

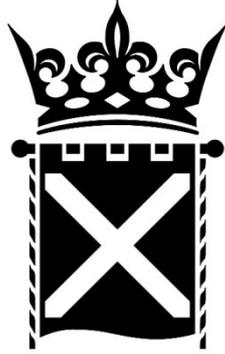
# **Justice Committee**

## **11th Report, 2012 (Session 4)**

### **Stage 1 Report on the Scottish Civil Justice Council and Criminal Legal Assistance Bill**

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The Scottish Parliament  
Pàrlamaid na h-Alba

## **Justice Committee**

### **11th Report, 2012 (Session 4)**

# **Stage 1 Report on the Scottish Civil Justice Council and Criminal Legal Assistance Bill**

**Published by the Scottish Parliament on 4 October 2012**





The Scottish Parliament  
Pàrlamaid na h-Alba

**Justice Committee**

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The Scottish Parliament  
Pàrlamaid na h-Alba

## **Justice Committee**

### **Remit and membership**

#### **Remit:**

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

#### **Membership:**

Roderick Campbell  
John Finnie  
Christine Grahame (Convener)  
Colin Keir  
Jenny Marra (Deputy Convener)  
Alison McInnes  
David McLetchie  
Graeme Pearson  
Sandra White

#### **Committee Clerking Team:**

Peter McGrath  
Joanne Clinton  
Andrew Proudfoot  
Christine Lambourne





The Scottish Parliament  
Pàrlamaid na h-Alba

**Justice Committee**

**11th Report, 2012 (Session 4)**

**Stage 1 Report on the Scottish Civil Justice Council and Criminal Legal Assistance Bill**

The Committee reports to the Parliament as follows—

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

**General principles of the Bill**

1. The Committee supports the general principles of the Bill, but urges the Scottish Government to consider carefully the recommendations, particularly on Part 2, set out in this report.

**Part 1: Scottish Civil Justice Council**

*Status of the Council*

2. The Committee accepts the Scottish Government's reasons for not designating the Scottish Civil Justice Council as a non-departmental public body. This does not mean that the Council should be exempt from scrutiny and we do not anticipate that in practice it will be. We also expect that good practice principles will be observed in relation to appointments to the Council.

*Functions and powers of the Council*

3. The Committee is satisfied that the powers and functions that the Bill confers on the Council appear overall to be appropriate and to give the Council sufficient flexibility to carry out its role.

4. The Committee notes that most stakeholders accepted, indeed welcomed, the Council having a policy as well as a rule-making remit, but that some sought reassurances as to where the boundaries of "policy" lay. The Committee is largely reassured by the Lord President's evidence, which appears to indicate that the Council's policy role in relation to the functioning of the civil justice system will be predominantly advisory and that any major decisions will continue to be made by the Scottish Government and Scottish Parliament.

5. The Committee considers it important that the Council should have the freedom to decide its own priorities (subject to the overall scrutiny of the

Parliament) in order to decide how best to implement the important reforms proposed in the Gill review. The Committee notes the Lord President's view that modernising court rules is likely to be the Council's initial priority.

*Consideration of rules by Court of Session*

6. 30. The Committee accepts the Lord President's assurances that it is extremely unlikely that any draft rule submitted by the Council will be rejected by the Court of Session.

*Composition of the Council and the Lord President's appointment process*

7. The Committee is satisfied with the Council's proposed membership range of between 14 and 20 members.

8. The Committee notes that a clear majority of mandatory appointees are members of the legal profession, but further notes that the Lord President has discretion to appoint up to six additional members. The Committee welcomes the Lord President's assurances that a wide range of interests and users will be represented. The Committee notes the Lord President's comment that the Council's initial priority will be to draft rules of court, which he said would require specialist legal input. However, we have some concerns that, from the outset, the perspective of end users may not be represented. The Committee anticipates that the Council's priorities may adjust over time and that the need for specialist legal input might then be reduced. We therefore expect that the balance of Council membership would shift to reflect that adjustment. In this connection, we note that the Scottish Ministers have powers under secondary legislation to adjust the Council's mandatory membership.

9. The Committee also notes the potential for Council committees to help ensure that individuals from a wide spectrum of backgrounds and interests have input into the Council's work.

10. In relation to the appointments process, the Committee welcomes the Lord President's assurances that he will draft a statement of appointment practice based on the principles set out by the Office of the Commissioner for Public Appointments in Scotland. However, we note the views of a large number of witnesses that the legislation should be strengthened so that such appointment principles are embedded in the Bill, and invite the Scottish Government to give this further consideration.

*Disqualification and removal from office*

11. The Committee considers it appropriate that the Lord President, as the individual ultimately responsible for the effective functioning of the Council, and, in a wider sense, of the civil justice system generally, should have the power to dismiss Council members. We note the Lord President's observations that he expects the issue to arise seldom, if ever.

*Chairing of meetings*

12. The Committee agrees with the Cabinet Secretary that any decision to appoint a deputy chair should be a matter for the Council, but that it should not be precluded from appointing a lay member to this role. However, we note that

section 11(4) as currently drafted allows the Council to elect a deputy chair only from judicial members.

*Committees*

13. The Committee welcomes provision being made for specialist committees in the Bill and sees these as being crucial in helping drive civil justice reform forward, especially in relation to specialist areas of civil justice. Given the concerns surrounding the membership of the Council, we see committees as a means to ensure that a broad spectrum of interests is represented while also allowing the Council to draw on particular areas of expertise if and when required.

*Accountability and transparency*

14. The Committee notes that, under Part 1 of the Bill, considerable power and responsibility accrues to the Lord President in relation to the running of the Council. However, the Committee considers that this is appropriate. The Lord President requires sufficient powers to push forward necessary civil justice reform. The Committee expects that the Council will comprise experienced and well-qualified members who will feel empowered to give robust advice to the Lord President, or to future Council chairs.

*Administrative justice*

15. In relation to the oversight of administrative justice in Scotland, the Committee notes that the future is uncertain. However, we note that the Scottish Government proposes to establish a non-statutory advisory committee and is considering long-term issues. The Committee proposes to maintain a watching brief on this issue. The balance of evidence suggests that it may not be appropriate, in the meantime, for the Council to take on the function of oversight of administrative justice.

*Part 1 Resources*

16. The Committee notes that the Scottish Government's business case for funding the Council rests on combining the costs saved from abolishing the two current non-statutory rules councils with revenue from increasing court fees.

**Part 2: Criminal legal assistance**

*Contributions from people detained by the police*

17. The Committee welcomes section 17 of the Bill, which would enable the Scottish Ministers to disapply the requirement to obtain contributions from persons held for police questioning who request legal advice. The Committee seeks clarification that the Scottish Government intends to use this power and an indication of when this might happen.

*Scheme of eligibility for criminal ABWOR*

18. In its report, the Subordinate Legislation Committee commented that the power to require the drawing up of a scheme of eligibility under section 18 is a "significant power" and that there seemed to be no good reason why it should not be exercised by way of subordinate legislation (specifically an affirmative instrument). The Justice Committee considers that this point appears to be well made, and would be interested in the Scottish Government's response to it.

*Appeals on behalf of deceased persons*

19. The Committee accepts that if the principle of making contributions for criminal legal aid is accepted, then that principle should be applied consistently. The Committee invites the Scottish Government to consider whether section 21 of the Bill could be applied so as to require a greater financial contribution from a person appealing on behalf of a deceased person than would have been required of the deceased person had they survived. If so, the Committee invites the Scottish Government to consider whether that is fair.

*Is it fair to require contributions for legal aid?*

20. The Committee is not opposed in principle to recipients of criminal legal aid making a contribution towards its cost. This is with the important proviso that any system devised to give effect to this principle must be carefully calibrated: it must be proportionate to the means of the individual and be sufficiently flexible to take into account particular personal circumstances.

*Recovery of contributions on acquittal*

21. The Committee notes that, whilst it is true that in many cases individuals may consider that they have no choice but to enter into civil proceedings, the prospect at least exists that if they win the case, they will recover expenses. The Committee therefore invites the Cabinet Secretary to consider further the issue of recovery of contributions in relation to criminal legal aid.

*Level of contributions*

22. The Committee notes the Scottish Government's assurances that contributions towards criminal legal aid will be based on disposable income, not income alone, that the amount sought will in many cases be modest, and that around 82% of current criminal legal aid recipients are unlikely to have to make a contribution. The Committee also notes the Cabinet Secretary's assurances that the relevant regulations would be kept under regular review. The Committee considers it important that there should be no incremental movement towards an ever-wider category of people falling within the contributory net and seeks a commitment from the Cabinet Secretary that reviews will take place on a regular basis, to ensure that access to justice is maintained.

23. The Committee asks the Scottish Government to provide more information on what overall rationale or set of principles it applied, and what factors it took into account, in determining the bands of income set out in the Policy Memorandum, and the levels of contribution that are to apply in respect of each band. The Committee also asks for similar information in relation to the proposals on capital.

24. The Committee is disappointed that an Equality Impact Assessment on Part 2 of the Bill was not published during consideration of evidence at Stage 1. An EQIA would have assisted the Committee in its scrutiny of the evidence and preparation of the report. Further evidence or data on the effect on the income of households would have been helpful, for example, whether it is appropriate for the income of a spouse or partner to be taken into account when calculating eligibility for criminal legal assistance.

25. In relation to people with disabilities, the Committee recognises that the UK Government's proposals on welfare reform have created uncertainty. The

Committee considers that people with disabilities should be no worse off under the Part 2 proposals if the UK Government's reforms go ahead than they would be currently, and would encourage the Scottish Government to use the flexibility inherent in the proposals to work towards that outcome.

*Collection of contributions*

26. The Committee welcomes the proposal in Part 2 to designate contributions towards summary criminal legal aid as fees. This should be of some assistance in helping firms maintain turnover.

27. However, the Committee notes the strong and widespread concerns of the solicitors' profession that requiring them to collect summary criminal legal aid contributions will be difficult in practice and will lead to them writing off a proportion of their income from criminal work. The Committee accepts that there would be significant resource implications in requiring SLAB to undertake this work, but also notes that SLAB are likely to be better placed to maintain and enforce collection systems. The Committee invites the Scottish Government to reflect further on this issue.

28. The Committee also notes the legal profession's concerns about the proposed timeframe for making contributions and the practical difficulties this may create. The Committee understands these concerns and invites the Scottish Government to consider further how they can be addressed.

29. The Committee agrees with the Scottish Government that the current legal aid system might, in some cases, create a perverse incentive for an accused person who accepts their guilt not to plead guilty at the first opportunity because delaying the plea to the trial rules out the need for the solicitor to collect a contribution. This does appear to be a flaw in the current system. On the other hand, the existence of this perverse incentive perhaps underlines that there may be a practical difficulty in requiring solicitors to collect summary criminal legal aid fees from clients.

*Consequences for the effective operation of the criminal justice system*

30. The Committee understands and accepts the need for the Scottish Government to make cuts to the overall legal aid budget, and that this entails making difficult decisions. However, it is crucial that any savings made are not effectively cancelled out, as a result of the changes being made having unintended consequences.

31. The Committee notes the concerns of the legal profession that requiring solicitors to collect summary criminal legal aid contributions might have knock-on effects for the effective running of the criminal justice system. These include a possible increase in adjournments and in party litigants.

32. The Committee calls for the changes under Part 2 to be carefully monitored. Additionally, we recommend that the Scottish Ministers report to Parliament 3 years after the changes come into effect. The report should set out the effect, if any, of the proposals on the effective functioning of the summary criminal justice system, including any additional costs arising. The report should also set out whether the proposals have had any effect on access to justice, for instance

whether it has had an effect on the availability of criminal legal advice and representation in rural areas.

*ECHR compliance*

33. The Committee invites the Scottish Government to address concerns expressed by some witnesses that the way in which Part 2 of the Bill is implemented might give rise to ECHR concerns in the individual circumstances of particular cases. A fair trial is a fair trial, regardless of the gravity of the charge.

34. One situation where concerns might arise is where an accused is left without legal representation during a trial. The Committee notes the Scottish Government's suggestion that the Public Defence Solicitors' Office might serve as a "safety net" for the unrepresented, but notes that the issue is not resolved.

35. The Committee also invites the Scottish Government to reflect upon evidence that setting the parameters for financial contributions at appropriate and equitable levels is crucial in ensuring compliance with Article 6 and to ensure that any scheme ultimately proposed under the Bill is robustly "ECHR-proofed", at regular intervals, having regard to the vulnerability and poverty of many of those who come into contact with the criminal justice system.

## INTRODUCTION

36. The Scottish Civil Justice Council and Criminal Legal Assistance Bill was introduced into the Scottish Parliament on 2 May 2012 and referred to the Justice Committee for consideration as lead committee at Stage 1. The Finance and Subordinate Legislation Committees also considered the Bill before reporting to the Justice Committee.<sup>1</sup>

37. As is evident from the Bill's short title, it has two purposes. Part 1 makes provision for a new Scottish Civil Justice Council. Part 2 makes provision in relation to financial contributions for criminal legal assistance. These two purposes are essentially unrelated: accordingly witnesses, with the exception of the Cabinet Secretary for Justice, focussed on one or other Part of the Bill when they gave evidence.

### PART 1: SCOTTISH CIVIL JUSTICE COUNCIL

#### Background

38. Part 1 of the Bill establishes a Scottish Civil Justice Council (SCJC), replacing the Court of Session Rules Council and Sheriff Court Rules Council. This arises from Lord Gill's 2009 review of Scottish Civil Courts<sup>2</sup> which proposed a package of structural and functional reforms to the provision of civil justice. These were described as being crucial in order to restore efficiency and effectiveness to a civil justice system that was seriously flawed and no longer fit-for-purpose for a modern country. In particular, the review made a specific recommendation to establish a Civil Justice Council for Scotland. Lord Gill described its proposed remit as—

“..similar to that of this Review: to keep under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. The Civil Justice Council for Scotland would monitor the implementation of this Report; receive representations and proposals for reform; have the power to commission research; and keep abreast of reforms and developments in other jurisdictions. In this way, reform and improvement of the civil justice system would be an on-going process.”<sup>3</sup>

39. The Scottish Government agreed, saying that the establishment of the Council would be necessary in order to implement further recommendations from Lord Gill's review.<sup>4</sup> The Scottish Government subsequently consulted on the creation of a Scottish Civil Justice Council,<sup>5</sup> and Part 1 is the first in a series of legislative

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<sup>1</sup> See Annexe A for the Subordinate Legislation Committee's report and the Convener of the Finance Committee's letter

<sup>2</sup> Scottish Civil Courts Review homepage. Available at: <http://www.scotcourts.gov.uk/civilcourtsreview/> [Accessed 3 September 2012]

<sup>3</sup> Report of the Scottish Civil Courts Review: Synopsis. Available at: <http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Synopsis280909.pdf> [Accessed 3 September 2012].

<sup>4</sup> Scottish Government. (2010) *Response to the Report and Recommendations of the Scottish Civil Courts Review*. Available at: <http://www.scotland.gov.uk/Publications/2010/11/09114610/0> [Accessed 11 September 2012].

<sup>5</sup> Scottish Government. (2011) *Consultation on the Creation of a Scottish Civil Justice Council*. Available at: <http://www.scotland.gov.uk/Publications/2011/09/28125601/0> [Accessed 11 September 2012].

measures to be taken forward under the Scottish Government's four-year Making Justice Work programme.<sup>6</sup>

40. Lord Gill has recently become Lord President and Lord Justice General, and at Stage 1 gave evidence on Part 1 of the Bill, in his capacity as Chair of the Scottish Courts Service and prospective Chair of the new Council. On the proposals, Lord Gill said—

“In general, I am entirely content with the terms of the Bill. As far as I can see, it will fully implement the recommendations in chapter 15 of the “Report of the Scottish Civil Courts Review”, and it is entirely in keeping with the spirit of the recommendations. I think that the creation of the Scottish Civil Justice Council will ensure an integrated and systematic approach to keeping the civil courts system under review so that it can deal responsibly and flexibly with changing needs and problems as and when they emerge.

“I see the Bill as the first stage of a package of legislative reforms under the making justice work project. The creation of the council will lay the foundation for the implementation of further projects and will be the vehicle for the implementation of all the legislative reforms that we have recommended.”<sup>7</sup>

## Evidence received on Part 1

### *Section 1 - Establishment of the Scottish Civil Justice Council*

41. The proposed establishment of a Scottish Civil Justice Council has been met with widespread support.<sup>8</sup> It was considered an important step in ensuring the effective operation and oversight of the Scottish civil justice system. However, a number of witnesses expressed concerns over, or sought clarification in relation to, some of its provisions. These are outlined in more detail below.

### *Status of the Council*

42. The Bill's Policy Memorandum describes the Council as a statutory advisory body, rather than a non-departmental public body (NDPB).<sup>9</sup> While the Scottish Civil Courts Review recommended that the Council should be an advisory NDPB,<sup>10</sup> the Scottish Government was “not persuaded”<sup>11</sup> that the creation of a new NDPD was required.

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<sup>6</sup> Scottish Government. (2012) Making Justice Work homepage. Available at: <http://www.scotland.gov.uk/Topics/Justice/legal/mjw> [Accessed 11 September 2012].

<sup>7</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1607. The Committee takes Lord Gill's reference to “the Bill” to mean Part 1 of the Bill, as Lord Gill did not express any views on proposals in Part 2.

<sup>8</sup> Written submissions from Simpson and Marwick, the Forum of Scottish Claims Managers, Consumer Focus Scotland, Traprain Consultants Ltd, the Scottish Children's Reporter Administration, the Glasgow Bar Association, Capability Scotland, the Faculty of Advocates, Friends of the Earth Scotland and the Environmental Law Centre Scotland, the Scottish Legal Aid Board, Citizens Advice Scotland and Which?.

<sup>9</sup> Policy Memorandum, paragraph 13.

<sup>10</sup> Report of the Scottish Civil Courts Review, chapter 15, paragraph 55.

<sup>11</sup> Scottish Government. (2010) *Response to the Report and Recommendations of the Scottish Civil Courts review* Paragraph 20.

43. Professor Alan Paterson, on behalf of senior public law professors in Scotland, said that the Council should have the status of an NDPB, as it will be an arm's length publicly funded body with a policy and advisory remit. Professor Paterson said that the Council, as proposed in the Bill, would be "an NDPB in all but name; it is just not to be called an NDPB."<sup>12</sup> For the public law professors, the issue was significant because particular accountability mechanisms and public appointment procedures<sup>13</sup> would ensue where a body was designated an NDPB.<sup>14</sup>

44. The joint submission of Friends of the Earth Scotland and the Environmental Law Centre Scotland did not express much concern about whether the Council was or was not formally designated as an NDPB, but called for an explicit recognition in the Bill that the Council provides a public service and acts on behalf of the public, and that all relevant best practice in public standards would be applied.

45. A Scottish Government official explained to the Committee that the reason for not designating the Council as an NDPB "relates to the constitutional architecture of Scotland."<sup>15</sup> He explained that the Judiciary and Courts (Scotland) Act 2008 put the Lord President at the head of both the Scottish judiciary and the Scottish Court Service, the latter (unusually) a non-Ministerial department. The main purpose of the Council is to assist the Lord President in his role, and it was therefore not appropriate that it be an NDPB.

**46. The Committee accepts the Scottish Government's reasons for not designating the Scottish Civil Justice Council as a non-departmental public body. This does not mean that the Council should be exempt from scrutiny and we do not anticipate that in practice it will be. We also expect that good practice principles will be observed in relation to appointments to the Council (as discussed further below).**

*Functions and powers of the Council (Sections 2 and 3)*

47. The Council's functions, as outlined in section 2(1) of the Bill, are:

- (a) to keep the civil justice system under review,
- (b) to review the practice and procedure followed in proceedings in the Court of Session and in civil proceedings in the sheriff court,
- (c) to prepare and submit to the Court of Session draft civil procedure rules,
- (d) to provide advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system, and
- (e) to provide such advice on any matter relating to the civil justice system as may be requested by the Lord President.<sup>16</sup>

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<sup>12</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1557.

<sup>13</sup> Public appointment procedures are discussed further in this report, in relation to section 7 – Lord President appointment process.

<sup>14</sup> Senior public law professors in Scotland. Written submission.

<sup>15</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1720.

<sup>16</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill. Policy Memorandum (SP Bill 13-PM, Session 4 (2012)), paragraph 10. Available at:

48. Section 2 also lists the principles in which the Council must have regard to in carrying out its functions. These include ensuring clarity and ease of understanding in procedural rules, pursuing consistency in the creation of procedures throughout the civil justice system, and promoting methods of resolving disputes outwith the courts.

49. Nowhere does section 2 expressly state that the Council has a “policy” role (as opposed, for instance, to a narrower role of reviewing and updating rules of court). However, the wording of paragraphs (a), (d) and (e) of subsection (1) appears quiet wide, as does the reference therein to the “civil justice system”, rather than, for instance, “civil procedure”. As discussed below, this led some stakeholders to speculate as to the extent to which the Council could take on a wider policy role. The Policy Memorandum noted that—

“most respondents [to the consultation preceding the Bill] were in favour of giving the Council “a degree of policy capacity, the main points of contention being as to when it should take on that function, and what the Council’s primary role should be (i.e rulemaking or policy).”<sup>17</sup>

50. Section 3 sets out the general power of the Council to “take such action as it considers necessary or desirable in pursuance of its functions”, and goes on to list specific examples of this, such as consulting persons it considers appropriate, publishing any recommendations it makes, and giving advice to the Scottish Ministers on the development of, or changes to, the civil justice system.

### *Evidence*

51. The Scottish Legal Aid Board, like all stakeholders, supported the creation of the Council, but argued that its remit should encompass tribunals, alternative dispute resolution and various representation services that support people in resolving their civil justice problems remit, rather than being too focused on the courts. The Board therefore suggested that the Bill include a definition of the civil justice system “to clarify the breadth of the SCJC’s role and that it extends beyond the civil courts.”<sup>18</sup>

52. Ronnie Conway of the Law Society of Scotland noted the scale of the challenge facing the Council, particularly in its early years. It would have to reform the civil justice system while simultaneously doing everything that the Court of Session Rules Council and Sheriff Court Rules Council do at present. Mr Conway identified updating the rules as the Council’s initial priority. He said he fully supported the principle that “rules relating to practice and procedure should be as clear and easy to understand as possible”<sup>19</sup> but suggested that updating the current 3,400 pages of rules for the Court of Session and sheriff court “will be a job for technicians for the next five years at least”.<sup>20</sup>

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[http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf).

<sup>17</sup> Policy Memorandum, paragraph 28.

<sup>18</sup> Scottish Legal Aid Board. Written submission.

<sup>19</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 2(3)(b).

<sup>20</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1620.

53. Others, including Consumer Advice Scotland and Which?, were of a different view, as they considered that the Council's policy function should be its primary focus.

54. Evidence from a group of senior public law professors in Scotland expressed concern at the Council giving advice on policy, on the ground that "only a minister can deliver on the more general policy function".<sup>21</sup> One of them, Professor Tom Mullen, questioned why there was no duty on the Council to make recommendations to Scottish Ministers, and no provision in the Bill for Scottish Ministers to invite the Council to look at a particular issue.

55. Lord Gill envisaged the bulk of the Council's early work being the drafting of technical rules, describing this as a "vital priority".<sup>22</sup> He described the formulation of policy as another important part of the Council's work, framing this in terms of "the sort of system we want to have, how we want it to work, and whose interests we want to protect."<sup>23</sup> Lord Gill added that he envisaged the Council's policy role as being to look at the decisions taken by the Parliament on matters such as court structure or civil remedies, and to decide how to make those decisions work in practice under rules of court.<sup>24</sup>

56. Questioned as to whether the drafting of the Bill needed to be tightened up to ensure that the Council's policy functions were not too wide, Lord Gill said that he did not think so. He said he was satisfied that section 2(1)(d) (which enables the Council to provide advice to the Lord President on the development of the civil justice system) provided sufficient flexibility to ensure that the Council was not "buried in rules" but "can stand back from the system and see how it can be improved." He gave, as examples of recommendations that the Council might make by virtue of that provision, recommendations to enlarge or reduce a court's jurisdiction, or to transfer certain types of case from one court to another. Lord Gill also sought to assure the Committee that, while the Council could make recommendations, it would be "for Parliament to decide whether they should be implemented."<sup>25</sup>

**57. The Committee is satisfied that the powers and functions that the Bill confers on the Council appear overall to be appropriate and to give the Council sufficient flexibility to carry out its role.**

**58. The Committee notes that most stakeholders accepted, indeed welcomed, the Council having a policy as well as a rule-making remit, but that some sought reassurances as to where the boundaries of "policy" lay. The Committee is largely reassured by the Lord President's evidence, which appears to indicate that the Council's policy role in relation to the functioning of the civil justice system will be predominantly advisory and that any major decisions will continue to be made by the Scottish Government and Scottish Parliament.**

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<sup>21</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1557.

<sup>22</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Cols 1609-10.

<sup>23</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1610.

<sup>24</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1612.

<sup>25</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1612.

**59. The Committee considers it important that the Council should have the freedom to decide its own priorities (subject to the overall scrutiny of the Parliament) in order to decide how best to implement the important reforms proposed in the Gill review. The Committee notes the Lord President's view that modernising court rules is likely to be the Council's initial priority.**

*Consideration of rules by Court of Session (section 4)*

60. One of the key roles of the Council would be to prepare draft procedural rules, as the two current councils do. As noted, this is set out as one of its functions in section 2. The main purpose of section 4 is effectively to preserve the current arrangement whereby any draft rules applying to the Court of Session will only come into effect if approved by the Court, and embodied by it by way of an Act of Sederunt. Section 4 also preserves the position that the Court of Session may make its own civil procedural rules, rather than simply approving drafts provided by the Council.

61. The Court's power in section 4(1)(b) and (c) to modify or reject the rules raised some concerns, particularly the absence of any provision requiring the Court to give reasons.<sup>26</sup> Gemma Crompton from Consumer Focus Scotland said that where draft rules were modified or rejected, there should be a "clear rationale"<sup>27</sup> for having done so. Which? said that a requirement to give reasons for rejecting any draft rules "must be made explicit within the Bill"<sup>28</sup>.

62. The Lord President said he did not foresee any difficulty in how section 4 would work in practice, given the composition of the Council and the scrutiny that would have taken place prior to any draft rule being submitted to the Court. He remarked that the "likelihood that a recommendation that emerges from the council will then be rejected by the court seems to me to be remote in the extreme."<sup>29</sup>

**63. The Committee accepts the Lord President's assurances that it is extremely unlikely that any draft rule submitted by the Council will be rejected by the Court of Session.**

*Composition of the Council and the Lord President's appointment process (sections 6 and 7)*

64. Section 6 provides for the membership and composition of the Council. It must have between 14 and 20 members, comprised of:

- the Lord President (who may delegate to the Lord Justice Clerk);
- the chief executive of the Scottish Court Service (who may delegate to a member of her staff);
- the principal officer of the Scottish Legal Aid Board (who may delegate to a member of his staff);

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<sup>26</sup> Written submissions from Scottish Women's Aid, Consumer Focus Scotland, Friends of the Earth Scotland and the Environmental Law Centre Scotland, Citizens Advice Scotland and Which?

<sup>27</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1561.

<sup>28</sup> Which? Written submission.

<sup>29</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1613.

- one member appointed by Scottish Ministers (who must be a member of Scottish Government staff);
- at least four judges, including a minimum of one Court of Session judge and one sheriff;
- at least two practising advocates;
- at least two practising solicitors;
- at least two consumer representative members; and
- up to six other people whom the Lord President considers to be suitable (an “LP member”).<sup>30</sup>

65. Much of the evidence received by the Committee in relation to the Council centred on its proposed membership and composition. In general terms, witnesses’ preferred composition tended to reflect their backgrounds and interests.

#### *Overall number of members*

66. The Faculty of Advocates considered that a Council of 20 members might prove “too unwieldy” and that restricting membership to around 15 would be “more conducive to the Council fulfilling its functions.”<sup>31</sup> The Faculty suggested removing the representative from the Scottish Legal Aid Board and the member appointed by Scottish Ministers, as well as reducing the number of appointees available to the Lord President. Consumer Focus Scotland considered that 20 should be seen as the absolute maximum; in practice a slightly smaller membership of around 15 might be more effective.<sup>32</sup>

#### *Balance of membership*

67. The general consensus among non-practising lawyers was that the Council should be more evenly split between legal and lay members.<sup>33</sup> Consumer Focus Scotland argued that it was not only lawyers and judges who could provide expertise as user representatives would bring “a different perspective” and add “significant value”<sup>34</sup> while Which? said that lay members would be more likely to “challenge existing systems and ideas.”<sup>35</sup>

68. A number of stakeholders<sup>36</sup> pointed to the recommendations of the recent Commission on the Future Delivery of Public Services<sup>37</sup> that “effective public

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<sup>30</sup> Scottish Parliament Information Centre. (2012) *Scottish Civil Justice Council and Criminal Legal Assistance Bill*. SPICe Briefing 12/36. Available at: [http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_12-36.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_12-36.pdf) [Accessed 11 September 2012].

<sup>31</sup> Faculty of Advocates. Supplementary written submission.

<sup>32</sup> ie Consumer Focus Scotland. Written submission.

<sup>33</sup> Written submissions from Scottish Women’s Aid, Consumer Focus Scotland, Friends of the Earth Scotland and the Environmental Law Centre Scotland, Citizens Advice Scotland, Scottish Legal Aid Board and Which?

<sup>34</sup> Consumer Focus Scotland. Supplementary written submission.

<sup>35</sup> Which? Written submission.

<sup>36</sup> Friends of the Earth Scotland and the Environmental Law Centre Scotland. Written submission.

services must be designed with and for people and communities” so that the interests of organisations or professional groups do not come before those of the public. Consumer Focus Scotland pointed out that such criticism had sometimes been directed towards the court system in Scotland.<sup>38</sup> Traprain Consultants Ltd considered that—

“Too often the focus appears to be on ensuring that the system works efficiently for the judiciary and the practising lawyers and less on cost and efficiency for the litigants. Both should, in fact, be taken into account”<sup>39</sup>

69. The submission from six senior public law professors in Scotland<sup>40</sup> referred to the operation of the Civil Justice Council (CJC) of England and Wales. An independent review of the CJC in 2008 (the Spencer Review<sup>41</sup>) concluded that its membership was too heavily weighted towards lawyers and the judiciary. The CJC is now evenly balanced with lay members drawn from user and consumer groups as well as academia.

70. A discrete issue was raised by Capability Scotland who said that the Council should include an equalities representative “to ensure that disabled people and those with other protected characteristics have their views and experiences taken into account.”<sup>42</sup>

71. Submissions on behalf of the insurance sector<sup>43</sup> pointed to the high number of civil cases involving insurers, with the Association of British Insurers stating that insurers had a fiscal interest in 80% of litigated cases. They argued that at least one member of the Council should be drawn from the insurance industry. It was suggested that having insurers on the Council would “reflect a fair representation”<sup>44</sup> of court users, provide a “natural balance”<sup>45</sup> to consumer representative members on the Council, and add “emphasis and credibility”<sup>46</sup> to its decisions. The ABI argued that—

“... a member from the insurance industry would be well placed to give the industry perspective on how proposed legislative/procedural change could be implemented, and what likely impact any change in legal procedure would have.”<sup>47</sup>

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<sup>37</sup> Scottish Government. (2011) *Report on the Future Delivery of Public Services by the Commission chaired by Dr Campbell Christie*. Available at: <http://www.scotland.gov.uk/About/Review/publicservicescommission> [Accessed 13 September 2012]

<sup>38</sup> Consumer Focus Scotland. Supplementary written submission.

<sup>39</sup> Traprain Consultants Ltd. Written submission.

<sup>40</sup> Senior Public Law Professors in Scotland. Written submission.

<sup>41</sup> Ministry of Justice. (2008) *Review of the Civil Justice Council: Responding to the needs of users by Jonathan Spencer*. Available at: <http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-1831.pdf> [Accessed 13 September 2012]

<sup>42</sup> Capability Scotland. Written submission.

<sup>43</sup> Written submissions from Simpson and Marwick, Forum of Scottish Claims Managers and the Association of British Insurers.

<sup>44</sup> Forum of Scottish Claims Managers. Written submission.

<sup>45</sup> Simpson and Marwick. Written submission.

<sup>46</sup> Simpson and Marwick. Written submission.

<sup>47</sup> Association of British Insurers. Written submission.

72. From a legal perspective, both the Law Society of Scotland and the Glasgow Bar Association considered that the Bill should require there to be at least four practising solicitors on the Council. Ronnie Conway from the Law Society described combining in the Council the remits of the Court of Session Rules Council and Sheriff Court Rules Council, and adding to that reform of the civil justice system, as a “mammoth task.” Mr Conway suggested that it would therefore be necessary to draw into the Council solicitors from “specialist parts of the profession, which would give them an advantage over a Court of Session judge, a sheriff or a member of the Faculty of Advocates.”<sup>48</sup> These specialist areas included personal injury law, family law, and commercial practice in particular.

73. The Lord President said that it was “desirable that a wide range of interest groups and users of the system be represented, and I am confident that they will be.”<sup>49</sup> However, Lord Gill believed that listing all relevant interest groups on the face of the Bill would “deprive us of the flexibility that is needed in setting up such a council.”<sup>50</sup> He considered that the list of people who are required to be on the Council under section 6(1) of the Bill was “entirely appropriate” and provided “plenty of flexibility”<sup>51</sup>.

74. Lord Gill also said it was important to recognise that much of the Council’s work, particularly at its inception, would involve the drafting of rules. He described this as a “substantial project” requiring “strong legal representation.”<sup>52</sup>

75. The Cabinet Secretary for Justice said that the proposed size and composition of the Council struck the right balance between reflecting a range of interests in the civil justice system and having sufficient expertise to carry out its functions.<sup>53</sup> He said that there was sufficient flexibility in the Bill to allow the membership of the Council to evolve as its role develops, so that if difficulties did arise, they could be addressed in due course.<sup>54</sup>

76. The Cabinet Secretary was asked about the Spencer Review, which had led to a re-balancing in the membership of the Civil Justice Council in England and Wales, with half legal and half lay members. He replied that the CJC is a non-departmental public body, and that its role is therefore slightly different to that of the proposed Scottish Council. He referred to the Lord President’s discretion to choose up to six members, and said that “we should try out the proposed balance and see where we get to.”<sup>55</sup> The Cabinet Secretary also highlighted the provision in section 6(3), allowing the Scottish Ministers to amend by subordinate legislation the number of members as they think fit.

77. During his appearance before the Committee, Lord Gill was not directly invited to comment on the Spencer Review. However, in a subsequent letter to the Committee, he pointed out that the Scottish Council’s remit was not directly

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<sup>48</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1620.

<sup>49</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1609.

<sup>50</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1608.

<sup>51</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1608.

<sup>52</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1609.

<sup>53</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1716.

<sup>54</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1719.

<sup>55</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1719.

comparable to that of the CJC, as the Scottish body would have rule-making functions that in England belonged to a separate body from the CJC. The Lord President advised that comparisons between the two councils that did not take account of this distinction should be avoided.<sup>56</sup>

#### *Appointment of Council members by the Lord President*

78. Section 7 of the Bill outlines the process which the Lord President must follow when appointing advocate, solicitor, consumer representative, and LP members of the Council. He must publish a “statement of appointment practice”, including a requirement to consult particular persons.<sup>57</sup>

79. Some stakeholders argued that the process should be more prescriptive and in particular that it should comply with the guidelines set down in the Public Appointments Commissioner for Scotland’s 2011 Code of Practice.<sup>58</sup> It was pointed out that appointments to the Civil Justice Council in England and Wales are regulated by the Public Appointments Commissioner, as are those to Scottish bodies such as the Judicial Appointments Board for Scotland, the Scottish Law Commission and the Scottish Legal Aid Board.<sup>59</sup>

80. Lord Gill sought to assuage these concerns—

“Under the bill, I will be required to prepare and publish a statement of appointment practice that sets out the processes that will be followed for the appointment of various members. I intend to draft a statement of appointment practice based on the principles set out by the Office of the Commissioner for Public Appointments in Scotland. That will safeguard the key principles of merit, fairness and openness, and it will be published.”<sup>60</sup>

81. Scottish Women’s Aid highlighted that there is no requirement in the Bill for the Lord President to prepare or publish an appointment process for the judicial members of the panel. It considered that this represented 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.”<sup>61</sup> Consumer Focus Scotland also noted this inconsistency, suggesting that section 7 be widened to include judicial members.<sup>62</sup>

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<sup>56</sup> Correspondence from the Lord President and Lord Justice General received on 24 September 2012.

<sup>57</sup> Namely: the Faculty for advocate members, the Law Society Council for solicitor members, and the Scottish Ministers for consumer representative or LP members.

<sup>58</sup> Written submissions from Senior Public Law Professors in Scotland, Scottish Woman’s Aid, Friends of the Earth Scotland and the Environmental Law Centre Scotland and Citizens Advice Scotland. The Commissioner’s Code of Practice includes a statement of appointment principles, which begins: “Scotland’s public appointments process will be open, fair, and accessible to all. Every public appointment round will be designed to identify and appoint the most able applicant(s) in as resource-effective a way as possible and will provide all applicants with an opportunity to demonstrate their merit in relation to the requirements of a particular role.” [<http://www.publicappointments.org/site/uploads/publications/ff122aed73959b8d51ff9b6375ba84f5.pdf>] [Accessed 25 September 2012]

<sup>59</sup> Written submissions from Friends of the Earth Scotland and the Environmental Law Centre Scotland and Senior Public Law Professors in Scotland.

<sup>60</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1611.

<sup>61</sup> Scottish Woman’s Aid. Written submission.

<sup>62</sup> Consumer Focus Scotland. Written Submission.

82. The Cabinet Secretary for Justice said it was right for the Lord President to take the lead role in determining the membership of the Council but agreed that the appointments process “must be transparent and robust.”<sup>63</sup> He said he welcomed the Lord President’s commitment to observe the principles set out by the Office of the Commissioner for Public Appointments in Scotland, which, in his view, provided assurance that there were sufficient safeguards as to the integrity of the appointments process.

83. The Cabinet Secretary was asked why the public appointments procedure was not clearly set out in the Bill. He referred to the Judiciary and Courts (Scotland) Act 2008, which viewed the judiciary “separately and tangentially”<sup>64</sup> from Scottish ministers and helped preserve the separation of powers between the Executive and judiciary. He considered that, as the public appointments procedure was specifically intended for ministerial appointments, it would not be appropriate in this case, although there would be much that the Lord President could apply from the procedure.<sup>65</sup>

**84. The Committee is satisfied with the Council’s proposed membership range of between 14 and 20 members.**

**85. The Committee notes that a clear majority of mandatory appointees are members of the legal profession, but further notes that the Lord President has discretion to appoint up to six additional members. The Committee welcomes the Lord President’s assurances that a wide range of interests and users will be represented. The Committee notes the Lord President’s comment that the Council’s initial priority will be to draft rules of court, which he said would require specialist legal input. However, we have some concerns that, from the outset, the perspective of end users may not be represented. The Committee anticipates that the Council’s priorities may adjust over time and that the need for specialist legal input might then be reduced. We therefore expect that the balance of Council membership would shift to reflect that adjustment. In this connection, we note that the Scottish Ministers have powers under secondary legislation to adjust the Council’s mandatory membership.**

**86. The Committee also notes the potential for Council committees (discussed below) to help ensure that individuals from a wide spectrum of backgrounds and interests have input into the Council’s work.**

**87. In relation to the appointments process, the Committee welcomes the Lord President’s assurances that he will draft a statement of appointment practice based on the principles set out by the Office of the Commissioner for Public Appointments in Scotland. However, we note the views of a large number of witnesses that the legislation should be strengthened so that such appointment principles are embedded in the Bill, and invite the Scottish Government to give this further consideration.**

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<sup>63</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1717.

<sup>64</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1721.

<sup>65</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1720.

*Appointment tenure (section 8)*

88. The Bill provides that all Council members, except the Scottish Ministers' appointee and the office-holder members, are to hold office for a period of three years." There were few comments on this provision. One submission queried whether this appointment period was long enough, particularly at the early stages of the Councils work, and suggested a five year term of office might be more appropriate.<sup>66</sup> However, re-appointments of members are permitted under subsection (7), which may partly address this concern.

*Disqualification and removal from office (section 9)*

89. Section 9 provides that certain categories of person (principally individuals holding elected office) are disqualified from Council membership. This elicited no concerns. It also provides that the Lord President may remove a member appointed under section 7 by notice in writing, owing to unfitness for office because of inability, neglect of duty or misbehaviour or being otherwise unsuitable for continued membership. Under section 9(3), the Lord President must consult the Scottish Ministers before removing an appointee from office, but only if the person the Lord President proposes to remove is a consumer representative or an LP member.

90. There were concerns that this power was too broad, and it was suggested that it be moderated by requiring the Lord President to devise a policy on removal from office or to consult the Scottish Ministers before using the power.<sup>67</sup> Professor Mullen proposed that section 9(3) be amended to require the Lord President to consult the Scottish Ministers before removing *any* appointed Council member from office.<sup>68</sup> The Faculty of Advocates had a contrary view, questioning why the Lord President should have to consult the Scottish Ministers before removing an LP member from office.<sup>69</sup>

91. The Bill does not provide for a right to a hearing, review or appeal in relation to a removal from office. Professor Mullen advised that it might be possible to seek a judicial review of such a decision.<sup>70</sup>

92. Lord Gill said he was comfortable with section 9, as his experience from sitting on public bodies was that "the question of a member's removal arises seldom, if ever"<sup>71</sup>.

**93. The Committee considers it appropriate that the Lord President, as the individual ultimately responsible for the effective functioning of the Council, and, in a wider sense, of the civil justice system generally, should have the power to dismiss Council members. We note the Lord President's observations that he expects the issue to arise seldom, if ever.**

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<sup>66</sup> Traprain Consultants. Written submission.

<sup>67</sup> Written submissions from Consumer Focus Scotland and Friends of the Earth Scotland and the Environmental Law Centre Scotland.

<sup>68</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1563.

<sup>69</sup> The Faculty of Advocates. Supplementary written submission.

<sup>70</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1563.

<sup>71</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1611.

*Chairing of meetings (section 11)*

94. Under section 11 of the Bill, it would be for the Lord President to determine who would chair meetings of the Council. However, section 11(2) restricts the choice to a member of the Council who is also a Court of Session judge. The Lord President may decide to chair meetings himself. Section 11(4) also requires that the deputy chair be selected from the judicial members.

95. These proposals were questioned by a number of witnesses,<sup>72</sup> including the public law professors—

“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.”<sup>73</sup>

96. Lord Gill, however, said that—

“I do not think that it would be appropriate for the body to be chaired by a lay person because much of the work will involve technical drafting questions. For that, a person needs to have some experience of draftsmanship in the legal context. In addition, they will also need some experience of how the rules of court work in practice, as well as the background to understand when a problem is genuine and the appropriate ways of resolving it.

“The vital priority of drafting rules means that it is essential that the body should be chaired by an experienced lawyer. I intend to chair it, because I am keen to see that it gets away to a good start. It is critical to the overall implementation of the civil courts review, the recommendations of which are obviously very dear to me.”<sup>74</sup>

97. The Cabinet Secretary of Justice said that he did not preclude a lay person being the deputy chair but considered that the choice should be a decision for the Lord President and the Council and was therefore best dealt with by them.<sup>75</sup>

**98. The Committee agrees with the Cabinet Secretary that any decision to appoint a deputy chair should be a matter for the Council, but that it should not be precluded from appointing a lay member to this role. However, we note that section 11(4) as currently drafted allows the Council to elect a deputy chair only from judicial members.**

*Committees (section 13)*

99. Section 13 of the Bill enables the Council to establish committees. Individuals who are appointed to committees need not be Council members. The Scottish Government considers that this provision will enable contributions to be made in

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<sup>72</sup> Written submissions from Traprain Consultants Ltd, Scottish Committee of the Administrative Justice and Tribunals Council, Scottish Women’s Aid,

<sup>73</sup> Senior Public Law Professors in Scotland. Written submission.

<sup>74</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1610.

<sup>75</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1721.

committees which would “reflect the full range of interests across Scotland’s civil justice system”<sup>76</sup> whilst keeping membership of the Council itself within a workable limit.

100. This provision was generally welcomed, as committees were seen as crucial to the effective functioning of the Council, given the formidable challenges it faces in driving forward the Gill reforms.

101. Professors Paterson and Mullen, speaking on behalf of senior public law professors in Scotland, suggested that committees could be established to deal with functions previously carried out by the Court of Session Rules Council and Sheriff Court Rules Council. Such committees could be chiefly comprised of lawyers and judges, so as to allow representation on the full Council between practising lawyers and judges and other stakeholder groups to be near parity.<sup>77</sup>

102. Friends of the Earth Scotland and the Environmental Law Centre Scotland agreed—

“There should be parity between legal and lay members on the Council itself, while effective use of the power to establish sub committees should ensure there is adequate flexibility in the system to access specialist skills on a more ad hoc basis as and when required.”<sup>78</sup>

103. Lauren Wood of Citizens Advice Scotland noted the wide remit of the Council, and the range of the tasks it would have to undertake. She said that it was “perhaps slightly unrealistic to see the council as a body that will have to cope with all those things at the same time.”<sup>79</sup> Instead, it was suggested that, to make “fullest use” of the Council, committees could draft rules and look at the changing nature of the civil justice system, with the Council itself being more of a “facilitator, whose role would be to listen to those committees and sub-committees.”<sup>80</sup>

104. Consumer Focus Scotland noted that there was no reference to an appointments process for Council committees.

105. The Lord President informed the Committee that he was “keen” for the Council to have a committee structure, which would help provide a forum for specialist interests—

“In the initial years of the Council, I would envisage Committees or sub-groups to be closely aligned to the implementation of the Court Reforms (Scotland) Bill and the subsequent primary legislation to implement Sheriff Principal Taylor’s Review.”<sup>81</sup>

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<sup>76</sup> Policy Memorandum, paragraph 16.

<sup>77</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Cols 1549-1550.

<sup>78</sup> Friends of the Earth Scotland and the Environmental Law Centre Scotland. Written submission.

<sup>79</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1621.

<sup>80</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1621.

<sup>81</sup> Correspondence from the Lord President and Lord Justice General received on 24 September 2012. The Cabinet Secretary for Justice announced in his answer to Parliamentary Question S4W-6567 (10 April 2012) the Scottish Government’s intention to consult on a Courts Reform (Scotland) Bill towards the end of 2012. It is expected that this Bill will deal with the aspects of the Scottish

106. The Cabinet Secretary also supported the use of committees, believing that for technical matters, such as drafting Court of Session and sheriff court rules, they made “a great deal of sense.”<sup>82</sup>

**107. The Committee welcomes provision being made for specialist committees in the Bill and sees these as being crucial in helping drive civil justice reform forward, especially in relation to specialist areas of civil justice. Given the concerns surrounding the membership of the Council, we see committees as a means to ensure that a broad spectrum of interests is represented while also allowing the Council to draw on particular areas of expertise if and when required.**

*Other issues*

*Alternative Dispute Resolution*

108. One of the principles of the Council is to ensure that—

“methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.”<sup>83</sup>

109. A number of submissions drew attention to the potential effectiveness and economy of non-court-based dispute resolution methods, such as arbitration and mediation (known collectively as Alternative Dispute Resolution (ADR)).<sup>84</sup> Consumer Focus Scotland put forward a case for a member of the Council to have particular experience of ADR, while a couple of written submissions proposed that ADR should be given an equal footing in the Bill alongside the civil court system.<sup>85</sup> Each referenced a mediation project in Edinburgh Sheriff Court<sup>86</sup> which they argued had shown that ADR does not need to be treated as entirely separate from the courts.

110. In evidence, Lord Gill said that the Scottish Civil Courts Review had proposed that ADR facilities would be made available to court users and he saw nothing in the Bill which would hinder that. Lord Gill considered that in many cases ADR was the “ideal method” for resolving a dispute but that in others it “would never be appropriate”.<sup>87</sup> He said that ADR should never be compulsory but that the option to take it up as an alternative to formal court processes should exist where possible.<sup>88</sup>

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Civil Courts Review which require primary legislation. Sheriff Principal Taylor’s review deals with a further recommendation of the Scottish Civil Courts Review to examine options for the costs and funding of civil litigation: <http://scotland.gov.uk/About/Review/taylor-review> [Accessed 25 September 2012]

<sup>82</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1721.

<sup>83</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 2(3)(d).

<sup>84</sup> Written submissions from Citizens Advice Scotland, Consumer Focus Scotland and Traprain Consultants Ltd.

<sup>85</sup> Written submissions from Traprain Consultants and Consumer Advice Scotland.

<sup>86</sup> Scottish Government. (2011) *Supporting Court Users: The in-court Advice and Mediation Projects in Edinburgh Sheriff Court: Research Phase 2*. Available at:

<http://www.scotland.gov.uk/Publications/2002/03/14414/1583> [Accessed 17 September 2012]

<sup>87</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1614.

<sup>88</sup> Scottish Parliament Justice Committee. *Official Report*, 4 September 2012, Col 1614.

111. Lauren Wood from Citizens Advice Scotland agreed that ADR should not be mandatory for court users, but expressed the wish that the Council would help promote a culture change within the civil justice system—

“If alternative dispute resolution is embraced as much more of a cultural part of the civil justice system, people’s access to that outlet will be a lot easier, and if their claim is not resolved there, it can be referred on.”<sup>89</sup>

112. Any such culture change, she suggested, could be started off at law schools.

113. Louise Johnson from Scottish Woman’s Aid was concerned that a negative inference might be drawn if women did not try mediation, even if it was not made mandatory. She said that ADR could be completely inappropriate in some situations (for instance where one of the parties has been abused or attacked by the other). She wanted individuals to have a right of access to the civil justice system at the level they felt most appropriate, so that “no punitive measures will be taken and it will not have an adverse influence if they do not want to go down a certain course.”<sup>90</sup>

#### *Accountability and transparency*

114. Under Part 1 of the Bill, considerable power and responsibility accrues to the Lord President, particularly if the Lord President decides to chair the Council. The Policy Memorandum explains that the Scottish Government considered “the most effective line of accountability for taking forward reforms to the civil justice system, including procedural reforms, is to have a body accountable to the Lord President.”<sup>91</sup> However, a number of witnesses questioned this approach, believing that this might create a possible conflict of interests.<sup>92</sup> For example, Consumer Focus Scotland accepted that the Lord President would have a key role in the work of the Council but considered that there was a need for separation between the two roles as the Lord President would—

“...sit on the Council, chair it and appoint members, as well as consider the recommendations that the Council makes, some of which he will have ultimate responsibility for implementing.”<sup>93</sup>

115. Ronnie Conway of the Law Society of Scotland said he did not consider that the Lord President had too much power in relation to the work of the Council. However, Mr Conway added that he might not give the same answer in future depending on circumstances at that time.<sup>94</sup> Lauren Wood from Citizens Advice Scotland also said that the current Lord President was best placed to lead the Council, but that Lord Gill would not be the Lord President for ever. She suggested that section 5(4) be extended so that the Council must present its annual plan and

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<sup>89</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1631.

<sup>90</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1634.

<sup>91</sup> Policy Memorandum, paragraph 25.

<sup>92</sup> Written submissions from Consumer Focus Scotland, Scottish Women’s Aid and Friends of the Earth Scotland and the Environmental Law Centre Scotland.

<sup>93</sup> Scottish Parliament Justice Committee. *Official Report, 26 June 2012*, Col 1562.

<sup>94</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1636.

annual report not only to the Scottish Parliament, but also to the Scottish Ministers so that it would “present its advice to the people who are making the policy.”<sup>95</sup>

116. Lord Gill said that concerns about a conflict of interest were “completely overstated” as—

“The role of the Lord President is at the heart of the rule-making function of the council, which makes it entirely appropriate that the Lord President should chair the council. At the end of the day, though, the council will have a mind of its own and, if it takes a view about a matter on which it wishes to make recommendations to the Lord President, the fact that the Lord President is the chairman of the council does not seem to me to bring us into any situation of conflict; on the contrary, I would have thought that the Lord President will listen very carefully to the sort of recommendations that come from such a body.”<sup>96</sup>

117. Lord Gill added that he currently chairs the civil and criminal courts rules councils. These bodies provide advice to the Lord President, and he did not consider that this had caused any problems in practice.

118. In response to a query as to whether the Bill could be amended to build in more checks and balances in relation to the Lord President’s role, he said—

“I would honestly not be worried about that in the least. In fact, I think that there would be greater cause for concern if I were not to chair the council, because in that case there would be a strong possibility that the council and the Lord President could take divergent views on some important matter. If the council deliberated on something under the Lord President’s chairmanship and reached certain conclusions, a wise Lord President would listen to what it said and learn from its collective wisdom on the point. I do not consider that there will be a major difficulty.”<sup>97</sup>

119. The Scottish Government also considered that the powers of the Lord President proposed in the Bill were appropriate, given that the Lord President is Scotland’s most senior judge. The Cabinet Secretary for Justice said that he was confident that the Council would operate as it was intended, as the membership of the Committee would ensure that there were appropriate checks and balances—

“...to be brutally frank, we are not talking about a bunch of patsies. We are talking about the chief executive of the Scottish Court Service, the chief executive of the Scottish Legal Aid Board and representatives from the Faculty of Advocates and the Law Society of Scotland. In my experience as a minister, they are no pushovers.”<sup>98</sup>

**120. The Committee notes that, under Part 1 of the Bill, considerable power and responsibility accrues to the Lord President in relation to the running of the Council. However, the Committee considers that this is appropriate. The**

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<sup>95</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1637.

<sup>96</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Cols 1616-1617.

<sup>97</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1617.

<sup>98</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1721.

**Lord President requires sufficient powers to push forward necessary civil justice reform. The Committee expects that the Council will comprise experienced and well-qualified members who will feel empowered to give robust advice to the Lord President, or to future Council chairs.**

*Administrative justice*

121. The Administrative Justice and Tribunals Council (AJTC) is a statutory body set up by the UK Tribunals, Courts and Enforcement Act 2007, to review the work of the administrative justice system in order to keep it accessible, fair and efficient. In Scotland the AJTC's functions are carried out by a Scottish Committee whose members are appointed by the Scottish Ministers. The UK Government proposed the abolition of the AJTC in the Public Bodies Act 2011. Should the Scottish Committee of the AJTC be abolished, the Bill's Policy Memorandum proposes that the Scottish Civil Justice Council should take over the Scottish Committee's functions "once judicial leadership for tribunals is transferred to the Lord President."<sup>99</sup>

122. The Scottish Committee of the AJTC stated that its functions would be best discharged by a stand-alone body with a specific remit for administrative justice. It acknowledged that in the absence of such a body, it might be appropriate for its functions to transfer to the proposed Council. However, the Scottish Committee did not believe that the proposed structure of the Council was suitable. It considered that the Bill should be amended so that the Council could accommodate the current functions of the Scottish Committee from its inception. Among the Scottish Committee's suggested amendments was a statutory requirement for there to be an Administrative Justice Committee.<sup>100</sup>

123. The Scottish Committee also highlighted a potential gap in oversight should the AJTC be abolished with no transitional arrangements put in place. This was echoed by a number of witnesses<sup>101</sup>, including the Faculty of Advocates, who suggested a "two stage approach"<sup>102</sup>. The first stage would involve a body focussed on implementing the Scottish Civil Courts Review recommendations. Once this was complete, the Council could then be formally established and include the functions of the AJTC. Professor Tom Mullen, on the other hand, proposed that the functions of the Scottish Committee be transferred to the Council as soon as it is operational. This would prevent administrative justice policy from developing "along a totally separate track"<sup>103</sup> from civil court policy. The Scottish Legal Aid Board also saw no reason why the Bill could not be amended to include the AJTC's functions, even if such provisions were not commenced until a later date.<sup>104</sup>

124. Lord Gill said he was supportive of the idea of the functions of the Scottish Committee of the AJTC being extended to the Scottish Civil Justice Council. But he did not believe that now would be the appropriate time to do so, given the

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<sup>99</sup> Policy Memorandum, paragraph 29.

<sup>100</sup> Scottish Committee of the Administrative Justice and Tribunals Council. Written submission.

<sup>101</sup> Written submissions from Consumer Focus Scotland, Which? and Friends of the Earth Scotland and the Environmental Law Centre Scotland.

<sup>102</sup> Faculty of Advocates. Supplementary written submission.

<sup>103</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Col 1565.

<sup>104</sup> Scottish Legal Aid Board. Written submission.

uncertainty over the direction of policy in relation to tribunals in Scotland, and the need to focus resources on the Council's existing remit.<sup>105</sup>

125. The Chair of the Scottish Committee of the AJTC, Richard Henderson, commented to the Committee on the different cultures of the civil courts system and administrative justice and tribunals. Some tribunals were like courts in their approach, with a quasi-adversarial procedure. Others took a more inquisitorial approach. Mr Henderson described courts and tribunals as not necessarily incompatible, but also remarked that—

“... at this stage in the development, if you were to put the organisations together, you would be doing so on a wing and a prayer. Until you have analysed the differences and decided whether they are fundamental, that will be the case. In some areas, the differences are utterly fundamental; in others, they are cosmetic.”<sup>106</sup>

126. Mr Henderson also told the Committee that he supported the two-phase approach suggested by Faculty, adding that “the process is so complex it must be undertaken in a measured and considered way, rather than in one big bang.”<sup>107</sup>

127. In a letter to the Scottish Committee of the AJTC on 4 September 2012, the Minister for Community Safety and Legal Affairs confirmed that Scottish Government officials were considering long-term options for taking forward the work of tribunals and administrative justice in Scotland. In the meantime, the Minister stated that she intended to set-up a non-statutory advisory committee to continue much of the Scottish Committee's work should the AJTC be abolished.

**128. In relation to the oversight of administrative justice in Scotland, the Committee notes that the future is uncertain. However, we note that the Scottish Government proposes to establish a non-statutory advisory committee and is considering long-term issues. The Committee proposes to maintain a watching brief on this issue. The balance of evidence suggests that it may not be appropriate, in the meantime, for the Council to take on the function of oversight of administrative justice.**

#### *Part 1 Resources*

129. The Financial Memorandum<sup>108</sup> outlines the anticipated costs for Part 1 of the Bill. The Scottish Government estimates the total cost of the Council will be between £313,000 and £375,000 in its first year. This will be met by the Scottish Court Service. As the current operating cost of the existing civil rules councils is approximately £226,000 per year, the additional cost of the new Council will be between £87,000 and £149,000 per year.

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<sup>105</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Cols 1616-1617.

<sup>106</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1640.

<sup>107</sup> Scottish Parliament Justice Committee. *Official Report, 4 September 2012*, Col 1641.

<sup>108</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill. Financial Memorandum.

Available at:

[http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-en.pdf)

130. There are also expected to be additional operational costs for the Council during its work in assisting with the Scottish Government's planned programme of reform of civil courts, but these are expected to decrease once the major reforms are implemented. While the Scottish Government said it was not able to estimate these costs at this time, it has made initial projections based on similar reforms in England and Wales. These projections point to a year 2 (2014-15) total cost of between £477,000 and £702,000, falling in subsequent years to between £343,000 and £571,000 in year 6 (2018-2019).

131. The Scottish Court Service expects to meet the rise in costs by increasing civil court fees by 1% above inflation. A consultation on the proposed increase was launched by the Scottish Government in May 2012 and closed in June.<sup>109</sup> The outcome of this consultation has yet to be announced.

132. The Finance Committee sought written evidence from a number of relevant parties and received responses from Consumer Focus Scotland, the Lord Justice General and Lord President of the Court of Session, the Scottish Court Service and the Scottish Legal Aid Board.<sup>110</sup>

133. Consumer Focus Scotland, in its submission, argued that the current rules councils are under-resourced and was therefore "unconvinced" that the additional staffing costs would be sufficient for the new Council to fulfil its much wider remit. Consumer Focus Scotland also questioned why remuneration of Council members, support for Council committees and possible research fees had not been included in the projected costs. On a wider issue of access to justice, Consumer Focus Scotland was also concerned that any increase to civil court fees "may deter some users from accessing the courts".<sup>111</sup>

134. While satisfied with the assumptions made by the Scottish Government in the Financial Memorandum, the Scottish Court Service said that without additional funding from an above inflationary increase in court fees, it could not meet the additional costs of the proposed Council.<sup>112</sup> The Lord President was also satisfied with the financial assumptions made in the memorandum, but he too believed that the Council would not be workable without the additional funding proposed through court fees.

135. In the Finance Committee's subsequent letter to the Justice Committee on the Financial Memorandum, it said it welcomed an assurance given in evidence by Scottish Government officials that the expected costs of the Council should not "substantially exceed to any appreciable degree"<sup>113</sup> the figures in the Financial Memorandum.

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<sup>109</sup> Scottish Government. (2012) *Review of Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian: A Consultation Paper*. Available at: <http://www.scotland.gov.uk/Publications/2012/05/7547/0> [Accessed 20 September 2012].

<sup>110</sup> Written evidence received on the Financial Memorandum by the Scottish Parliament Finance Committee. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45633.aspx>

<sup>111</sup> Consumer Focus Scotland. Written submission to the Finance Committee.

<sup>112</sup> Scottish Court Service. Written submission to the Finance Committee.

<sup>113</sup> Scottish Parliament Finance Committee. *Official Report*, 5 September 2012, Col 1485.

136. The Finance Committee nevertheless suggested that this was a matter which the Justice Committee might wish to look at again when it considers the SSI which would be necessary to increase court fees.

137. In evidence to the Justice Committee, the Cabinet Secretary was invited to comment on whether relying on the recovery of court fees endangered the robustness of the business case underlying the funding of the Council. The Cabinet Secretary replied that he did not think so, as experience had shown that unless civil court fees were paid up front “you really cannot get out of the starting blocks and move on.”<sup>114</sup>

138. The Justice Committee heard that remunerating Council members could open up membership to a wider category of people.<sup>115</sup> Scottish Government officials told the Finance Committee that there was not a tradition of remuneration of members in the existing councils.

**139. The Committee notes that the Scottish Government’s business case for funding the Council rests on combining the costs saved from abolishing the two current non-statutory rules councils with revenue from increasing court fees.**

## PART 2: CRIMINAL LEGAL ASSISTANCE

### Introduction

140. Part 2 makes changes to the current framework for criminal legal assistance, set out in the Legal Aid (Scotland) Act 1986. It amends various provisions in the 1986 Act (ie it is not a free-standing piece of legislation).

141. The overall aim behind the changes is to provide for the introduction of contributions in criminal legal aid. The Policy Memorandum argues that “in a time of reduced expenditure, those who are able to pay for at least some of their costs should do so, so that legal aid can then be focused on those who need it most and funds still available for legal aid can be better targeted.”<sup>116</sup> It further notes that the principle of making contributions is already established in relation to other forms of legal assistance, including civil legal aid, and that introducing the principle into criminal legal aid “will, therefore, both ensure parity between the different aid types and, by delivering savings, help to maintain as much as possible existing levels of access to justice in economically challenging times.”<sup>117</sup>

142. The Scottish Government’s intention to make changes to the current eligibility rules had been signalled in its 2011 publication, *A Sustainable Future for Legal Aid*,<sup>118</sup> which set out a rationale for reducing the legal aid budget (civil and criminal) at a time of reduced public spending. The Scottish Government outlined that it wished to avoid making radical changes to the scope of legal aid of the sort

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<sup>114</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1724.

<sup>115</sup> Scottish Parliament Justice Committee. *Official Report*, 26 June 2012, Cols 1556-1557.

<sup>116</sup> Policy Memorandum, paragraph 31.

<sup>117</sup> Policy Memorandum, paragraph 33.

<sup>118</sup> Scottish Government. (2011) *A Sustainable Future for Legal Aid*. Available at: <http://www.scotland.gov.uk/Publications/2011/10/04161029/0> [Accessed 2 October 2012].

(particularly in relation to civil legal aid) that were being proposed south of the border. The changes set out in Part 2 amount to the Government's main (but not only) proposal for reducing the legal aid budget over the coming years.

143. In 2010-11, the total cost of all legal aid (including advice and assistance and ABWOR; both explained below) was £161.4m. Following the UK Government's 2011 comprehensive spending review, which saw a drop in the overall Scottish budget, the Scottish Government determined that the budget for legal aid should fall to £132.1m in 2014-15. It is important to stress that the legal aid budget is not formally capped; the amount actually spent depends on the demand for it in any year. The amount of what might loosely be called "legal activity" (ie clients seeking advice from solicitors, and cases being raised in courts and tribunals) is not of course within the direct control of government. Rules on eligibility, though, are; hence Part 2 of the Bill. The Scottish Legal Aid Board (SLAB), which administers the legal aid fund, also has a limited discretion in relation to determining individual applications for legal aid, as discussed further below.

#### *Current regime*

144. In understanding the changes proposed under Part 2, it helps to have an overview of the criminal legal aid system in general. This is set out in both in the Explanatory Notes and in the SPICe briefing, so what follows is only a brief summary.

145. There are several forms of criminal legal aid:

- *Advice and assistance*: preliminary advice and assistance (not representation) from a solicitor on a criminal matter. There is an eligibility test for advice and assistance, which is financial and administered by the solicitor;
- *Assistance by way of representation (ABWOR)*: an extension of advice or assistance, potentially available for more basic or preliminary criminal proceedings, most commonly the entering of a guilty plea. Again, there is a financial eligibility test applied by the solicitor. The solicitor must also consider whether it is in the interests of justice to make legal aid available;
- *Summary criminal legal aid*: follows a plea of not guilty in custody and cited cases being prosecuted under summary procedure.<sup>119</sup> The test for eligibility for summary criminal legal aid is twofold: would paying the full cost cause "undue hardship"; and is it in the interests of justice to make legal aid available? It is SLAB, rather than the solicitor, which applies this test, which operates on an all-or-nothing basis, ie: if the client is eligible for summary legal aid, then they contribute nothing;
- *Solemn criminal legal aid*: available in more serious (solemn) cases. The same "undue hardship" test is applied as for summary legal aid but there

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<sup>119</sup> ie less serious crimes, although, in evidence, practitioners were keen to stress to the Committee that "less serious" is a relative term and that, particularly since the summary justice reforms implemented in 2008, there has been a significant increase in more serious crimes being prosecuted at summary justice level. [Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Cols 1655-1657.]

is no additional “interests of justice” element to the test. Since November 2010, the test has been administered by SLAB. Again, if the client is found to be eligible, then they make no contribution;

- *Court grants of legal aid and automatic legal aid:* there are a limited set of circumstances where the court may grant criminal legal aid or where the right to legal aid is automatic. (The Bill makes no change to these rules);
- *Legal aid for criminal appeals:* again SLAB applies an undue hardship test to determine eligibility. Most appeals go through a sift process to determine whether there is merit in proceeding to a full hearing. Where this is the case, there is no additional “interests of justice” test.

#### *Comparison with civil legal aid*

146. During evidence-taking, some discussion was had about the differences and similarities between civil and criminal legal aid. Civil legal aid is available where someone raises or defends an action in the civil courts. An applicant must meet a financial eligibility test. The applicant must also satisfy SLAB that there is a legal basis for their case and that it is reasonable in the circumstances of the case that legal aid is granted. As with the proposals in Part 2 of the Bill, contributions can be sought from both income and capital. The financial thresholds applied for civil legal aid are more generous than those which are envisaged under the Bill: however, the level of contribution can also be significantly higher. In addition, the successful party in civil court action would usually be able to cover their costs in bringing the case from the unsuccessful party – i.e. the court would make an award of “expenses” (covering the reasonable costs associated with instructing lawyers, getting expert evidence etc.) against the loser. Entitlement to civil legal aid is assessed on disposable income in a manner similar to that proposed in the Policy Memorandum accompanying the Bill. The income of a spouse or partner is usually considered when calculating entitlement to civil legal aid.<sup>120</sup> Means-tested social security benefits and disability-related payments and benefits are disregarded. Advice and Assistance and ABWOR are also available in certain circumstances in relation to civil matters.

147. The outline of criminal legal aid above makes clear that the principle of means-testing for criminal legal assistance already exists, as does the principle of making a contribution for assistance in relation to a criminal case. However:

- in relation to criminal legal aid (solemn, summary or appeal), the Committee understands that it is rare for an accused not to meet the “undue hardship” test;<sup>121</sup>

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<sup>120</sup> The income of a spouse or partner is not considered currently when assessing entitlement to criminal legal aid (except to decide how household costs should be apportioned between family members).

<sup>121</sup> Under the 1986 Act, SLAB in effect has discretion to determine how the undue hardship test applies in practice. Current guidance, dating from May 2012, is available on SLAB’s website at [www.slab.org.uk](http://www.slab.org.uk). (There is no direct link to the guidance, *Applying the Undue Hardship Test*, which is in the form of a Word document, but it may be found via an online search). The guidance runs to 5 pages of text, but the key determinant is whether the claimant has disposable income of £222 or disposable capital of £1716: other than under exceptional circumstances, anyone with income or

- the principle of making a contribution exists only in relation to criminal advice and assistance or ABWOR. In relation to criminal legal aid, it is all or nothing.

148. What this means is that where a case goes to trial, the vast majority of accused persons will not pay anything for their legal representation and associated costs. This will change under Part 2 of the Bill. As explained further below, whether this will change *significantly* was the subject of discussion at Stage 1. Based on analysis of data held by SLAB, the Scottish Government is of the view that around 82% of clients would not have to make any contribution under its plans. Some witnesses sought more clarity on this point or warned of a “slippery slope” towards more people contributing once the overall principle had been accepted and legally enshrined.

### Proposals under Part 2 of the Bill

149. The Explanatory Notes provide a comprehensive description of each section of Part 2; what follows is an outline. It should be stressed that Part 2 does not of itself set out the totality of the Government’s proposals to reform criminal legal assistance: regulations and SLAB guidance or schemes will help put flesh on the bones of the legislation. The Policy Memorandum sets out the Scottish Government’s current thinking.

150. *Section 17* gives the Scottish Ministers the power to determine by regulations the circumstances in which advice and assistance may be provided without payment of a contribution. Section 17 therefore runs counter to the overall aim of Part 2, which is to *extend* the principle of making contributions towards criminal legal assistance. The Policy Memorandum explains that the aim of section 17 (which is not evident from the drafting) is to enable the provision of free advice and assistance in *Cadder*<sup>122</sup> situations. Solicitors have complained that it is difficult to collect the necessary documentation to assess contributions when a client is in police custody.

151. This provision was generally welcomed by stakeholders, especially those from the legal profession, and is not discussed further below.<sup>123</sup>

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capital in excess of those amounts does not meet the “undue hardship” test. The Committee has had difficulty during Stage 1 in finding hard evidence in relation to (a) the percentage of individuals who fail the legal hardship test (or who would fail it if they applied to SLAB) or (b) what percentage of overall spending on criminal defence costs comes from private funds. A Scottish Government official remarked to the Committee that “the cost of privately funded cases is not a matter of public record.” (Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1733). Mark Harrower of the Edinburgh Bar Association told the Committee that he could not say how much money non-recipients of criminal legal aid provide in fees to criminal law firms, but that “they do not inject anything into ours.” (Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1659.) The Committee presumes this is fairly typical of most criminal law practitioners.

<sup>122</sup> In *Cadder v HM Advocate*, the Supreme Court determined, contrary to previous police and Crown Office practice, that a person detained and questioned by the police on suspicion of having committed a crime had a legal right to request legal assistance. (*Cadder v HM Advocate*, UK Supreme Court, 26 October 2010)

<sup>123</sup> In their written submission, the Scottish Human Rights Commission expressed concern about section 17, but this appears to be based on a misreading of what it is intended to do.

**152. The Committee welcomes section 17 of the Bill, which would enable the Scottish Ministers to disapply the requirement to obtain contributions from persons held for police questioning who request legal advice. The Committee seeks clarification that the Scottish Government intends to use this power and an indication of when this might happen.**

153. Sections 18 and 19 change the rules on eligibility to criminal ABWOR. In the Policy Memorandum, the Government makes clear that the overall aim is to “align” criminal ABWOR with criminal legal aid so that essentially the same test is applied in determining whether an individual must make a contribution and, if so, how much they must pay.

154. A test similar (but not identical) to the current test for summary and solemn legal aid is set out, the main criterion of which is “undue hardship”. This is to be applied by the solicitor, with the client having the opportunity to apply directly to SLAB where, after the solicitor has completed the assessment, the client still feels that the result would cause undue hardship.<sup>124</sup> Those who satisfy this test may still have to pay a contribution if they fall within certain financial parameters. These are set in the Bill as disposable income of £68 per week or more or disposable capital of £750 or more.<sup>125</sup> How much of a contribution those falling within these parameters would pay is to be set out in regulations.<sup>126</sup> (The Government’s current proposals are discussed further below.) SLAB must also publish a “scheme of eligibility” setting out financial circumstances in which it considers that paying fees and outlays for ABWOR would result in undue hardship.

**155. In its report, the Subordinate Legislation Committee commented that the power to require the drawing up of a scheme of eligibility under section 18 is a “significant power” and that there seemed to be no good reason why it should not be exercised by way of subordinate legislation (specifically an affirmative instrument). The Justice Committee considers that this point appears to be well made, and would be interested in the Scottish Government’s response to it.<sup>127</sup>**

156. Specific provision is made in respect of certain, so-called passported welfare benefits – income support, income-based jobseeker’s allowance, or income-related employment and support allowance. Anyone in receipt of any of these benefits, who also met the requirements in relation to capital, would not have to make any ABWOR contribution.

157. The Scottish Government has stated that aligning criminal ABWOR with criminal legal aid would increase consistency in the handling of criminal legal assistance and, in particular, reduce perverse incentives to plead not guilty (because under current rules, it is generally easier to qualify for criminal legal aid than for ABWOR). This was something of a bone of contention during evidence-taking, as discussed below.

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<sup>124</sup> Policy Memorandum, paragraph 51.

<sup>125</sup> These figures may be amended by order (section 22)

<sup>126</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 22.

<sup>127</sup> The Subordinate Legislation Committee also makes a more technical point about whether a power of Ministerial direction set out in relation to the scheme is too broadly drawn, which the Scottish Government may also wish to consider.

158. *Section 20* makes provision to introduce contributions for criminal legal aid relating to both summary and solemn trials and appeals. It does not modify the current “undue hardship” or (as the case may be) “interests of justice” tests but sets financial parameters to determine who must pay a contribution. These are as for ABWOR (disposable income of £68; disposable capital of £750; and exemptions for those on passported benefits, where they also meet the capital requirement). Regulations will again set out how much those within those parameters would contribute. *Section 20* also provides that in the case of summary criminal legal aid, contributions are to be collected by solicitors. This provision proved controversial in evidence-taking, as discussed below.

159. *Section 21* enables SLAB to require contributions when an appeal is being made on behalf of a deceased person. This provision was not widely discussed in evidence, perhaps because it may not in practice apply often and because its main purpose appears to be to enable consistency in the handling by SLAB of appeal cases involving living and deceased persons. It is therefore not discussed further in the rest of this report. However, the Committee did note the Scottish Human Rights Commission’s view that the wording appeared to enable SLAB to require a person appealing on behalf of a dead person to pay a contribution that the deceased might not have had to pay if they had survived.<sup>128</sup>

**160. The Committee accepts that if the principle of making contributions for criminal legal aid is accepted, then that principle should be applied consistently. The Committee invites the Scottish Government to consider whether section 21 of the Bill could be applied so as to require a greater financial contribution from a person appealing on behalf of a deceased person than would have been required of the deceased person had they survived. If so, the Committee invites the Scottish Government to consider whether that is fair.**

### **Key themes arising in evidence**

161. A number of concerns were raised about Part 2 of the Bill. The Committee identified seven distinct (but often overlapping) areas of concern:

- whether it was right in principle to require contributions for legal aid;
- if so, whether fairness required that there should be provision to enable refunds of legal aid contributions to be made in certain circumstances on acquittal;
- whether the level of contributions being proposed was appropriate;
- whether it was right for solicitors rather than SLAB to collect summary criminal legal aid contributions;
- whether the changes proposed would affect the smooth running of the criminal justice system;

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<sup>128</sup> Scottish Human Rights Commission. Written submission.

- whether the financial savings likely to be made were proportionate to the risks and disbenefits that might arise; and
- human rights concerns.

*Is it fair to require contributions for legal aid?*

162. The Faculty of Advocates expressed the clearest opposition in principle to the overall aim of Part 2. The Faculty noted that the Scottish Government had declared “fairness to the accused and the taxpayer” as one of the governing principles behind Part 2 but said that—

“Fairness requires that an individual, who is brought to trial and ultimately acquitted, be left, as far as possible, in no worse a position that he was prior to the proceedings commencing. The Faculty would support the introduction of financial contributions but only in circumstances where contributions would be refundable to an acquitted contributor.”<sup>129</sup>

163. The Faculty also argued that, without a refund system, the Bill would create perverse incentives to plead guilty out of fear of the financial consequences of taking a case to trial.<sup>130</sup> The Church of Scotland took a similar view, saying that it was concerned that under the proposals in the Bill “people who are poor or vulnerable may feel a perverse pressure to plead guilty and even to move out of work and onto benefits in order to be eligible for non-contributory legal aid.”

164. James Wolffe QC, representing the Faculty, said that in the case of an acquittal—

“the state has hauled someone into court on a criminal charge but has not made that good. Why should a person who, apart from anything else, has had to undergo a great deal of stress and anxiety be left significantly out of pocket?”<sup>131</sup>

165. Dr Cyrus Tata of the Centre for Law, Crime and Justice at the University of Strathclyde said, in relation to the current system, that a “plausible argument” could be made that anyone seeking to make use of ABWOR should pay a contribution since in most cases this in practice amounted to an admission of guilt. But requiring contributions in relation to criminal legal aid, in his view, crossed a line of principle—

“the principle is surely distinct where a citizen maintains his/her innocence and is prosecuted through a trial, and is even acquitted. It is difficult to see how that citizen should be deemed to have responsibility for having been: arrested/detained, charged, bailed or remanded for weeks in custody, prosecuted through trial and then possibly acquitted, (not to mention the collateral personal consequences such as family breakdown, loss of income/employment and social stigma), to then show s/he is taking some financial responsibility for their choices. From the logic of the Bill one could be forgiven for imagining that it is the individual citizen who chooses to

<sup>129</sup> The Faculty of Advocates. Written submission.

<sup>130</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1666.

<sup>131</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1667.

charge and prosecute herself, remand herself in custody, and chooses to try herself in court.”<sup>132</sup>

166. Within the solicitors’ profession, there were differences of view. The Edinburgh Bar Association said that “as a matter of general principle” it did not accept that accused persons should pay contributions towards the cost of legal representation.<sup>133</sup> The Law Society of Scotland, however, stated that it “fully agrees with the principle that those who can afford to pay a contribution towards the cost of their legal aid should be required to do so.”<sup>134</sup>

167. SLAB agreed, saying that it was—

“right as a matter of principle that those who can afford to pay some or all of their defence costs should be expected to do so. The current system requires legal aid to be made available to some who, while they cannot afford to meet the *whole* cost of their case, have sufficient disposable income and/or capital to make some financial contribution.”<sup>135</sup>

168. Scottish Women’s Aid also supported the policy underpinning Part 2 from a distinct perspective—

“For a long time, women have complained of the injustice ... 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 contributions to her legal aid costs...”<sup>136</sup>

169. The Cabinet Secretary expressed not dissimilar views, describing it as a “manifest injustice” that a victim of domestic violence who goes to court to protect themselves may be liable for a contribution to their civil legal aid, while a perpetrator could receive criminal legal aid with no contribution.”<sup>137</sup> (The Committee takes the reference to a victim going to court to “protect themselves” to be a reference to obtaining an interdict. The Committee notes that in circumstances such as the Cabinet Secretary outlined, a civil remedy may not be the only means of legal redress against the alleged perpetrator: a criminal remedy may also be available.)

170. SLAB’s written submission described it as an “anomaly” that contributions could be required under civil but not criminal legal aid. A similar point was made in the Scottish Government’s policy memorandum on the Bill, which said that the changes under Part 2 would “ensure parity between the different aid types”.<sup>138</sup> The Scottish Government argued that this would make the legal aid system “more

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<sup>132</sup> Dr Cyrus Tata. Written submission.

<sup>133</sup> Edinburgh Bar Association. Written submission.

<sup>134</sup> Law Society of Scotland. Written submission.

<sup>135</sup> Scottish Legal Aid Board. Written submission.

<sup>136</sup> Scottish Women’s Aid. Written submission.

<sup>137</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1717.

<sup>138</sup> Policy Memorandum, paragraph 33.

equitable”.<sup>139</sup> For the Faculty of Advocates, there was no anomaly; anyone facing a criminal trial was being prosecuted under the coercive power of the state. Criminal and civil trials were fundamentally different.<sup>140</sup>

### *Refunds*

171. In relation to the argument that acquitted persons should be refunded their costs, the Scottish Government noted that those who currently pay privately for legal aid (ie, presumably, those who fail the “undue hardship” and, in summary cases, “interests of justice” test) do not have their costs refunded on acquittal, and that (unlike in England and Wales) it has never been the case that they had. Therefore—

“If contributions paid in criminal legal assistance cases were to be refunded in the event of acquittal, this would mean that those who received criminal legal assistance would be treated preferentially in comparison to those who paid privately.”<sup>141</sup>

172. This argument did not persuade the Faculty of Advocates. James Wolffe QC considered that all the Government had done in making this argument was to identify an unfairness in the present system, and that—

“the one objection highlighted in the policy memorandum, which is that people who do not qualify for legal aid at all have no system of recovering their contributions does not seem to me to be a good answer. Whether it is necessary to deal with what we would see as an anomaly in that respect while dealing with the issue under discussion is another question.”<sup>142</sup>

173. Dr Tata described the rationale provided in the Memorandum as “tantamount to saying “two wrongs make a right”.”<sup>143</sup>

174. The Cabinet Secretary said he agreed that it was—

“an absolute tenet of our legal system that a person is innocent until they are proven guilty, but the systems north and south of the border are different, and it seems to me that it is perfectly reasonable that, if a person requires to make a slight contribution to get legal aid, they should do so. If the person is acquitted, the approach simply reflects what happens in other areas of civil law, in dealing with freeing orders or domestic violence for example.”<sup>144</sup>

175. In relation to the perceived distinctiveness of criminal and civil proceedings, the Cabinet Secretary indicated that he did not accept the premise that, compared with criminal proceedings, entering into civil proceedings was a voluntary act, as some people effectively found themselves with no choice but to enter into civil proceedings.<sup>145</sup>

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<sup>139</sup> Policy Memorandum, paragraph 46.

<sup>140</sup> The Faculty of Advocates. Written submission.

<sup>141</sup> Policy Memorandum, paragraph 73.

<sup>142</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1667.

<sup>143</sup> Dr Cyrus Tata. Written submission.

<sup>144</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1727.

<sup>145</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Cols 1731-1732.

176. The Cabinet Secretary was asked whether he would be willing to contemplate amending his proposals to allow a refund, not necessarily in all cases where there was an acquittal, but perhaps at the discretion of a judge (for instance, where the judge was of the view that the trial should never have been brought). The Cabinet Secretary replied that the issue was “fraught”, but that he would reflect upon the suggestion.<sup>146</sup>

*Committee view*

**177. The Committee is not opposed in principle to recipients of criminal legal aid making a contribution towards its cost. This is with the important proviso that any system devised to give effect to this principle must be carefully calibrated: it must be proportionate to the means of the individual and be sufficiently flexible to take into account particular personal circumstances (as discussed further below).**

**178. The Committee notes that, whilst it is true that in many cases individuals may consider that they have no choice but to enter into civil proceedings, the prospect at least exists that if they win the case, they will recover expenses. The Committee therefore invites the Cabinet Secretary to consider further the issue of recovery of contributions in relation to criminal legal aid.**

*Level of contributions*

179. Under the Bill, anyone with disposable income of £68 per week or more, or disposable capital of £750 or more, would have to pay a contribution towards ABWOR or legal aid. The Bill does not specify how much they would pay. Nor does it prescribe an upper income or capital limit above which the cost of assistance would have to be paid in full. However the Policy Memorandum sets out the scheme that the Scottish Government and SLAB propose to implement (by way of regulations and guidance), should Part 2 be enacted. The Memorandum explains that—

“If the applicant has net disposable income of £68 or more, but less than £222, (the weekly equivalent of the middle income threshold in civil legal aid cases and the current upper weekly income figure used as a guide in summary criminal and solemn criminal cases), the applicant will be liable to pay a contribution from his/her weekly excess disposable income. It is intended that the upper limit in respect of ABWOR will be set out in the scheme of eligibility prepared by the Board.<sup>147</sup> The upper limit for criminal legal aid, which will be closely aligned with that for ABWOR, is set out in the Board’s existing published guidance.”<sup>148</sup>

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<sup>146</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1734.

<sup>147</sup> This is a reference to the scheme of eligibility to be prepared by SLAB under section 18 of the Bill. The scheme must be approved by the Scottish Ministers. There is no equivalent provision to prepare a scheme of eligibility for criminal legal aid. In practice, SLAB publishes guidance on the criteria it applies in determining “undue hardship” in relation to criminal legal aid (see further footnote 121). This is an example of SLAB’s discretionary powers in relation to current legislation.

<sup>148</sup> Policy Memorandum, paragraph 56.

180. The Memorandum goes on to set out, in two tables, the Scottish Government's current proposals for determining contributions.<sup>149</sup> In essence, the Scottish Government envisages a sliding scale of contributions, with those at the lower end of the disposable income scale contributing as little as £6.40 a week. The number of weeks during which an individual would have to pay a contribution would depend on the type of case – from 8 weeks for ABWOR relating to a Justice of the Peace Court case to 52 weeks for a solemn case or an appeal – but contributions would be capped at the actual cost of legal assistance for the case.

181. The Government's proposals in respect of determining capital contributions are less clear. The Policy Memorandum explains—

“If the applicant has disposable capital at or over the threshold then the level of the capital and the nature of the case involved will need to be looked at before the solicitor or the Board can determine whether or not it would cause undue hardship to expect the applicant to pay either for her or his own legal costs or a contribution to those costs. The amount of any contribution is likely to be graduated so that the more disposable capital the applicant has the higher the rate of contribution they would have to pay. Where a contribution is assessed from disposable capital, the Board will normally expect this to be paid in one instalment. However, if the capital assets are not fully liquid, the Board may extend this period depending on the length of time taken to liquidate those assets.”<sup>150</sup>

*What is “disposable” income or capital?*

182. The Bill does not provide a definition of “disposable” income or capital. In relation to income, the Policy Memorandum provides a quite complex explanation of what is envisaged—

“In applying the eligibility test, the solicitor and the Board will calculate disposable income by making subtractions from eligible income for a set of unavoidable expenditures such as rent, board and lodgings, mortgage payments, council tax and child care and maintenance payments, loan repayments, contribution payments being made in other cases and regular payments made associated with a disability. An allowance will be given for each dependant, expected to be at the rates given in the current Advice and Assistance Keycard. Non-passported benefits will be taken into account as income although they may well be cancelled out as being used for unavoidable expenditure. The resources of spouses and partners will be taken into account when assessing financial eligibility except where the spouse or partner has a contrary interest in the case (for example where they are a co-accused, complainer or Crown witness in the case) or where the parties are living separately and apart. Regulations will specify precisely which items of income and which weekly outgoings can be taken into account in the assessment of disposable income.”<sup>151</sup>

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<sup>149</sup> Policy Memorandum, pages 14 and 15.

<sup>150</sup> Policy Memorandum, paragraph 64.

<sup>151</sup> Policy Memorandum, paragraph 54.

183. In the case of capital, the Memorandum states that it includes “savings and anything else of value owned by the client. ... However, there will be several exclusions including the home in which the client and their partner lives, household furniture and clothing and the value of the client’s car unless it is of high net value.”<sup>152</sup>

184. In relation to the resources of spouses or partners, the Committee notes that these may be taken into account. It is reassuring to note that an exception would be made where the spouse or partner has a contrary interest in the case. On the other hand, this proposal does open up the prospect of one person’s income or capital being taken into account in relation to an alleged criminal act with which they have no connection whatsoever.

#### *Witnesses’ views*

185. A number of witnesses expressed concerns that the threshold had been set too low, and that very poor and vulnerable people might be asked to make contributions. These included representatives of the Law Society, the Edinburgh Bar Association, and the Scottish Human Rights Commission. In relation to the Scottish Government’s assurances that 82% of clients would not have to make contributions under its proposals, the Law Society called for the data supporting this figure to be made available.<sup>153</sup> (The Policy Memorandum states that the figures come from analysis of all the cases dealt with by SLAB in 2011.)<sup>154</sup>

186. Dr Tata, of the University of Strathclyde, expressed fears that, once the principle of making contributions towards legal aid had been accepted, there could be a “slippery slope” towards more and more people making a contribution—

“Once we accept the principle, why not ask more people to contribute? If the economic situation does not improve – we are told that the Bill is motivated, or, in a sense, incited, by the economic downturn – in another five years’ time, we will be back to discuss whether payments should be required in not only 18 but 30 per cent of cases. Why not go higher?”<sup>155</sup>

187. Professor Alan Miller of the Scottish Human Rights Commission said that the level of eligibility proposed was a “real concern”—

“I am not at all convinced that a sufficient assessment has been done of the impact of the Bill on vulnerable individuals who come into contact with the criminal justice system and are unable to pay for proper legal representation.”<sup>156</sup>

188. Capability Scotland expressed particular worries that the proposals could have a disproportionate impact on people with disabilities. Elspeth Molony of Capability Scotland cited research showing that 40 per cent of disabled people considered they did not have equal access to justice. She said that she feared the Bill would make the situation worse, especially given impending welfare reforms.

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<sup>152</sup> Policy Memorandum, paragraph 62.

<sup>153</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1660.

<sup>154</sup> Policy Memorandum, paragraph 66.

<sup>155</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1712.

<sup>156</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1692.

She called for disability living allowance (or its replacement, the personal independence payment) to be disregarded in calculating income, but said that even if it were, this would not be “the end of the story for disabled people”, since disability benefit may not cover the totality of a disabled person’s entire additional living costs.<sup>157</sup>

189. In this connection, the Committee notes that in the Policy Memorandum it is stated that an Equality Impact Assessment “will be published” in relation to the Bill, but that, as of the conclusion of evidence-taking, this was still not available. This is disappointing as an EQIA might have helped the Committee in assessing witnesses’ claims that the proposals in Part 2 might have a disproportionately negative effect on particular categories of people.

190. SLAB representatives sought to reassure the Committee by emphasising that assessments would be made on the basis of *disposable* income, and that, depending on individual circumstances, numerous deductions would be permitted from actual income. They considered that some witnesses had failed to take this fully on board. In SLAB’s view, the levels of contribution being proposed were reasonable, proportionate and affordable. SLAB also pointed out that the alignment of ABWOR with criminal legal aid under the Bill might actually benefit some individuals.<sup>158</sup> (ABWOR contributions currently kick in at £105 of income. In calculating income, account may be taken of various outlays incurred by the client. However, these permitted deductions are less extensive in scope than those that the Government envisages being applied to arrive at “disposable income” under the Bill).

191. In order to illustrate these points, SLAB furnished the Committee with various real-life examples of persons who had been assessed for criminal ABWOR or legal aid in the past, demonstrating how they would be assessed under the proposed system.<sup>159</sup>

192. SLAB representatives also sought to stress the flexibility of the “undue hardship” test, and its capacity to take into account the individual circumstances of each client. They sought to reassure the Committee that SLAB was already fully accustomed to taking into account the often complex personal circumstances of individuals and quickly reaching a view as to eligibility. The Scottish Government’s proposals in relation to assessment were simply an extension of the sort of work SLAB was already accustomed to carrying out.<sup>160</sup>

193. These points were underlined in the evidence of the Cabinet Secretary, who said that disposable income would be determined—

“after deducting a long list of costs, including housing costs, council tax, childcare costs, loan repayments, maintenance payments, costs associated with disability and an allowance for dependent spouses and children. On top

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<sup>157</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Cols 1653-1654.

<sup>158</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Cols 1683-1685.

<sup>159</sup> Scottish Legal Aid Board. Supplementary written submission.

<sup>160</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Cols 1685-1686.

of that, the board has discretion to waive a contribution if undue hardship is caused.”<sup>161</sup>

194. In addition to stressing that around 82% of clients should not have to make any contribution, the Cabinet Secretary sought to emphasise that many or most contributions would not necessarily be high. He said that it was likely that just under half of those making a contribution would be asked to pay less than the current ABWOR maximum of £142.<sup>162</sup>

195. In relation to concerns that the Government’s proposals on contributions would not, in practice, operate as had been intended, or that they might be a “slippery slope” towards an unfair or disproportionate system, the Cabinet Secretary said he was—

“happy to give you a guarantee and an absolute assurance that we will continue to review the regulations and that if there are difficulties we will seek to amend them. That is how we deal with legal aid”.<sup>163</sup>

196. The Cabinet Secretary added that it seemed more feasible to proceed in this way, rather than by a pilot project or a sunset clause, as some had mooted. He indicated that an appropriate time for a review might be two or three years after implementation.<sup>164</sup>

197. In relation to Capability Scotland’s concerns about (amongst other things) imminent changes to “passport” benefits, the Cabinet Secretary told the Committee that it was hard to give definitive assurances at the present stage whilst the UK Government was in the middle of introducing welfare reforms, but that he would be happy to discuss further with Capability Scotland what further provision could be made in regulations to ensure that disabled people were not placed at a disadvantage.<sup>165</sup> The Cabinet Secretary went on to say that SLAB’s “very wide discretion” to intervene in cases of undue hardship, combined with regulation-making powers available to the Scottish Ministers under the legislation, should be sufficient to help deal with the consequences of the “moveable feast” of benefit reform.<sup>166</sup>

### *Conclusions*

**198. The Committee notes the Scottish Government’s assurances that contributions towards criminal legal aid will be based on disposable income, not income alone, that the amount sought will in many cases be modest, and that around 82% of current criminal legal aid recipients are unlikely to have to make a contribution. The Committee also notes the Cabinet Secretary’s assurances that the relevant regulations would be kept under regular review. The Committee considers it important that there should be no incremental movement towards an ever-wider category of people falling within the contributory net and seeks a commitment from the Cabinet Secretary that**

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<sup>161</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1717.

<sup>162</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1717.

<sup>163</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1735.

<sup>164</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Cols 1735-1736.

<sup>165</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Cols 1717-1718.

<sup>166</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1725.

**reviews will take place on a regular basis, to ensure that access to justice is maintained.**

**199. The Committee asks the Scottish Government to provide more information on what overall rationale or set of principles it applied, and what factors it took into account, in determining the bands of income set out in the Policy Memorandum, and the levels of contribution that are to apply in respect of each band. The Committee also asks for similar information in relation to the proposals on capital.**

**200. The Committee is disappointed that an Equality Impact Assessment on Part 2 of the Bill was not published during consideration of evidence at Stage 1. An EQIA would have assisted the Committee in its scrutiny of the evidence and preparation of the report. Further evidence or data on the effect on the income of households would have been helpful, for example, whether it is appropriate for the income of a spouse or partner to be taken into account when calculating eligibility for criminal legal assistance.**

**201. In relation to people with disabilities, the Committee recognises that the UK Government's proposals on welfare reform have created uncertainty. The Committee considers that people with disabilities should be no worse off under the Part 2 proposals if the UK Government's reforms go ahead than they would be currently, and would encourage the Scottish Government to use the flexibility inherent in the proposals to work towards that outcome.**

*Collection of contributions*

202. Under the Bill, solicitors would continue to be responsible for collecting any contributions due for ABWOR (which in practice are likely to become a larger percentage of the payment due) and would also take on responsibility for collecting any contributions due for summary criminal legal aid. SLAB would continue to administer the fund for solemn legal aid and in relation to most appeals.

203. Representatives of the solicitors' profession strongly objected to what they saw as this additional burden of collection being forced upon them, with the Law Society describing it as "impracticable, unworkable and unsustainable."<sup>167</sup> SLAB and the Scottish Government, however, argued that it was appropriate for solicitors to collect fees in summary cases. They argued that solicitors were already accustomed to collecting contributions for ABWOR, and that this merely extended the principle. They also said that it would be more straightforward for solicitors to collect payments. Colin Lancaster, Director of Policy Development at SLAB said he found arguments that SLAB should collect summary contributions "strange"—

"We are talking about a system where the state pays fees to solicitors on behalf of people who cannot pay those fees. We are talking about a system in which we would collect the fee from the client and give it to the solicitor, rather than the client giving their fee to the solicitor for the work that the

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<sup>167</sup> The Law Society of Scotland. Written submission. Similar views were expressed in the written submissions from the Glasgow and Edinburgh Bar Associations.

solicitor is doing for them. It is the solicitor's fee, so it would seem unnecessary for us to become involved in that process. We do not get involved in that process for private clients. I am not sure why one would say that we would need to collect the fee from a client who was receiving legal aid when solicitors have mechanisms to collect their fee from their private clients. They would not suggest that we should be an intermediary in those circumstances.”<sup>168</sup>

204. However, Mark Harrower of the Edinburgh Bar Association (speaking also on behalf of the Glasgow Bar Association) said the reality was that his firm did not even try to collect ABWOR contributions because “we do not have the time or the mechanisms to do so”. He added that it was his understanding (and SLAB's) that most solicitors do not collect ABWOR contributions.<sup>169</sup> Solicitors' representatives argued that SLAB with its available resources and recovery mechanisms not available to private firms would be far better placed to collect contributions, and to keep tabs on non-paying individuals.<sup>170</sup>

205. SLAB also referred to costs, arguing that transferring the responsibility for collecting summary contributions to them would have significant resource implications. SLAB had estimated that staffing costs would have to increase by around £600,000 per annum.<sup>171</sup> For the Law Society, however, transferring the collection function to them was another instance of their being required to carry out unpaid work. The Society identified a number of practical difficulties in handing the collection role to solicitors, saying that it would welcome further dialogue to overcome these issues, but that they would not arise at all if SLAB were to have the collection responsibility.<sup>172</sup>

206. There appeared to be widespread agreement that solicitors' income would inevitably fall under the Government's plans. Solicitors would be unable to collect 100% of contributions so turnover would be reduced.<sup>173</sup> (Solicitors also considered that having to pursue clients for fees could have significant resource implications.) Best estimates as to what that loss might be varied widely. The Law Society suggested that the non-collection rate might be in the region of 30% of contributions, SLAB thought lower, and the Edinburgh Bar Association higher. The EBA's Mr Harrower drew the Committee's attention to data showing that around

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<sup>168</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1690.

<sup>169</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1659.

Evidence subsequently provided by the Law Society of Scotland stated that, based on consultations with members of the profession and local societies, it was the Society's “strong impression that the majority of practitioners do not collect such contributions [ie ABWOR contributions] at the present time.” (Law Society of Scotland. Second supplementary written submission). SLAB also provided follow-up evidence on this point, indicating that in 2011-12 the total value of payments which fell to be collected by solicitors for criminal ABWOR (and which would therefore be deducted from the final payment by SLAB to the solicitor), stood at some £154,000. (Scottish Legal Aid Board. Second supplementary written submission.)

<sup>170</sup> ie The Law Society of Scotland. Written submission.

<sup>171</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1681.

<sup>172</sup> The Law Society of Scotland. Written submission.

<sup>173</sup> SLAB clarified that it was solicitors who wholly bore the risk for non-collection of ABWOR or summary criminal legal aid; SLAB would not indemnify them. [Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1679.]

42% of fiscal fines due to the procurator fiscal service were outstanding<sup>174</sup> (despite the service having collection mechanisms not available to private solicitors' firms). The Law Society predicted that sole and rural practitioners would be particularly badly affected.<sup>175</sup>

207. Unfortunately, the Financial Memorandum does not provide any real assistance on the likely cost to private firms.<sup>176</sup> However SLAB was able to direct the Committee to an analysis it had carried out of four medium-sized firms. This showed that around 2.6-6% of the firms' overall criminal earnings would have consisted of contributions had the Part 2 proposals been in effect.<sup>177</sup> Both SLAB and the Cabinet Secretary<sup>178</sup> used this evidence to argue that the financial impact on solicitors should not be over-estimated.

208. Dr Lancaster also made the interesting argument that firms would, in future, make a commercial judgment about how to respond to a client who did not pay—

“The solicitor will consider their history with the client and work out whether it is worth severing their ties with them for, perhaps, a small contribution from a client who has delivered repeat business to the firm, is likely to deliver repeat business in future, and may well deliver solemn business...”<sup>179</sup>

209. The Cabinet Secretary said that the fact that the Bill deemed contributions to be fees (and therefore immediately cashable in firms' accounts), as solicitors had requested during the consultation period, showed that the Government was being reasonable and listening to the profession's concerns.<sup>180</sup>

210. The Committee also heard some concerns about the proposal to require payments in weekly instalments of up to 52 weeks (in the case of solemn legal aid or appeals). Mr Harrower noted that summary justice was, by definition, often summarily dispensed, and that it was not uncommon for people appearing direct from custody have their case disposed of in one day—

“In such cases, we start to make the legal aid application only after the case is over and we have got back to the office. If we cannot get hold of financial documentation after the fact – you should remember that the client has no real incentive to provide it – we will not get paid.”<sup>181</sup>

211. Dr Tata said that contributions should be required only once the case had been concluded (in line with his view that those acquitted should not have to pay at all).<sup>182</sup>

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<sup>174</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1660.

<sup>175</sup> The Law Society of Scotland. Written submission.

<sup>176</sup> No figure is provided in the relevant table. Instead the entry reads “Variable (but not expected to be high)”. [Financial Memorandum, table 14.]

<sup>177</sup> Scottish Legal Aid Board. Supplementary written submission.

<sup>178</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1718.

<sup>179</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1682.

<sup>180</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1718.

<sup>181</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1664.

<sup>182</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1711.

*Perverse incentives*

212. Witnesses were invited to comment on the Scottish Government's contention that it was appropriate to require solicitors to collect contributions for both ABWOR and summary legal aid because the current set-up created a "perverse incentive" (ie it encouraged solicitors to advise clients to plead not guilty initially since this since it would relieve them of the burden of collecting the contribution owed). Different views were expressed.

213. Dr Lancaster considered that the Government was correct—

"In future, there will be no need for those people [ie people do who not currently qualify for ABWOR] to enter a plea of not guilty to apply for summary criminal legal aid. They will be able to enter the plea that they want to make, and they will have taken advice from a solicitor on the consequences of doing so."<sup>183</sup>

214. He added that the current arrangements amounted to a "barrier" to some people making an appropriate plea at the first appropriate opportunity, which would be eliminated by the proposed alignment.<sup>184</sup> Similar views were expressed in the written submission of the Association of Chief Police Officers in Scotland.

215. Dr Tata also broadly agreed that the Government might be right. He remarked that "solicitors whom I have interviewed or studied in recent years have said that given the awful hassle in getting people to pay it is easier to enter a not guilty plea." However, Dr Tata went on to urge caution, referring to what he saw as an increasing trend on the part of Government and prosecutors to encourage early guilty pleas. He argued that there were already "very strong drivers" for guilty pleas, and it was not unknown for individuals caught up in the disorienting and stressful situation of a prosecution to plead guilty even when they thought they were innocent.<sup>185</sup>

216. Mr Harrower said that any "perverse incentive" would be in the other direction; his reading of the figures provided in the Policy Memorandum was that there would now be an incentive for clients paying contributions to plead guilty at the earliest opportunity, because that would be significantly cheaper.<sup>186</sup>

*Committee view*

**217. The Committee welcomes the proposal in Part 2 to designate contributions towards summary criminal legal aid as fees. This should be of some assistance in helping firms maintain turnover.**

**218. However, the Committee notes the strong and widespread concerns of the solicitors' profession that requiring them to collect summary criminal legal aid contributions will be difficult in practice and will lead to them writing off a proportion of their income from criminal work. The Committee accepts that there would be significant resource implications in requiring SLAB to undertake this work, but also notes that SLAB are likely to be better**

<sup>183</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Cols 1694-1695.

<sup>184</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1695.

<sup>185</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Cols 1714-1715.

<sup>186</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1661.

placed to maintain and enforce collection systems. The Committee invites the Scottish Government to reflect further on this issue.

219. The Committee also notes the legal profession's concerns about the proposed timeframe for making contributions and the practical difficulties this may create. The Committee understands these concerns and invites the Scottish Government to consider further how they can be addressed.

220. The Committee agrees with the Scottish Government that the current legal aid system might, in some cases, create a perverse incentive for an accused person who accepts their guilt not to plead guilty at the first opportunity because delaying the plea to the trial rules out the need for the solicitor to collect a contribution. This does appear to be a flaw in the current system. On the other hand, the existence of this perverse incentive perhaps underlines that there may be a practical difficulty in requiring solicitors to collect summary criminal legal aid fees from clients.

*Consequences for the effective operation of the criminal justice system*

221. Another set of concerns was that was that the Part 2 proposals might increase inefficiency and delay in the court system, arising (a) from the introduction of contributions and (b) from the burden of collecting them falling on solicitors in summary cases.

222. Mark Harrower of the Edinburgh Bar Association said that one of the reasons his firm did not collect ABWOR contributions from clients was because "it is not worth creating conflict between ourselves and the client given the current level of contributions". He elaborated that extending the requirement to criminal legal aid could potentially create—

"a layer of conflict between us and the people whom we represent in court. If the changes come in, there will be many stages at which we will be giving advice to accused persons while asking them for quite large contributions, and we foresee such a move causing delays and leading to clients falling out with solicitors, because contributions will not be paid."<sup>187</sup>

223. Mr Harrower said he anticipated solicitors seeking adjournments during cases because contributions had not been paid and therefore did not consider it appropriate to proceed with the case until this matter was settled. (Under section 24(6) of the 1986 Act, a judge may adjourn a trial where an accused is not represented where "due to the exceptional circumstances of the case it would be inequitable to proceed" to enable a new legal aid application to be made.) He added—

"There is a pre-trial hearing in cases where not guilty pleas have been tendered, which is called an intermediate diet. Those hearings were introduced a number of years ago to try to make the system more efficient, which they did. One of the things that sheriffs want to know at the intermediate diet is whether we are ready for trial. If a major aspect of being ready for trial is whether we have managed to collect the contribution, or

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<sup>187</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1654.

whether there is a system in place for getting that contribution that we can be sure will produce the full contribution by the end of the case—or even after the end of the case—we will have to say to the court that we are not ready for trial unless we are sure that we will get that contribution.”<sup>188</sup>

224. Colin Lancaster of SLAB, however, said that he was not aware of situations where solicitors announce that they cannot proceed with a case involving a private client because the client had not paid their fees. He said that this—

“does not sound like a legitimate reason to give to the court for seeking an adjournment. Not having been provided with funds by a client is not the same as not being ready to proceed...”<sup>189</sup>

225. Some stakeholders predicted that the Government’s proposals would inevitably lead to an increase in party representation, as clients either opted out of being represented because of the cost or found themselves without representation because of a failure to pay a contribution. As well as raising concerns over whether a fair trial could be guaranteed in such circumstances (see below), witnesses predicted that this would lead to failure to settle early or agree time-saving joint minutes with the Crown, more adjournments (because the accused was not ready) slower court proceedings (in order to ensure a fair trial), and, overall, increased “churn”.<sup>190</sup>

226. Both SLAB and the Cabinet Secretary told the Committee that these concerns appeared to be largely unfounded. There was no evidence that the proposed changes would inevitably lead to more party representation. In particular, they said that there was no evidence from England and Wales that the recent introduction there of contributions for criminal legal aid had led to an increase in unrepresented accused persons.<sup>191</sup> Dr Tata acknowledged this point, but said that the data from England should be interpreted with caution as there were a number of variables and the system had only been in place for a couple of years.<sup>192</sup> (These variables include the fact that contributions have only been introduced for Crown – ie more serious – cases – in England and Wales).

227. Concerns were also voiced about access to justice. The Law Society argued that, in particular, solicitors in rural areas might start to withdraw from acting in criminal cases because they no longer saw it as profitable.<sup>193</sup> Dr Tata noted SLAB’s view that a defence solicitor might want to make a commercial judgment as to whether a client was (as he put it) “a good financial bet.” He said that if there were any merit in this argument, then solicitors might wonder whether they should “drop” clients who were not such good bets.<sup>194</sup>

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<sup>188</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1670.

<sup>189</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1690.

<sup>190</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1664; Cols 1670-1672; 18 September 2012, Cols 1709-1710.

<sup>191</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1725.

<sup>192</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1709.

<sup>193</sup> The Law Society of Scotland. Written submission.

<sup>194</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Col 1710.

*Savings under the Bill versus possible risks*

228. The Financial Memorandum estimates that the Scottish Government's proposals under Part 2 would cut around £3.9m from the annual cost of criminal legal assistance minus approximately £0.1m per annum in increased administrative costs to SLAB.

229. Some witnesses queried whether this (in their view) rather modest saving was commensurate with the risks and possible disbenefits arising from the Scottish Government's plans. Dr Tata, who had identified more unrepresented cases and more adjournments as two possible consequences, told the committee he was—

“not sure to what extent, if at all, the financial memorandum takes account of behaviour displacement or the adaptation of behaviour that we can expect as a result of the Bill. It may well reduce SLAB's overall costs, but I am sure that there will be knock-on consequences and displacement in the overall system.”<sup>195</sup>

230. In relation to unrepresented clients, SLAB held open the possibility of the Public Defence Solicitors Office acting as a “safety net”, to ensure that an accused had representation. The Cabinet Secretary indicated that he was entirely willing to explore this option further but acknowledged that relations between the Law Society and the PDSO were “rather fraught”<sup>196</sup>, and that he therefore did not wish to make a clear commitment. He said he was happy to give the Committee an undertaking that SLAB would engage with the LSS, and offer the PDSO as a safety net for the unrepresented in criminal cases.<sup>197</sup> (The Committee notes that, in the event of this offer being taken up, and the PDSO being relied on to any significant extent, this might incur some additional costs to the public purse.)

231. The Cabinet Secretary also stated that the PDSO would have to collect contributions in the same way as private practitioners.<sup>198</sup> (This is despite the Bill allowing SLAB to collect contributions on behalf of the PDSO.<sup>199</sup>) The Committee is not certain whether the Cabinet Secretary's remarks mean that the PDSO would not have access to the resources used by SLAB to help facilitate the recovery of contributions.

*Committee view*

**232. The Committee understands and accepts the need for the Scottish Government to make cuts to the overall legal aid budget, and that this entails making difficult decisions. However, it is crucial that any savings made are not effectively cancelled out, as a result of the changes being made having unintended consequences.**

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<sup>195</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1709.

<sup>196</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1725. In this connection, the Committee notes receipt of a late supplementary submission from the Law Society of Scotland indicating concerns (on grounds of practice and principle) about using the PDSO in this way and indicating that it was also concerned not to have been consulted on the proposal.

<sup>197</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1725.

<sup>198</sup> Scottish Parliament Justice Committee. *Official Report, 18 September 2012*, Col 1725.

<sup>199</sup> Section 11A(3) of the 1986 Act, as inserted by section 19.

233. The Committee notes the concerns of the legal profession that requiring solicitors to collect summary criminal legal aid contributions might have knock-on effects for the effective running of the criminal justice system. These include a possible increase in adjournments and in party litigants.

234. The Committee calls for the changes under Part 2 to be carefully monitored. Additionally, we recommend that the Scottish Ministers report to Parliament 3 years after the changes come into effect. The report should set out the effect, if any, of the proposals on the effective functioning of the summary criminal justice system, including any additional costs arising. The report should also set out whether the proposals have had any effect on access to justice, for instance whether it has had an effect on the availability of criminal legal advice and representation in rural areas.

#### *ECHR compliance*

235. The Committee sought evidence on whether the Government's proposals would be compliant with the European Convention on Human Rights. The evidence received indicated that if there are any concerns as to convention compliance, they arise in relation not to Part 2 itself, but to the way that any regime set up under its auspices might apply in particular circumstances.<sup>200</sup>

236. In the Policy Memorandum, the Scottish Government acknowledges that Article 6, the right to a fair trial, is relevant to the Bill. Article 6(3) enshrines the right to defend oneself against a criminal charge and, if lacking in means, to be given free legal assistance where the interests of justice so require. Without much elaboration, the Policy Memorandum states that the requirements of Article 6 are met.

237. Some uncertainty was expressed over the whether the Scottish Government's proposals might, in particular circumstances, put the right to a fair trial at risk. To some extent, this mirrored the debate as to whether the proposed scheme was "fair" in a more general and less overtly legal sense. Ian Moir of the Law Society argued that—

"As a basic principle, a scheme that might incentivise people to plead guilty because the level of contributions has been wrongly set will not provide justice and might not meet the requirements of the European Convention on Human Rights."<sup>201</sup>

238. In its written submission, Justice Scotland noted Convention jurisprudence that there appeared to be no impediment *per se* to requiring a contribution to legal aid.<sup>202</sup> However it was crucial that the eligibility criteria drawn up should not

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<sup>200</sup> In this connection, the Committee notes that the Presiding Officer has announced that she considers the Bill to be within the legislative competence of the Scottish Parliament. The Scottish Parliament may not create laws insofar as they breach the ECHR.

<sup>201</sup> Scottish Parliament Justice Committee. *Official Report, 11 September 2012*, Col 1664.

<sup>202</sup> In this connection, the Committee notes information in the Policy Memorandum (paragraph 42) that in the Netherlands and Finland, as well as in England and Wales, contributory systems for criminal legal assistance are in place, with the caveat that these appear to have significant differences from the scheme proposed for Scotland.

exclude those with insufficient means, nor amount to such a significant impediment to legal aid that representation could not be secured. Justice Scotland said that some questions remained over the fairness of a trial where an accused was left unrepresented because of a failure to pay their contribution. Its submission went on to make some detailed observations about criminal procedure in a case where an accused's representatives have withdrawn from acting, which might leave the judge in the tricky position of deciding whether, under the circumstances, the accused was being denied a fair trial.

239. Justice Scotland also commented that it would be too simplistic to argue that a client who had failed to pay had, in effect, exercised a waiver of their right to professional representation and therefore could not seek to rely on Article 6. The issue, it argued, was “not that straightforward.”

240. Professor Alan Miller of the Scottish Human Rights Commission was concerned that the Scottish Government had not, in his view, carried out a proper human rights assessment of the proposed regime under Part 2 of the Bill. He described the statement on human rights in the Policy Memorandum as “grossly inadequate” and said that there had not been a proper assessment of the Bill's effect on the vulnerable who could not afford representation—

“They will either have to represent themselves ... or it is easier and cheaper just to plead guilty than to go through it at all. That is where we will have invisible human rights breaches. They may not be in the newspapers and they may not go to the European Court of Human Rights.”<sup>203</sup>

241. As already stated, SLAB and the Scottish Government are of the view that there is no evidence that there would be a significant increase in unrepresented accused, but that, if a problem were to emerge, there is the potential for the Public Defence Solicitors Office to play a role. The Cabinet Secretary considered that this undertaking should allay human rights concerns.<sup>204</sup>

242. Professor Miller said it was important for the Committee to seek stronger reassurances than were currently being provided by the Scottish Government, in order to ensure that the right to a fair trial would be protected, and called for thorough impact assessment of Part 2 of the Bill, the running of a pilot scheme, or the insertion of a review clause to enable evaluation of Part 2 in due course.<sup>205</sup> He also queried whether the, as he saw it, evident human rights risks being introduced by the Bill were proportionate to the likely financial savings—

“If the view is taken that there are real risks here, which we may or may not be able to manage or mitigate, members must take a step back, look at the Government spending priorities and consider whether the impact is worth the candle going further down the road.”<sup>206</sup>

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<sup>203</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1692.

<sup>204</sup> Scottish Parliament Justice Committee. *Official Report*, 18 September 2012, Cols 1717-1718.

<sup>205</sup> Professor Miller actually referred to a sunset clause (ie a clause that would see an Act, or particular provisions in an Act, go out of force after a particular period, but it would appear from the context that he was seeking a review clause).

<sup>206</sup> Scottish Parliament Justice Committee. *Official Report*, 11 September 2012, Col 1676.

243. The Committee notes the Scottish Government's view that the regime proposed under the Bill would focus on disposable income, and the Government (and SLAB's) view that any contributions being sought would be proportionate to the means of the individual. The Committee also notes the Cabinet Secretary's offer to review the effectiveness of Part 2, and regulations produced under it, at an appropriate point.

*Committee view*

**244. The Committee invites the Scottish Government to address concerns expressed by some witnesses that the way in which Part 2 of the Bill is implemented might give rise to ECHR concerns in the individual circumstances of particular cases. A fair trial is a fair trial, regardless of the gravity of the charge.**

**245. One situation where concerns might arise is where an accused is left without legal representation during a trial. The Committee notes the Scottish Government's suggestion that the Public Defence Solicitors' Office might serve as a "safety net" for the unrepresented, but notes that the issue is not resolved.**

**246. The Committee also invites the Scottish Government to reflect upon evidence that setting the parameters for financial contributions at appropriate and equitable levels is crucial in ensuring compliance with Article 6 and to ensure that any scheme ultimately proposed under the Bill is robustly "ECHR-proofed", at regular intervals, having regard to the vulnerability and poverty of many of those who come into contact with the criminal justice system.**

#### GENERAL PRINCIPLES OF THE BILL

247. This is a Bill with two distinct purposes. One purpose was widely welcomed by practically all stakeholders. The other raised a number of concerns, some of which appeared to the Committee to have some validity. The Committee's formal responsibility is to report on the general principles of the whole Bill.

248. The Committee is pleased to support Part 1 of the Bill, as a vital first step in the process of modernising Scots civil procedure envisaged in Lord Gill's review, with the overall aim of making our system effective and efficient, from the point of view of both the practitioner and the consumer, and an attractive forum of choice in an international context. The Committee has made some recommendations on how the legislation might be improved, or might best be implemented, but is overall satisfied with these provisions.

249. In relation to Part 2 of the Bill, the Committee is not opposed in principle to recipients of criminal legal aid making a contribution towards the cost of that assistance, provided that assistance is proportionate to their means. The Committee has noted some significant concerns about the Scottish Government's proposals for putting that principle into practice, and made recommendations about how these might be addressed. We expect the Scottish Government to consider these carefully.

250. Accordingly, **the Committee supports the general principles of the Bill, but urges the Scottish Government to consider carefully the recommendations, particularly on Part 2, set out in this report.**

## **ANNEXE A: REPORTS FROM OTHER COMMITTEES**

The Finance Committee's letter to the Committee on the Financial Memorandum of the Scottish Civil Justice Council and Criminal Legal Assistance Bill is available at:

[http://www.scottish.parliament.uk/S4\\_FinanceCommittee/General%20Documents/Convener\\_to\\_Justice\\_Convener\\_re\\_FM\\_7.9.2012.pdf](http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Convener_to_Justice_Convener_re_FM_7.9.2012.pdf)

The Subordinate Legislation Committee's Report on the Scottish Civil Justice Council and Criminal Legal Assistance Bill is available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52621.aspx>

## **ANNEXE B: EXTRACTS FROM THE MINUTES**

### **17th Meeting, 2012 (Session 4) Tuesday 15 May 2012**

#### **Scottish Civil Justice Council and Criminal Legal Assistance Bill (in private):**

The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (1) a timetable for Stage 1 scrutiny of the Bill; (2) to issue a call for written evidence; (3) witnesses for the first evidence session; and (4) to delegate to the Convener authority to agree the final composition of other witness panels.

### **22nd Meeting, 2012 (Session 4) Tuesday 26 June 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee took evidence on the Bill at Stage 1 from—

Gemma Crompton, Policy Manager, Consumer Focus Scotland;  
Professor Tom Mullen, Glasgow University School of Law;  
Professor Alan Paterson, Strathclyde University School of Law;  
Alan Rogerson, Vice Chairman, Forum of Scottish Claims Managers.

### **24th Meeting, 2012 (Session 4) Tuesday 4 September 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee took evidence on the Bill at Stage 1 from—

The Rt Hon Lord Gill, Lord President and Lord Justice General;  
Lauren Wood, Social Policy Co-ordinator, Citizens Advice Scotland;  
Ronnie Conway, Civil Justice Committee, Law Society of Scotland;  
Richard Henderson, Chair, Scottish Committee of the Administrative Justice and Tribunals Council;  
Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid.

Roderick Campbell declared that he is a member of the Faculty of Advocates.

### **25th Meeting, 2012 (Session 4) Tuesday 11 September 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee took evidence on the Bill at Stage 1 from—

Elsbeth Molony, Senior Policy and Consultancy Manager, Capability Scotland;  
James Wolffe QC, Faculty of Advocates;  
Mark Harrower, Vice President, Edinburgh Bar Association;  
Oliver Adair, Legal Aid Convener, and Ian Moir, Legal Aid Vice-Convener, Law Society of Scotland;  
Dr Colin Lancaster, Director of Policy Development, and Kingsley Thomas, Manager of Criminal Legal Assistance, Scottish Legal Aid Board;  
Professor Alan Miller, Chair, Scottish Human Rights Commission.

Roderick Campbell declared that he is a member of the Faculty of Advocates.

**26th Meeting, 2012 (Session 4) Tuesday 18 September 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee took evidence on the Bill at Stage 1 from—

Dr Cyrus Tata, Reader in Law, Strathclyde University;

Kenny MacAskill, Cabinet Secretary for Justice;

Colin McKay, Deputy Director, Legal System Division, Scottish Government.

Roderick Campbell declared that he is a member of the Faculty of Advocates.

**27th Meeting, 2012 (Session 4) Tuesday 25 September 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill (in private):**

The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to consider a revised draft at its next meeting.

**28th Meeting, 2012 (Session 4) Tuesday 2 October 2012**

**Scottish Civil Justice Council and Criminal Legal Assistance Bill (in private):**

The Committee considered a revised draft Stage 1 report. Various changes were agreed to and the Committee agreed its report on the Bill.

**ANNEXE C: INDEX OF ORAL EVIDENCE**

[22nd Meeting, 2012 \(Session 4\) Tuesday 26 June 2012](#)

Gemma Crompton, Policy Manager, Consumer Focus Scotland;  
Professor Tom Mullen, Glasgow University School of Law;  
Professor Alan Paterson, Strathclyde University School of Law;  
Alan Rogerson, Vice Chairman, Forum of Scottish Claims Managers.

[24th Meeting, 2012 \(Session 4\) Tuesday 4 September 2012](#)

The Rt Hon Lord Gill, Lord President and Lord Justice General;  
Lauren Wood, Social Policy Co-ordinator, Citizens Advice Scotland;  
Ronnie Conway, Civil Justice Committee, Law Society of Scotland;  
Richard Henderson, Chair, Scottish Committee of the Administrative Justice and  
Tribunals Council;  
Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid.

[25th Meeting, 2012 \(Session 4\) Tuesday 11 September 2012](#)

Elsbeth Molony, Senior Policy and Consultancy Manager, Capability Scotland;  
James Wolffe QC, Faculty of Advocates;  
Mark Harrower, Vice President, Edinburgh Bar Association;  
Oliver Adair, Legal Aid Convener, and Ian Moir, Legal Aid Vice-Convener, Law  
Society of Scotland;  
Dr Colin Lancaster, Director of Policy Development, and Kingsley Thomas,  
Manager of Criminal Legal Assistance, Scottish Legal Aid Board;  
Professor Alan Miller, Chair, Scottish Human Rights Commission.

[26th Meeting, 2012 \(Session 4\) Tuesday 18 September 2012](#)

Dr Cyrus Tata, Reader in Law, Strathclyde University;  
Kenny MacAskill, Cabinet Secretary for Justice;  
Colin McKay, Deputy Director, Legal System Division, Scottish Government.

## **ANNEXE D: INDEX OF WRITTEN EVIDENCE**

### **Evidence received in alphabetical order**

[Association of British Insurers \(137KB pdf\)](#)  
[Association of Chief Police Officers in Scotland \(7KB pdf\)](#)  
[Capability Scotland \(227KB pdf\)](#)  
[Church of Scotland \(196KB pdf\)](#)  
[Citizens Advice Scotland \(120KB pdf\)](#)  
[Citizens Advice Scotland \(supplementary submission\) \(66KB pdf\)](#)  
[Consumer Focus Scotland \(262KB pdf\)](#)  
[Consumer Focus Scotland \(supplementary submission\) \(107KB pdf\)](#)  
[Edinburgh Bar Association \(35KB pdf\)](#)  
[Faculty of Advocates \(223KB pdf\)](#)  
[Faculty of Advocates \(supplementary submission\) \(76KB pdf\)](#)  
[Forum of Scottish Claims Managers \(101KB pdf\)](#)  
[Friends of the Earth Scotland and the Environmental Law Centre Scotland \(212KB pdf\)](#)  
[Glasgow Bar Association \(78KB pdf\)](#)  
[JUSTICE Scotland \(92KB pdf\)](#)  
[Law Society of Scotland \(226KB pdf\)](#)  
[Law Society of Scotland \(supplementary submission\) \(68KB pdf\)](#)  
[Law Society of Scotland \(second supplementary submission\) \(65KB pdf\)](#)  
[Scottish Children's Reporter Administration \(205KB pdf\)](#)  
[Scottish Committee of the Administrative Justice and Tribunals Council \(251KB pdf\)](#)  
[Scottish Human Rights Commission \(554KB pdf\)](#)  
[Scottish Legal Aid Board \(146KB pdf\)](#)  
[Scottish Legal Aid Board \(supplementary submission\) \(235KB pdf\)](#)  
[Scottish Legal Aid Board \(second supplementary submission\) \(163KB pdf\)](#)  
[Scottish Women's Aid \(225KB pdf\)](#)  
[Senior public law professors in Scotland \(157KB pdf\)](#)  
[Simpson and Marwick \(64KB pdf\)](#)  
[Tata, Dr Cyrus, Reader in Law, Strathclyde University \(256KB pdf\)](#)  
[Traprain Consultants Ltd \(72KB pdf\)](#)  
[Which? \(76KB pdf\)](#)

### **Other written evidence**

[Letter from the Scottish Government to the Scottish Committee of the Administrative Justice and Tribunals Council \(4 September 2012\) \(63KB pdf\)](#)  
[Letter from the Lord President and Lord Justice General to the Convener \(24 September 2012\) \(67KB pdf\)](#)

**Written submissions are also published (in the order received) on the Committee's webpage at:**

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52440.aspx>

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