

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Supplementary written submission from Consumer Focus Scotland

Introduction

1. Consumer Focus Scotland welcomed the opportunity to give oral evidence to the Justice committee on the Scottish Civil Justice Council and Criminal Legal Assistance Bill on 26 June 2012. Some issues were raised during that session on which we would like to provide supplementary comments.

User representation on the Council

2. As we stated in our initial evidence to the committee, the civil courts and civil justice system have been recognised as providing a public service.¹ The Commission on the Future Delivery of Public Services in Scotland ('Christie Commission') made clear a priority for reforming public services in Scotland should be recognising that effective services should be designed with and for people and communities, not delivered 'top down.' The Christie Commission identified that many public services are 'top-down', producer- and institution-focused, where 'the interests of organisations and professional groups come before those of the public.' This is a criticism that has sometimes been directed towards the court system in Scotland.

3. Ensuring a strong representation of user interests on the Scottish Civil Justice Council (SCJC) will be a key way of ensuring that the civil courts and civil justice system are designed and delivered in collaboration with users, and are not reformed in a 'top-down' or provider- or professional user-dominated way. The Council needs to be suitably informed by representatives of those who ultimately use the system and who the system is there to protect. As stated in our original written evidence to the committee, it is our view that there should be a 50/50 split of 'lawyer' (judicial, advocate and solicitor) and 'non-lawyer' (user and other relevant interests)² members of the SCJC. We would not, however, like the size of the Council to increase beyond the maximum 20 members identified. It may be desirable for the membership, in practice, to be less than 20 members.

4. Ensuring strong user representation should not just be viewed as an important principle - recognition should be given to the value that including such members will make to the SCJC's work. It is not only judicial, advocate and solicitor members who

¹ 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

² We would not seek to preclude people with law degrees or even a solicitor qualification, or some experience of working in another branch of the legal sector, from being included within the 'non-lawyer' category. We make the distinction to illustrate that the non-lawyer members represent a particular constituency. As stated within our original written evidence to the committee, we do think there would be benefits in including some 'public interest members' on the SCJC, who could bring expertise from outwith the legal system.

can bring expertise of how the system is functioning and what needs to be done to improve it. User representatives will likely have extensive working knowledge of the civil justice system, but will bring a different perspective from professional interests, which would add significant value to the SCJC.

5. We think the Bill should be more specific about the required knowledge and expertise required within the membership of the SCJC. This may lead to wider criteria for membership than currently included in the Bill.

6. To ensure a broad range of user interests are provided for in the Bill, we would suggest wording similar to that used in the Civil Procedure Act 1997 could be used – as well as persons with experience and knowledge of consumers affairs, and the lay advice sector, its membership is to include ‘persons able to represent the interests of particular kinds of litigants (for example, businesses or employees).’ Wording similar to this might be preferable to that used in s6(1)(h)(iii) in the Bill.

Clause 4: Court of Session to consider rules

7. At the oral evidence session on 26 June we were asked to clarify our written evidence in relation to clause 4: the Court of Session’s ability to consider rules. Our written evidence stated that we believed 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.

8. In order to achieve this, we would like clause 4 of the Bill to be amended to include a sub-section outlining the limitations of the Court of Session’s powers, for example by specifying that the Court of Session’s powers under s4(1)(b) and (c) (its power to approve the rules with such modifications as it considers appropriate, or to reject the rules) should be applied only where the rules fail to meet identified principles.

9. In order to ensure sufficient flexibility, we do not believe the principles should be set down in the primary legislation. However, so that the application of this power is suitably transparent, we believe the legislation should specify the means by which these principles will be identified. This could be in an order made by Scottish Ministers, for example.

10. We would also like clause 4 to be amended to include a sub-section stating that where the Court of Session approves the rules with modifications, or rejects the rules, reasons for this should be provided to the SCJC.

Whether the staffing resources planned for the Council are appropriate

11. At the oral evidence session on 26 June, we were asked our views on whether the staffing resources planned for the SCJC were sufficient to meet its remit. We have now had the opportunity to consider the Financial Memorandum in more detail. We are not in a position to estimate how many staff, or what grade of staff, will be required to implement the civil courts review reforms. We do, however, have some concerns about the staffing resources that are being allocated to the SCJC

when it moves beyond implementing these reforms to its 'steady position' of rule-drafting and keeping the civil justice system under review.

12. In this steady form, it is expected that the SCJC will require additional staff resources beyond that provided to the existing Rules Councils of between £63,000 and £100,000 per annum (an additional 1.8 – 2.8 full time equivalent staff). We consider the current rules councils to be under-resourced, and we are unconvinced that these additional staffing costs will be sufficient for the SCJC to undertake its substantial workload of ongoing care and maintenance of rules, and its policy functions, particularly if staffing resources are required to support any sub-committees of the SCJC. We would note that the Civil Justice Council in England and Wales has staffing resources of £211,000 per annum.

13. We do not think the current estimated costs accurately reflect the required costs of the SCJC undertaking its policy functions. As we highlighted in our oral evidence, no resources are currently allocated to enable the SCJC to undertake research, which the Bill's explanatory notes make clear would be within its powers.³ Undertaking such research would likely assist the SCJC during the programme of civil courts reforms, and would likely be essential in its role of keeping the civil justice system under review.

14. Likewise, the Financial Memorandum does not appear to account for any costs associated with the SCJC consulting or working with other groups and bodies when undertaking its policy functions. The only consultation resources that are allocated to the Council for consult are attributed to consultations on proposed rules changes.

15. We are disappointed that remuneration of Council members is not included in projected costs of the SCJC, despite such remuneration being permitted by the Bill. Enabling the Scottish Court Service to remunerate certain categories of members is desirable; 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.

16. We are unclear whether costs of supporting any sub-committees of the SCJC have been included in the costs, for example the likely staffing and accommodation costs.

17. We are concerned that the Scottish Government expects the additional costs associated with running the SCJC, as well as other aspects of civil courts reform over the next three years, to be met by increasing court fees.⁴ This means such costs will be met by users of the civil courts – those individuals, or organisations, asserting or defending their legal rights.

18. We acknowledge the severe financial constraints within which all public sector organisations, including the Scottish Government and Scottish Court Service, are operating. However, we do not believe it is appropriate that in future the full costs of

³ Scottish Civil Justice Council and Criminal Legal Assistance Bill Explanatory Notes at paragraph 34

⁴ Scottish Civil Justice Council and Criminal Legal Assistance Bill Financial Memorandum at paragraph 145

running the SCJC will be borne by civil court users, in line with the Scottish Government's policy of moving towards a system full cost pricing through court fees. We believe that taxpayers should have some responsibility for contributing to the funding of the SCJC on an ongoing basis. We have two main reasons for this:

- Firstly, the civil courts and civil justice system in Scotland have been explicitly recognised as providing a public service.⁵ The system does not just benefit those who become involved in proceedings, but rather fulfils a broader public good.⁶ We therefore believe it appropriate for the taxpayer to make a contribution to the running costs of the organisation tasked with keeping the system under review and making recommendations on required reforms.
- Secondly, the remit of the SCJC goes beyond the civil courts to the wider civil justice system; this includes issues such as alternative dispute resolution and the availability of advice services⁷ and is intended in the future to include tribunals. We are unclear therefore why the costs of running the SCJC should be borne fully by civil court users.

Consumer Focus Scotland
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⁵ 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

⁶ Such as observation was made by the Civil Justice Council in England and Wales: *Full costs recovery: a paper by the fees sub-committee*; Civil Justice Council, 2002

⁷ Scottish Civil Justice Council and Criminal Legal Assistance Bill Explanatory Notes at paragraph 28