

## Scottish Parliament Justice Committee

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

#### Written submission from senior public law professors in Scotland

#### Introduction

1. We welcome the opportunity to respond to the call for written evidence regarding the Scottish Civil Justice Council and Criminal Legal Assistance Bill ('the Bill') as we believe that the Bill touches on important aspects of Public Law.

#### Observations

2. We have four points to raise respecting the first part of the Bill, which covers the establishment of a Scottish Civil Justice Council (SCJC). These relate to the remit, composition, appointment process and status of the new body.

#### *Remit*

3. First, we welcome the proposal in the Bill that a Civil Justice Council should be established in Scotland with a wide remit. We agree with the observation<sup>1</sup> of the *Scottish Civil Courts Review* chaired by Lord Gill ("the Review"), that "in other jurisdictions oversight of the implementation of proposals for reform to the civil justice system, responsibility for monitoring the success of those reforms, and the giving of advice to government about the operation of the courts has been entrusted to a body with a permanent remit to keep these matters under review, that is to say, a Civil Justice Council." We also agree with the Review's recommendation<sup>2</sup> that a Civil Justice Council should be established in Scotland "with a remit similar to that of the CJC in England and Wales, but which also has responsibility for drafting the rules of court".

4. However, in the light of para. 26 Chapter 15 of the Review we do not think that the proposed remit of the SCJC – as set out in section 1(d) and (e) of the Bill - should be limited to providing advice and making recommendations to the Lord President on the development of, and changes to, the civil justice system. In our view the Scottish Government retains the ultimate responsibility for civil justice policy. Constitutionally, it is for Ministers to make policy, and the perceived need to have an expert advisory body does not diminish that responsibility. The Bill as currently drafted appears to us to weaken ministerial responsibility for the development of policy. Currently, the Bill imposes a duty to advise the Lord President on this, but only a power to advise the Scottish Ministers. To make it clear that Ministers retain ultimate control of policy development, we suggest two changes. The first would be to extend the remit to include a duty to advise the Scottish Government on civil justice matters. This is in keeping with the equivalent provision for the English and Welsh CJC where advice is provided to both the Lord Chancellor and the judiciary. (section 6, Civil Procedure Act 1997). The second would be to include in

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<sup>1</sup> *Scottish Civil Courts Review*, 2009 ( Chapter 15 para. 26 )

<sup>2</sup> In chapter 15 para. 51

the Bill a duty to provide advice and make recommendations on any matter relating to the civil justice system as may be requested by the Scottish Ministers.

5. In addition to these changes designed to strengthen the role of ministers in policy development, we consider that the SCJC should (like the English and Welsh CJC) have the duty to “consider how to make the civil justice system more accessible, fair and efficient” rather than these simply being principles to which they must have regard.

### *Composition*

6. Second, we have concerns as to the proposed composition of the SCJC as contained in section 6 of the Bill which is too heavily weighted towards judges and legal practitioners. The development of civil justice policy should take account of the interests of all users of the system and of the public interest. Appointing an advisory body dominated by a particular set of stakeholders risks undervaluing the interests of others and the expertise and perspectives they can bring to the subject which may well be different from those of practitioners and judges. This point is reflected in the report of the Spencer Review<sup>3</sup> of the operation of the English and Welsh CJC in 2008. This independent review, which is referred to in the SPICE briefing<sup>4</sup> in relation to the Bill, broadly supported the work of the English and Welsh CJC but concluded that the CJC needed to pay more heed to the interests of users and consumers and that the then membership of the CJC was too heavily balanced towards the judiciary and legal practitioners (the ratio of legal to other stakeholders was about 3:1). Accordingly the Spencer Review<sup>5</sup> recommended that the balance between judges and lawyers and other stakeholders ( including the user and consumer communities ) should be nearer to 50:50 with approximately half the members of the Council to be drawn from “user, consumer and advice interests and from academia”. This balance has now largely been achieved in England and Wales.

7. In contrast, 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 Spencer Review and now the practice in England and Wales. Nor does it sit well with the UK and Scottish Governments’ pursuit of “full cost recovery” - the policy that the users of courts should generally pay for the full costs of the court proceedings including the cost of staff and judicial salaries and of the maintenance of the buildings.<sup>6</sup> Such a policy would argue for a greater involvement of users and consumers in relation to the body charged with advising on the development of, and changes to, the civil justice system. Accordingly we recommend 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 the breadth of members ( business and non-business users, consumers, advisers, insurers, and academics ) seen on the CJC today. For the avoidance of doubt, we should state that the category of ‘other stakeholders’ would

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<sup>3</sup> *Review of the Civil Justice Council, Responding to the needs of users*. Report of an independent review by Jonathan Spencer 2008.

<sup>4</sup> At p.9

<sup>5</sup> In Chapter 8.

<sup>6</sup> See Hazel Genn, *Judging Civil Justice* (CUP, 2010) at p.47.

not exclude all those with a legal qualification or legal training. The distinction is between, on the one hand, judges and those practising as solicitors or advocates and, on the other, all remaining categories of stakeholder. It would be valuable to have on the council, for example, persons with a legal training currently working as academics and in the consumer and advice community.

8. We are puzzled as to why, if a lay person can chair the Scottish Legal Complaints Commission, the Scottish Legal Aid Board and the Judicial Appointments Board for Scotland, a lay person cannot even be the deputy chair of the proposed SCJC. In our view the Chair of the SCJC should be the Lord President and the deputy chair should be a lay member with the power to chair when required.

9. Finally, the planned merger of Citizens Advice Scotland and Consumer Focus Scotland seems not to have been taken account of in the Bill. Although we do not propose that specific body should be named in the Bill to represent consumer interests, we recommend that consideration should be given as to whether the merger of these consumer bodies should be reflected in the proposed membership of the SCJC.

#### *Appointment Process*

10. Third, we have concerns as to the appointment process proposed in sections 6 and 7 of the Bill which do not incorporate standard public appointment principles. Although section 7 requires the Lord President to prepare and publish a statement of appointment practice, there is no requirement that appointments are made in accordance with the standard principles. The presumption should be that public appointments are made in accordance with the standard principles unless there are convincing reasons for making an exception. No argument has been offered by the Scottish Government for departing from these principles in this case. Appointments to the English and Welsh CJC, as commented on in the Spencer Review,<sup>7</sup> are expected to comply with standard public appointments procedures. This entails a merit based process which is open and transparent, with invitations or advertisements seeking applications against a person specification or competences and interviews, followed by a recommendation by a panel constituted in line with the standard guidance from the Office of the Commissioner of Public Appointments. The current recruitment of three judicial members for the CJC (including a High Court judge) complies with this procedure. So too do appointments to the Scottish Legal Aid Board, the Scottish Legal Complaints Commission and (for most members) the Judicial Appointments Board for Scotland. Accordingly we are of the opinion that current provisions in sections 6 and 7 of the Bill do not go far enough. Like Consumer Focus (Scotland) and Citizens Advice Scotland we believe that appointments to the CJC should be in accordance with public appointments procedures and the principles set out by the Public Appointments Commissioner for Scotland.

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<sup>7</sup> In Chapter 9.

*Status of the body*

11. Fourth, we have concerns as to the proposed status of SCJC. The Bill indicates that the SCJC is to be a statutory advisory body rather than the advisory non-departmental public body (NDPB) that the Scottish *Civil Courts Review* proposed.<sup>8</sup> This may explain why the Bill does not stipulate that public appointments procedures need to be complied with in relation to the SCJC. In our view there is no distinction of substance between what is being proposed – which is an arms-length body with an advisory remit paid for out of the public purse – and an NDPB. Accordingly we believe that whatever its technical status the SCJC should be treated as akin to an advisory NDPB with the accountability mechanisms that that would entail, and that the public appointments procedures and other accountability mechanisms should appear on the face of the Bill.

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<sup>8</sup> See Chapter 15 para 54.