinburgh In-Court Mediation project has proved that mediation can be a very successful tool in dispute resolution. Over 80% of cases which are referred for mediation are resolved successfully within a very short timeframe. Further, the compliance rate for the mediated decisions is high as parties have reached an outcome together.

However, the experience of the project has highlighted a need for procedure to acknowledge ADR methods earlier. Cases must be referred to the project by a sheriff after a summary cause hearing is raised. On completion of the mediation the case must be closed again in front of a sheriff. Despite the success rate of mediation, a significant proportion of Court time is tied to referrals and closures of cases. If access to ADR was encouraged as a tier before any court process resources could be better used within Courts.

It is for reasons like this that CAS believes the civil justice system should be treated as a whole from the outset: Courts, administrative justice outlets and ADR.

### **Section 3: Powers of the Council**

The use of the word 'may' throughout s3 is positive in the permissive powers granted but CAS believes that the SCJC should be required to exercise certain powers. As part of the policy and research function, we believe the wording of s3(2) should be changed to read 'In particular, the Council should:' This would retain discretionary powers under s3(1) which makes the s3(2) list of powers non-exhaustive but in requiring the exercise of certain powers would enact the transparency and accountability we believe should be required of the SCJC.

In any body which performs a function of ultimate interest to the public, transparency, accountability and consistency should underpin the powers that body holds.

Although the SCJC is not to be a public body in operation the public interest in the work of the Council should mean that its framework for operation is akin.

Part of this is that SCJC should maintain consistency in its function. Policy and research should be legislated inclusions, and s3(2) should represent required outcomes of those functions. The provisions of s3(1) should be relied upon only when something emerges which is not currently envisaged and so not currently required in the enacted remit.

If the expectation is that the SCJC will perform research functions (as the explanatory notes imply), the powers which relate to the successful execution of research should be explicitly referred to in legislation. s3(1) does allow for the power to commission research by virtue of its flexibility but as research is not a required function, it is quite possible that one Council will use the power to commission research and the next will not. This could lead to a situation where 'the SCJC' is a changeable body which turns on the priorities of the then Lord President which would not be in keeping with the principles of transparency.

A check on this would be a requirement for the SJCJ to provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system (s3(2)(f)) and in return for the Scottish Ministers to be required to take regard of that information. Although there is a requirement for the annual report of the SCJC to be presented to the Scottish Parliament, the lack of reporting to the SG implies that civil policy is a matter for the Lord President and we believe that this takes too narrow a view. The English Civil Justice Council are required to undertake such reporting and the functions of the body are strengthened as a result.

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

CAS believe that the power of the CoS in this section to modify or reject draft rules put forward by the SCJC is contrary to the ethos of treating the civil justice system as an encompassing spectrum. Such a power could empower the CoS to make refusal or amendments to rules which have been drafted to the benefit of the wider spectrum of power thus making their contribution disproportionate. It would also go against the principles of accountability, transparency and consistency which are vital to the legitimate operation of the body.

If this power is to be retained in some form, it should be to either pass or send back draft rules with comments. As rules are likely to be drafted after a process of research and consultation, considering comments would become part of the enactment process. It is hoped that this section will not be relied upon significantly as the CoS should be consulted in any draft rules before they are presented to them for approval.

#### **Section 5: Annual programme and report**

CAS agree with the provision that the Council should prepare an annual report of its objectives and priorities at the outset of the period and a report of its activities at the end of the period. We also agree that the report should be presented to Parliament

but further we believe that the report should be presented to Ministers of the Scottish Government.

Before the publication of the objectives and priorities, we believe that there should be a requirement to consult on this annual plan with relevant stakeholders.

## **Section 6: Composition of the Council**

### ***General comments on membership***

Section 6 of the Bill stipulates that the SCJC should contain at least 9 judges and legal practitioners, but only two from the consumer community and none for the user community. This imbalance is out of keeping with the Civil Justice Council of England and Wales.

CAS consider that the Bill's provisions on the composition of the SCJC should contain a more equal balance between judges and practitioners on the one hand and other stakeholders on the other, with latter category including business and non-business users, consumers, advisers, insurers, and academics. The discretion which the Bill currently allows should be tightened to determine this group and strengthen its diversity through consistency. We believe criteria for membership of the Council should be set out in legislation.

In seeking a balance between judges and practitioners, we believe that from the outset, there should be a proportional representation of members from each of the tiers of the new civil justice landscape, including administrative justice and ADR. When the MJWP is complete, the civil justice system will have re-distributed emphasis throughout the system – not just focusing on the courts. As a body to take strategic oversight of the civil justice system, the innovation of the SCJC should begin now and give equal regard in legislation to the tiers who will form the system at the summation of the programme.

The inclusion of a diversity of stakeholders, judges and practitioners should not however add to the number of members of the Council. We consider 20 to be the maximum number of Council members, and if this number climbs higher we believe it would be to the detriment of the effective function of the Council.

### ***Consumer membership***

In terms of consumer members, in the light of the planned transfer of functions from Consumer Focus Scotland to the Citizens Advice Service, we consider that at least one member of the new SCJC should be drawn from Citizens Advice Scotland to represent both the consumer and individual user interest.

The UK Government announced in (April 2012) new proposals to officially make the Scottish CAB Service a champion for consumer information, advice, education and advocacy – in addition to its current role as a provider of free, impartial and confidential advice. As a result of these changes, CAS (and Citizens Advice England and Wales) will become the publicly-funded voice of consumers across Great Britain, championing their needs and empowering them to make the right choices for themselves.

Not only are CAS the consumer body going forward, projects within the Scottish Association of Citizens Advice Bureaux currently represent users in the civil justice system at many levels. In 2011/2012, the Citizens Advice Bureaux in Scotland made 5,500 representations in courts and tribunals, not counting the cases which were resolved before the point of representation. Accordingly the Scottish citizens advice service is in an excellent position to represent the consumer interest as well as provide a perspective on engagement with the civil justice system.

### ***The role of the Lord President***

CAS believes that the role of the Lord President in relation to the SCJC should be reconsidered. We agree that the SCJC should report to the LP in their capacity as the head of the Scottish Court Service, and we also agree that the SCJC should listen to the requests made by the LP to inform their remit. However, we feel that if the LP is to sit on and chair the SCJC then poses problems with transparency and accountability.

We believe that there should be a clear separation of roles between the LP and the SCJC and the way to ensure this is to withdraw the possibility of the LP sitting on or chairing the Council. This will ensure that the Council can act as an independent advice body, working with the LP to influence policy impartially without any risk of being partisan to the wishes of the then LP.

### **Section 7: Lord President appointment process**

We believe that, like with the appointment process of Consumer Focus (Scotland) and CAS, appointments to the CJC should be in accordance with public appointments procedures and the principles set out by the Public Appointments Commissioner for Scotland, including a merit based process which is fair, open and transparent, has person specifications and interviews.

As a body which provides a function in the public interest, the principles of appointment to and operation of a public body should apply to the Council even if they are not defined as a public body.

### **Section 10: Expenses and remuneration**

CAS agree that membership of the SCJC should generate expenses and/or remuneration. In paying expenses, the Council will be able to open its membership to a wider pool of candidates who otherwise may not be able to participate because of loss of income. The work of the Council will be strengthened through the widest possible pool of the best candidates without the prohibition of loss of income.

### **Section 11: Chairing of meetings**

We can see arguments for and against the chair being a senior judge. However, given the success of lay chairs in SLAB, the Judicial Appointment Board and the Scottish Legal Complaints Commission, we think there is a strong argument for a lay

vice chair with the power to chair meetings of the SCJC when the main chair is not present.

If the legislation sets out a minimum number of lay representatives and criteria for lay appointments then the task of assuring a lay vice chair will be made easier.

### **Section 13: Committees**

CAS welcome the power of the SCJC to establish Committees and think that this will be a valuable tool in the policy and research function of the Council. However, we do feel that there should be a clearly outlined procedure in the legislation for appointment of non-members to Committees in line with the principles of a fair, open and transparent appointment process.

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