

## Justice Committee

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

#### Written submission from Consumer Focus Scotland

Consumer Focus Scotland is the independent consumer champion for Scotland. We are rooted in over 30 years of work promoting the interests of consumers, particularly those who experience disadvantage in society.

Part of Consumer Focus, our structure reflects the devolved nature of the UK. Consumer Focus Scotland works on issues that affect consumers in Scotland, while at the same time feeding into and drawing on work done at a GB, UK and European level.

We work to secure a fair deal for consumers in different aspects of their lives by promoting fairer markets, greater value for money, improved customer service and more responsive public services. We represent consumers of all kinds: tenants, householders, patients, parents, energy users, solicitors' clients, postal service users or shoppers.

We aim to influence change and shape policy to reflect the needs of consumers. We do this in an informed way based on the evidence we gather through research and our unique knowledge of consumer issues.

#### Key Points

1. Consumer Focus Scotland supports the establishment of a Scottish Civil Justice Council (SCJC). We consider this to be an important means of ensuring the effective operation of the civil justice system. Critical to this is its planned policy function, and we support this function extending beyond the civil courts to the wider civil justice system. We would support the SCJC's remit including administrative justice.
2. We believe it is essential that the structure and operation of the SCJC reflects the following:
  - The SCJC will have a policy function, rather than simply be a rules-making body.
  - Its remit extends to the wider civil justice system rather than just the civil courts.
  - The civil courts and civil justice system provide a public service<sup>1</sup> and there is therefore a clear public interest in the work of the SCJC.

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<sup>1</sup> See for example: Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review; Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive; Scottish Government (2010) *Scottish Government response to the report and recommendations of the Scottish Civil Courts Review*, Edinburgh: Scottish Government

3. We believe the needs of users of the civil justice system must be central to the work of the SCJC. To reflect this, we think the SCJC should have regard to two additional principles when undertaking its functions:
  - The need to improve the operation of the civil justice system to the benefit of its end users.
  - Ensuring that the needs of all interested parties, including users and potential future users, are taken into account, through a process of proactive engagement.
4. We do not believe that the proposed composition of the SCJC is appropriate to undertake its full range of proposed functions. We believe the following changes are required:
  - Additional criteria should be used to ensure the membership contains the necessary expertise to undertake its functions.
  - There should be equal members of 'lawyer' and 'non-lawyer' members.
  - The role of the Lord President in relation to the SCJC should be reconsidered.
5. It is essential that the SCJC is accountable and transparent, and that its work is subject to appropriate scrutiny. Areas where we believe the Bill should be strengthened in this regard are:
  - There should be a general requirement for the SCJC to consult and work with other groups and bodies with an interest in the civil justice system, including users.
  - The Court of Session's ability to reject or modify the rules proposed by the SCJC should be applied only when the rules fail to meet certain specified principles. Reasons for the decision to reject or modify proposed rules should be given.
  - The process for appointing members to the SCJC and its sub-committees must be transparent. We believe that all judicial, advocate, solicitor and non-lawyer members of the Council should be appointed within the principles of fair and open competition and best practice for public appointments.
  - There should be a clear separation of roles and responsibilities between the SCJC and the Lord President.
  - The SCJC should be required to submit its annual plan and annual report to the Lord President.

## **Consumer Focus Scotland Stage 1 evidence on the Scottish Civil Justice Council and Criminal Legal Assistance Bill**

### **Introduction**

1. Consumer Focus Scotland, and its predecessor organisation, the Scottish Consumer Council, have campaigned for many years for improvements to the civil justice system to ensure it better meets the needs of its users.
2. We support the establishment of a Scottish Civil Justice Council (SCJC). We believe its creation will be a key means to avoid in future the type of piecemeal reforms that were criticised by the civil courts review, and which have led to a

court system that does not deliver 'the quality of justice to which the public is entitled.'<sup>2</sup>

3. We welcome the opportunity to submit evidence to the Justice Committee on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. We are commenting only on Part 1 of the Bill, on proposals to establish a Scottish Civil Justice Council.

## **Comments on the Bill's provisions**

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

#### *Functions*

4. We support the functions of the SCJC as set out in the draft legislation. We agree the SCJC should have a policy function. It should be able to proactively keep the civil justice system under review and be able to make recommendations to the Lord President and Scottish Ministers. We believe the SCJC's policy function should be its primary function; it is through the undertaking of this function that the drafting of new rules would likely be required. Having such a strategic oversight of the civil justice system will be an important means of ensuring the system is operating effectively in the interests of its users. We believe it will also help to prevent more costly wholesale reforms being required again in the future. It will be essential that the SCJC has sufficient resources to enable it to undertake its wide range of functions.
5. We welcome the intention that the SCJC's remit should extend to the wider civil justice system rather than simply the civil courts. One of the key benefits of establishing the SCJC is its potential to consider and oversee all different elements of the civil justice system, including how they are functioning together as a whole. We are therefore pleased that one of the key principles of the SCJC is to promote, where appropriate, methods of dispute resolution which do not involve the courts.
6. We would also support the SCJC's remit being extended to include both administrative justice and tribunals. The administrative justice system is a hugely important means for consumers to resolve their disputes. The organisation with current responsibility for keeping the administrative justice system in Scotland under review, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), is intended to be abolished by the UK Government. It is vital to ensure that the functions of the SCAJTC, particularly in relation to making administrative justice and tribunals increasingly accessible, fair and effective by ensuring that the needs of users are central,<sup>3</sup> are retained. We would suggest that the SCJC may be an appropriate body to assume such functions, provided it is suitably constituted. We would have concerns if there was a gap between the abolition of SCAJTC and the SCJC assuming such functions, resulting in the

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<sup>2</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

<sup>3</sup> Administrative Justice and Tribunals Council Framework Document, Ministry of Justice, November 2007

needs of users being insufficiently represented at a time of substantial change in the administrative justice system.

### *Principles*

7. Overall we support the principles to which the SCJC must have regard, subject to the following comments.
8. The civil courts and civil justice system are an important way for people to assert or defend their rights. As such, they have been recognised as providing a public service.<sup>4</sup> Any reforms to the system must therefore be designed around the needs of those who ultimately use it. The needs of users of the civil justice system must be therefore be central to the work of the SCJC.
9. To reflect this, we think the SCJC should have regard to two additional principles when undertaking its functions:
10. Firstly, we think the SCJC's work should be underpinned by the need to improve the operation of the civil justice system to the benefit of its end users – by this we mean litigants, potential litigants or users of other justice services, rather than lawyers, judges or court staff.
11. Secondly, we think the SCJC must ensure that the needs of all interested parties, including users and potential future users, are taken into account when undertaking its functions, through a process of proactive engagement. This was recently recommended by the Civil Justice Advisory Group, chaired by Lord Coulsfield.<sup>5</sup> Such engagement will be necessary to ensure the work of the SCJC is suitably informed by all relevant interests, and is subject to appropriate scrutiny. It will be particularly important for the SCJC to seek innovative ways to gather the views of individual users of the civil justice system, who likely to be members of 'seldom heard' or harder to reach groups. We do not think simply giving the SCJC the power to consult and co-operate with appropriate persons is sufficient to address this - ensuring such engagement should be a fundamental principle under which the SCJC operates in order to ensure transparency. This engagement should include ensuring that the work of the Council, including the introduction of new court rules, is appropriately communicated to relevant parties.
12. We have the following observations on two of the proposed principles:
13. S2(3)(b) (rules relating to practice and procedure should be as clear and easy to understand as possible.) It is crucial that this means as clear and easy for litigants to understand as possible, rather than the judiciary or legal professionals.

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<sup>4</sup> See for example: Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review; Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*, Edinburgh: Scottish Executive; Scottish Government (2010) *Scottish Government response to the report and recommendations of the Scottish Civil Courts Review*, Edinburgh: Scottish Government

<sup>5</sup> Consumer Focus Scotland (2011) *Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group*, Glasgow: Consumer Focus Scotland, recommendation 15

The civil courts review, for example, recommended that its proposed simplified procedure for claims under £5000 should have rules ‘drafted for party litigants rather than practitioners.’<sup>6</sup> We believe that rules should, where possible, be straightforward, easy to understand and drafted in plain English. If any rules require a degree of complexity, there should be a presumption that explanatory notes for litigants accompany the rules.

14. S2(3)(c) (practice and procedure should, where appropriate, be similar in all civil courts.) We would broadly welcome attempts to simplify the current complex set of court procedures, and to ensure consistency of practice, particularly across sheriff courts. We know that sometimes the same types of cases can be dealt with differently in different sheriff courts, and believe that users should be entitled to expect consistent treatment regardless of which sheriff court district they happen to live in.
15. However, it is essential that the requirement to have regard to this principle does not prevent the SCJC from taking fully into account the different environments that exist in the sheriff court and the Court of Session when determining civil procedure. We have previously expressed concerns about some proposed consistent approaches being disproportionate for application in the sheriff court.<sup>7</sup> We would be concerned if the desire for a similar approach led to increased formality in the sheriff court. Moves towards consistency should not be at the expense of allowing flexibility to take account of the differences in case type, complexity and formality of proceedings, type of litigants or level of legal representation in the sheriff court.

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

16. It is essential that the SCJC operates in an open and transparent fashion in order to ensure it is subject to an appropriate degree of scrutiny. This is because there is a clear public interest in the broad range of functions the SCJC is to perform. If it operates effectively, it should be highly influential in the future development of the civil justice system in Scotland. It is therefore crucial that those affected by any changes to policies or procedures – in particular users of the courts and wider justice system - are given sufficient opportunity to input into the SCJC’s work.
17. We note the provisions of clause 3 are permissive (that the Council may make use of certain powers). This leaves the use of such powers as discretionary. We have particular concerns if the powers of the SCJC to consult such persons as it considers appropriate (s3(2)(d)) and co-operate with, and seek the assistance and advice of, such persons as it considers appropriate (s3(2)(e)), were to be seen as optional. In order to ensure the work of the SCJC is suitably informed by relevant interests, and is subject to appropriate scrutiny, we believe there should be a general requirement for the SCJC to consult and work with other groups and bodies with an interest in the civil justice system, including users.

<sup>6</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review, chapter 5 at paragraph 131

<sup>7</sup> Consumer Focus Scotland (2011) *Consumer Focus Scotland’s response to the consultation on lay representation in the Court of Session and the Sheriff Court*, Glasgow: Consumer Focus Scotland

18. In particular:

- The SCJC should consult on all significant proposed rules changes, to enable all interested parties, including court users, the opportunity to comment on the proposals.
- The SCJC should proactively co-operate with, seek the assistance of, and consult with users of the court system as well as other relevant interests, as part of its policy function of keeping the system under review.
- The SCJC should consult widely on its annual plan, in order to ensure it is focusing on the appropriate issues. This would be in keeping with the current practice of other relevant organisations, such as the Scottish Law Commission.

19. We would note that the power to commission research is not explicitly identified in the Bill, although from the explanatory notes it is anticipated that the SCJC would take such action. The civil courts review recommended that the SCJC should have the power to commission research, and the Civil Justice Council in England and Wales has such a power. While the power to commission research would be permitted by virtue of s3(1), it may be helpful for this to explicitly identified within the powers of the SCJC.

20. We note that s3(2)(f) enables the SCJC to provide advice and make recommendations to Scottish Ministers on the development of, and changes to, the civil justice system. We are unclear whether section 65(2) of the Judiciary and Courts (Scotland) Act 2008, requiring Scottish Ministers to have regard to the information, advice and proposals provided by the Scottish Court Service, would apply to any advice given by the SCJC. It may be helpful for any obligations on Scottish Ministers or the Lord President to have regard to the advice and recommendations of the SCJC to be set out in the legislation.

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

21. We agree that the Court of Session should consider the draft rules of the SCJC. However, we do not agree that it should have an unfettered ability to make any modifications it considers appropriate to the draft rules or to reject the draft rules proposed. If the SCJC and its sub-committees encompass a wide range of interests and take an open and inclusive approach, we would expect any rules it drafts to be well informed. Its wide remit, particularly its ability to look at the civil justice system more widely, and its potential future responsibility for tribunal rules, means it may be preparing rules in the context of wider changes to the civil justice system.

22. In light of this, we believe the Court of Session should be able to reject or modify the rules proposed by the SCJC only when the proposed rules fail to meet certain identified principles. Examples might include if the proposed rules were incompatible with other rules, or disproportionate. Where the decision was taken to reject or modify the proposed rules, we think it would be appropriate for reasons to be given by the Court of Session for why that is the case. We believe this should be set out in the legislation.

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

23. We agree that the SCJC should prepare an annual plan and annual report and lay both documents before the Scottish Parliament.
24. We note from the policy memorandum that it is intended that the SCJC is to be accountable to the Lord President. As the Bill is currently drafted, we are not entirely clear how this is to be achieved. In order to ensure that the SCJC is accountable to the Lord President, we think the SCJC should also be required to submit its annual plan and annual report to the Lord President.
25. As noted above, in order to ensure that the SCJC is focussing on the appropriate issues, we believe the SCJC should also be required to consult widely on its annual plan. This would be in keeping with the current practice of other relevant organisations, such as the Scottish Law Commission.

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

26. We do not believe that the proposed composition of the SCJC is appropriate to undertake its full range of proposed functions. In particular we do not think the proposed membership reflects the SCJC's policy function, or that its function extends beyond the courts to the wider civil justice system.
27. We have three key comments on the SCJC's membership:
- Additional criteria should be used to ensure the membership contains the necessary expertise to undertake its functions.
  - There should be equal members of 'lawyer' and 'non-lawyer' members
  - The role of the Lord President in relation to the SCJC should be reconsidered.

#### *Additional membership criteria*

28. It is important that within the membership of the SCJC, there is the range of necessary knowledge and expertise required for the SCJC to undertake its statutory functions effectively, and to ensure it is able to have regard to the principles set out in the legislation. It is important that knowledge and expertise of the membership reflects the fact the SCJC has a policy function as well as responsibility for preparing court rules, and that its policy function extends beyond the courts to the wider civil justice system.
29. We think it is desirable for the required knowledge and expertise required within the membership of the SCJC to be set out on the face of the Bill. Membership criteria for the consumer representative members are currently specified in the Bill. There are other areas where we believe the functions (or intended functions) and principles of the SCJC require additional membership criteria to be used to ensure sufficient expertise:
30. We believe it is necessary for at least one member of the member of the Council to have knowledge or experience of some form of alternative dispute resolution (ADR). Ideally, this should include one member from a specific ADR background. This is important to ensure that the SCJC has the necessary expertise when

having regard to the principle that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

31. If, as intended, the SCJC's remit is widened to include administrative justice, it is important that the membership should include members with knowledge and experience of the administrative justice system. We would suggest that at least two members would be appropriate: one with knowledge of tribunals, and one with knowledge of the wider administrative justice system, such as an ombudsman or complaints handling process. This is to reflect the current remit of the Scottish Committee of the Administrative Justice and Tribunals Council.
32. If such issues are of sufficient importance to be included within the functions and principles of the SCJC, then we believe they are sufficiently important to warrant the explicit requirement that the Council membership includes persons with knowledge of such issues.

#### *Categories of membership*

33. We support the inclusion of consumer representative members, and agree with the criteria proposed for such membership.<sup>8</sup> We do, however, think the number of such representative should be increased to ensure the consumer representative members reflect the broad range of interests of those who use the courts and wider civil justice system, including members of the public and other specific interest groups, such as business users.
34. We would emphasise however, that membership of the Council should not be limited only to those who can bring the perspective of different elements of the civil justice system. It would also be desirable to include some 'public interest members' so that the SCJC can benefit from the insight brought by those from different walks of life, and particularly those without any legal expertise.
35. The SCJC's proposed maximum 20 members is already significantly larger than proposed in the Scottish Government's consultation, which suggested around 15 members. In order to ensure good governance, we do not think that applying additional membership criteria should result in a Council larger than 20 members. It may be desirable for the membership, in practice, to be less than 20 members.

#### *Equal numbers of 'lawyer' and 'non-lawyer' members.*

36. The current design of the SCJC is weighted in favour of the judiciary and other legal interests ('lawyer' members) rather than user or other relevant interests ('non-lawyer members'). While the 'LP members' could be used to increase the proportion of 'non-lawyer' members on the SCJC, such members are discretionary.
37. It is our view that there should be equal numbers of 'lawyer' and 'non-lawyer' members on the SCJC. We believe it is important that the equal numbers of

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<sup>8</sup> The Bill provides that the consumer representatives between them should have knowledge of consumer affairs, knowledge of the non-commercial advice sector, and an awareness of the interests of litigants in the civil courts.

'lawyer' and 'non-lawyer' members be set out on the face of the Bill. As noted above, we also think it would be appropriate for some of the membership criteria to be explicitly set out in the legislation.

38. Including sufficient 'non-lawyer' members will be an important means of ensuring that the work of the SCJC is sufficiently informed by user rather than 'provider' interests. This is particularly important given the SCJC is to have a policy function as well as a rule drafting function, and its remit extends beyond the courts to the wider civil justice system. Within such a context, and in recognition that the courts and civil justice system provide a public service, we do not believe it is necessary or appropriate for the SCJC to be dominated by judicial and legal interests. 'Non-lawyer' members can provide valuable insight into issues that are of particular importance to non-professional users of the system. These insights will be particularly important when the SCJC is considering issues other than courts.
39. The SCJC having equal numbers of 'lawyer' and 'non-lawyer' members would follow best practice, and would be in keeping with similar bodies within the justice field, such as the Judicial Appointments Board and the Scottish Legal Complaints Commission. The Civil Justice Council in England and Wales has moved to equal membership following an independent review which found its previous composition was too weighted towards judges and legal practitioners and did not feel user driven.<sup>9</sup>

#### *The role of the Lord President in relation to the SCJC*

40. We agree that the SCJC should be accountable to the Lord President as head of the Scottish Court Service. However, to ensure the SCJC is seen to be transparent and accountable in its operation, we believe there requires to be a clear separation of roles and responsibilities between the SCJC and the Lord President. We therefore believe the role of the Lord President in relation to the SCJC needs to be reconsidered, and in particular, whether he should be a member of the SCJC and act as chair.
41. As currently proposed, the Lord President has a range of different roles relating to the SCJC. These include:
- The SCJC is intended to be accountable to the Lord President.
  - The Lord President is to sit on the SCJC and can act as chair.
  - The Lord President has responsibility for appointing the judicial, advocate, solicitor, consumer representative and LP members of the SCJC.
  - The Lord President can inform the remit of the SCJC by asking it to provide him with advice on particular issues.
  - The Lord President will have responsibility for implementing, if appropriate, the policy recommendations of the SCJC in his role as head of the Scottish Court Service, and approving (with or without modification) or rejecting the draft rules of procedure prepared by the SCJC in his function as presiding judge of the Court of Session.

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<sup>9</sup> Ministry of Justice (2008) *Review of the Civil Justice Council: Responding to the needs of users. Report of an independent review by Jonathan Spencer CB*, London: Ministry of Justice

42. We believe it is important that the SCJC provides independent advice to the Lord President, to assist him in his responsibilities. In order that this advice is – and is seen to be – independent, we think there requires to be a clear separation of roles and responsibilities between the SCJC and the Lord President. We believe the Lord President’s position on the Council itself, and the process to be used by him to appoint members, are the key areas in need of review.
43. In order to create a separation of roles and responsibilities between the SCJC and the Lord President, we would suggest it is not appropriate for the Lord President to sit on, or chair, the SCJC. In order to ensure that the SCJC is sufficiently accountable to the Lord President in his role as head of the Scottish Court Service, however, we think the SCJC should be required to submit its annual plan and annual report to the Lord President as well as the Scottish Parliament.

#### **Clause 7: Lord President appointment process.**

44. We welcome the requirement that the Lord President is prepare and publish a statement of the appointment practice he will follow. However, there are two ways in which we believe these provisions should be strengthened.
45. Firstly, we believe s7(2) should be widened to include the judicial members. As currently drafted, there is no requirement for the Lord President to publish a statement for how judicial members will be appointed to the SCJC. In the interests of transparency, we believe the Lord President should be required to publish a statement of how the judicial members will be appointed.
46. Secondly, we believe the provisions should be strengthened to ensure the process for appointing all judicial, advocate, solicitor, consumer, and any potential LP members, is a transparent appointments process, operating within the principles of fair and open competition and best practice for public appointments. For example, we would be concerned if the Lord President was able to continue with the current system for appointing legal members to the rules councils – whereby the Law Society of Scotland and Faculty of Advocate nominate members to the Lord President – when appointing legal members to the SCJC. We believe such a process would lack transparency
47. In light of the SCJC’s functions, in which there is a clear public interest, we think that appointments for all of the judicial, advocate, solicitor and non-lawyer members, should be made through a transparent appointments process, operating within the principles of fair and open competition and best practice for public appointments. Our preference is for such appointments to be made by means of a selection panel.

#### **Clause 9: Disqualification and removal from office.**

48. We would suggest it may be appropriate for the Lord President to prepare a policy covering the procedure to be used when considering whether to remove a member from the SCJC.

### **Clause 10: Expenses and remuneration**

49. We support the provisions on expenses and remuneration. Enabling the Scottish Court Service to remunerate certain categories of members is desirable; this may be a key means of opening up the membership to people not otherwise in a position to apply for such a post. This could result in a potential widening of the range of people who apply to be members, and in particular could be an important means of encouraging diversity in appointments.

### **Clause 11: Chairing of meetings**

50. We do not agree with the proposals that the only persons able to chair meetings are the Lord President, or a judge of the Court of Session. As stated above, we have suggested it is not appropriate for the Lord President to sit on, or chair, the SCJC.

51. We think there should be greater flexibility in the provisions relating to the chair. Our preference would be for the meetings to be chaired by a non-lawyer member. This would be in keeping with other organisations in the justice sector such as the Judicial Appointments Board and Scottish Legal Complaints Commission.

52. We believe a non-lawyer chair would be appropriate because:

- There is a clear public interest in the work of the SCJC. A non-lawyer chair may help to instil confidence in the work of the SCJC. A similar rationale was behind the decision that the Judicial Appointments Board should have a non-lawyer chair.<sup>10</sup>
- The work of the SCJC extends beyond the courts to the wider civil justice system, including issues such as alternative dispute resolution. In future it may also have responsibility for administrative justice. Within such a context, we do not think there is as strong an argument for the chair needing to be a senior member of the courts judiciary.

53. We are particularly disappointed that the provisions do not allow for a non-judicial member to be deputy chair. The provisions require members of the Council to elect a deputy from among the judicial members. While our preference would be for the SCJC to be chaired by a non-lawyer member, at the very least, we would like the provisions to be widened to enable a non-lawyer member to be appointed as deputy chair.

### **Clause 13: Committees**

54. We support the provisions enabling the SCJC to establish committees. We agree there should be the ability to co-opt non-Council members onto committees; this will be important where committees are established to consider specific topics where expertise beyond that on the Council would be helpful.

55. The legislation, however, does not make provision for how members are to be appointed to the committees; this does not appear to be covered by clause 7

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<sup>10</sup> Judiciary and Courts (Scotland) Bill Policy Memorandum

(Lord President appointment process). We believe the appointment process for committee members should be transparent and the requirement to produce and publish the appointments process should be set out in the legislation.

Consumer Focus Scotland  
21 June 2012