Passage of the

Scottish Civil Justice Council and Criminal Legal Assistance Bill 2012

SPPB 183
Passage of the

Scottish Civil Justice Council and Criminal Legal Assistance Bill 2012

SP Bill 13 (Session 4), subsequently 2013 asp 3

SPPB 183

EDINBURGH: APS GROUP SCOTLAND
For information in languages other than English or in alternative formats (for example Braille, large print, audio tape or various computer formats), please send your enquiry to Public Information, The Scottish Parliament, Edinburgh, EH991SP.

You can also contact us by email sp.info@scottish.parliament.uk

We welcome written correspondence in any language

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament’s copyright policy can be found on the website www.scottish.parliament.uk

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

## Contents

**Foreword**

*Introduction of the Bill*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill (As Introduced) (SP Bill 13)</td>
<td>1</td>
</tr>
<tr>
<td>Explanatory Notes (and other accompanying documents) (SP Bill 13-EN)</td>
<td>19</td>
</tr>
<tr>
<td>Policy Memorandum (SP Bill 13-PM)</td>
<td>56</td>
</tr>
<tr>
<td>Delegated Powers Memorandum (SP Bill 13-DPM)</td>
<td>78</td>
</tr>
</tbody>
</table>

**Stage 1**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage 1 Report, Justice Committee</td>
<td>89</td>
</tr>
<tr>
<td>Letter from the Finance Committee</td>
<td>151</td>
</tr>
<tr>
<td>Extract from the Minutes, Finance Committee, 5 September 2012</td>
<td>156</td>
</tr>
<tr>
<td>Official Report, Finance Committee, 5 September 2012</td>
<td>157</td>
</tr>
<tr>
<td>Submissions to the Finance Committee</td>
<td>161</td>
</tr>
<tr>
<td>Report by the Subordinate Legislation Committee</td>
<td>175</td>
</tr>
<tr>
<td>Oral evidence</td>
<td>189</td>
</tr>
<tr>
<td>Written evidence</td>
<td>257</td>
</tr>
<tr>
<td>Correspondence</td>
<td>405</td>
</tr>
<tr>
<td>Scottish Government Response to Stage 1 Report</td>
<td>423</td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 25 October 2012</td>
<td>442</td>
</tr>
</tbody>
</table>

**Before Stage 2**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Committee Correspondence</td>
<td>469</td>
</tr>
</tbody>
</table>

**Stage 2**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshalled List of Amendments for Stage 2 (SP Bill 13-ML1)</td>
<td>482</td>
</tr>
<tr>
<td>Groupings of Amendments for Stage 2 (SP Bill 13-G1)</td>
<td>490</td>
</tr>
<tr>
<td>Extract from the Minutes, Justice Committee, 13 November 2012</td>
<td>492</td>
</tr>
<tr>
<td>Official Report, Justice Committee, 13 November 2012</td>
<td>494</td>
</tr>
<tr>
<td>Bill (As Amended at Stage 2) (SP Bill 13A)</td>
<td>519</td>
</tr>
<tr>
<td>Revised Explanatory Notes (SP Bill 13A-EN)</td>
<td>537</td>
</tr>
</tbody>
</table>

**After Stage 2**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Committee Correspondence</td>
<td>552</td>
</tr>
</tbody>
</table>

**Stage 3**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshalled List of Amendments selected for Stage 3 (SP Bill 13A-ML)</td>
<td>573</td>
</tr>
<tr>
<td>Groupings of Amendments for Stage 3 (SP Bill 13A-G)</td>
<td>580</td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 29 January 2013</td>
<td>582</td>
</tr>
<tr>
<td>Official Report, Meeting of the Parliament, 29 January 2013</td>
<td>584</td>
</tr>
<tr>
<td>Bill (As Passed) (SP Bill 13B)</td>
<td>627</td>
</tr>
</tbody>
</table>
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Justice Committee’s Stage 1 Report did not include the full text of oral and written evidence received by the Committee. The material linked in Annexes A, C and D is therefore reproduced in full after the body of the report.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS INTRODUCED]

CONTENTS

Section

PART 1
SCOTTISH CIVIL JUSTICE COUNCIL

Establishment
1 Establishment of the Scottish Civil Justice Council

Functions and powers
2 Functions of the Council
3 Powers of the Council
4 Court of Session to consider rules
5 Annual programme and report

Membership of the Council
6 Composition of the Council
7 Lord President appointment process
8 Tenure
9 Disqualification and removal from office
10 Expenses and remuneration

Chairing and proceedings of meetings
11 Chairing of meetings
12 Proceedings
13 Committees

General
14 Dissolution of existing rules councils
15 Modification of enactments
16 Interpretation of Part 1

PART 2
CRIMINAL LEGAL ASSISTANCE

Contributions in respect of automatically available criminal advice and assistance
17 Contributions in respect of automatically available criminal advice and assistance

Assistance by way of representation in relation to criminal matters
18 Availability of criminal assistance by way of representation
19 Clients’ contributions for criminal assistance by way of representation

Contributions for criminal legal aid

20 Contributions for criminal legal aid

Contributions for appeals where appellant deceased

21 Contributions for appeals where appellant deceased

General

22 Regulations about contributions for criminal legal assistance

23 Consequential modifications

PART 3

GENERAL

24 Ancillary provision

25 Commencement

26 Short title
Scottish Civil Justice Council and Criminal Legal Assistance Bill  

[AS INTRODUCED]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

PART I

SCOTTISH CIVIL JUSTICE COUNCIL

Establishment

1 Establishment of the Scottish Civil Justice Council

There is to be a body to be known as the Scottish Civil Justice Council ("the Council").

Functions and powers

2 Functions of the Council

(1) The functions of the Council 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.

(2) In carrying out its functions under this Act, the Council must have regard to—

(a) the principles in subsection (3), and
(b) any guidance issued by the Lord President.

(3) The principles are—

(a) the civil justice system should be fair, accessible and efficient,
(b) rules relating to practice and procedure should be as clear and easy to understand as possible,

(c) practice and procedure should, where appropriate, be similar in all civil courts, and

(d) methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

(4) For the purposes of this Part, “civil procedure rules” are rules which relate to any matter relating to the Court of Session or the sheriff court that the Court of Session may regulate by act of sederunt.

3 Powers of the Council

(1) The Council may take such action as it considers necessary or desirable in pursuance of its functions.

(2) In particular, the Council may—

(a) have regard to proposals for legislative reform which may affect the civil justice system,

(b) prepare draft civil procedure rules in anticipation of the Court of Session being given power to regulate (by act of sederunt) the matters covered by those rules (but such rules may not be submitted to the Court for approval until the Court has the power to regulate the matters in question),

(c) have regard to the criminal justice system and its effects on the civil justice system,

(d) consult such persons as it considers appropriate,

(e) co-operate with, and seek the assistance and advice of, such persons as it considers appropriate,

(f) provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system, and

(g) publish any recommendation it makes.

4 Court of Session to consider rules

(1) The Court of Session must consider any draft civil procedure rules submitted to it by the Council and may—

(a) approve the rules,

(b) approve the rules with such modifications as it considers appropriate, or

(c) reject the rules.

(2) Where the Court of Session approves civil procedure rules (with or without modification) it must embody the approved rules in an act of sederunt.

(3) Nothing in this Part affects the powers of the Court of Session to prepare or make civil procedure rules.
5  **Annual programme and report**

(1) The Council must prepare an annual plan setting out its objectives and priorities for each yearly period beginning on 1 April before the start of that period (“the programme”).

(2) The Council must prepare an annual report on its activities as soon as reasonably practicable after the end of each yearly period ending on 31 March (“the report”).

(3) The report must include a summary of the recommendations made (if any) by the Council during the period covered by the report.

(4) The Council must lay a copy of the programme and the report before the Scottish Parliament.

(5) In complying with the duty in subsection (4), the Council may combine the programme for the coming year with the report for the ending year.

**Membership of the Council**

6  **Composition of the Council**

(1) The Council is to have not more than 20 members and is to be comprised of—

(a) the Lord President,

(b) the Chief Executive of the Scottish Court Service,

(c) the principal officer of the Scottish Legal Aid Board,

(d) 1 member appointed by the Scottish Ministers under subsection (2),

(e) at least 4 judges (“judicial members”), including a minimum of—

(i) 1 judge of the Court of Session, and

(ii) 1 sheriff principal or sheriff,

(f) at least 2 practising advocates (“advocate members”),

(g) at least 2 practising solicitors (“solicitor members”),

(h) at least 2 persons (“consumer representative members”) who, between them, appear to the Lord President to have—

(i) experience and knowledge of consumer affairs,

(ii) knowledge of the non-commercial legal advice sector, and

(iii) an awareness of the interests of litigants in the civil courts, and

(i) up to 6 other persons considered by the Lord President to be suitable to be members of the Council (“LP members”).

(2) The Scottish Ministers must appoint as a member a person who is a member of staff of the Scottish Government and whom they consider to be suitable to be a member of the Council.

(3) The Scottish Ministers may by order amend subsection (1) by substituting for the number of members (or the minimum number in a category of membership) for the time being specified there such other number as they think fit.

(4) Before making an order under subsection (3) the Scottish Ministers must consult the Lord President.
The power to make an order under subsection (3) includes power to make such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

But such power does not include power to modify the description of a category of membership described in subsection (1) or to add a category of membership.

Orders under subsection (3) are subject to the affirmative procedure.

**Lord President appointment process**

The Lord President must appoint persons to be members of the Council in respect of the categories of membership described in section 6(1)(e) to (i) and ensure that the number of members in each such category of membership is maintained at the required level.

The Lord President must prepare and publish a statement of appointment practice setting out the process which the Lord President will follow for appointing—

- advocate members,
- solicitor members,
- consumer representative members, and
- LP members.

The statement of appointment practice must include a requirement for the Lord President to consult—

- the Faculty of Advocates before appointing an advocate member,
- the Council of the Law Society of Scotland before appointing a solicitor member,
- the Scottish Ministers before appointing—
  - a consumer representative member, or
  - a LP member.

**Tenure**

The Lord President, the Chief Executive of the Scottish Court Service and the principal officer of the Scottish Legal Aid Board are members of the Council by virtue of holding their respective offices.

A member appointed by the Scottish Ministers holds office until such time as the Scottish Ministers appoint a replacement member.

A judicial member holds office for a period of 3 years unless, prior to the expiry of that period, the Lord President replaces the member with another judicial member or requires the member to leave office.

Any other member holds office for a period of 3 years.

A member appointed under section 7(1) ceases to hold office—

- at the end of a period of appointment,
- upon giving written notice of resignation to the Lord President,
- on becoming disqualified from holding office as a member or on being removed from such office (see section 9),
(d) on ceasing to fall within the category of membership in respect of which the member was appointed.

(6) For the purposes of subsection (5)(d), a LP member ceases to fall within that category of membership where, in the opinion of the Lord President, the basis of the LP member’s appointment has materially changed.

(7) A person who is or has been a member of the Council may be reappointed (whether in respect of the same or a different category of membership) for further periods.

9 Disqualification and removal from office

(1) A person is disqualified from appointment under section 7(1) as a member of the Council, and from holding office as such a member, if the person is or becomes—

(a) a member of the Scottish Parliament,

(b) a member of the House of Commons,

(c) a member of the European Parliament,

(d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994,

(e) a member of the Scottish Government, or

(f) a Minister of the Crown.

(2) The Lord President may, by notice in writing, remove any member appointed under section 7(1) if satisfied that the member—

(a) is unfit to be a member by reason of inability, neglect of duty or misbehaviour, or

(b) is otherwise unsuitable to continue as a member.

(3) The Lord President must consult the Scottish Ministers before removing—

(a) a consumer representative member, or

(b) a LP member.

10 Expenses and remuneration

(1) The Scottish Court Service may pay such expenses as it thinks fit to—

(a) a member of the Council, and

(b) a person appointed under section 13(2) as a member of a committee of the Council.

(2) The Scottish Court Service may pay such remuneration as it thinks fit to—

(a) an advocate member,

(b) a solicitor member,

(c) a consumer representative member,

(d) a LP member, and

(e) a person (other than one mentioned in subsection (3)) appointed under section 13(2) as a member of a committee of the Council.

(3) Remuneration is not to be paid under subsection (2) to a person who is—
Chairing and proceedings of meetings

11 Chairing of meetings

(1) It is for the Lord President to determine who is to chair meetings of the Council.

(2) The only persons who may do so are—
   (a) the Lord President (but see also section 12(5)), or
   (b) a judicial member holding the office of judge of the Court of Session.

(3) A person ceases to be chair when—
   (a) if applicable, the judicial member ceases to be a member of the Council, or
   (b) the Lord President determines that someone else is to chair meetings under subsection (1).

(4) Members of the Council must elect, from the judicial members, a member to act as deputy to the chairing member.

12 Proceedings

(1) The Lord President may determine the number of members required to constitute a quorum for meetings of the Council.

(2) The Lord President may determine different numbers of members to constitute a quorum for different purposes.

(3) The Council may otherwise determine—
   (a) its own procedure, and
   (b) the procedure of any committees established by it.

(4) The validity of any proceedings or actings of the Council is not affected by—
   (a) any vacancy in the membership of the Council (even if that vacancy creates a deficiency in one of the categories of membership),
   (b) any defect in the appointment of a member of the Council,
   (c) disqualification of any individual from holding office as a member of the Council.

(5) The Lord President may nominate the Lord Justice Clerk to attend and participate in meetings of the Council on behalf of the Lord President (which participation includes, where the Lord President is acting as chair under section 11(1), chairing the meeting).

(6) The Chief Executive of the Scottish Court Service may nominate a member of staff of the Scottish Court Service to attend and participate in meetings of the Council on behalf of the Chief Executive.

(7) The principal officer of the Scottish Legal Aid Board may nominate a member of staff of the Scottish Legal Aid Board to attend and participate in meetings of the Council on behalf of the principal officer.
(8) The Scottish Ministers may nominate another member of staff of the Scottish Government who they consider would be suitable to be a member of the Council to attend and participate on behalf of the member appointed by them under section 6(2).

13 Committees

(1) The Council may establish committees.

(2) A person who is not a member of the Council may be appointed to be a member of any committee established by it.

General

14 Dissolution of existing rules councils

(1) The Court of Session Rules Council established under section 18 of the Administration of Justice (Scotland) Act 1933 (c. 41) (and continued under section 8 of the Court of Session Act 1988 (c. 36)) is dissolved.

(2) Section 8 of the Court of Session Act 1988 is repealed.

(3) The Sheriff Court Rules Council is dissolved.

(4) Sections 33 and 34 of the Sheriff Courts (Scotland) Act 1971 (c. 58) are repealed.

15 Modification of enactments

(1) In section 38(3) of the Legal Aid (Scotland) Act 1986 (c. 47) (rules of court), after “consult” insert “the Scottish Civil Justice Council,”.

(2) In section 32(3) of the Sheriff Courts (Scotland) Act 1971 (c. 58) (power of Court of Session to regulate civil procedure in sheriff court), for “Sheriff Court Rules Council under section 34 of this Act” substitute “Scottish Civil Justice Council”.

(3) In section 62 of the Judiciary and Courts (Scotland) Act 2008 (asp 6) (administrative support for other persons), in subsection (1)—

(a) after paragraph (d) insert—

“(ea) the Scottish Civil Justice Council,”, and

(b) paragraphs (e) and (g) are repealed.

16 Interpretation of Part 1

In this Part—

“advocate” means a member of the Faculty of Advocates,

“civil procedure rules” has the meaning given in section 2(4),

“solicitor” means a person qualified to practise as solicitor under section 4 of the Solicitors (Scotland) Act 1980 (c. 46),

“the Chief Executive of the Scottish Court Service” means the chief executive appointed under paragraph 14(1) of schedule 3 to the Judiciary and Courts (Scotland) Act 2008 (asp 6),

“the Lord Justice Clerk” means the Lord Justice Clerk of the Court of Session,

“the Lord President” means the Lord President of the Court of Session,
“the principal officer of the Scottish Legal Aid Board” means the principal officer appointed under paragraph 7(1) of Schedule 1 to the Legal Aid (Scotland) Act 1986 (c. 47).

**PART 2**

**CRIMINAL LEGAL ASSISTANCE**

**Contributions in respect of automatically available criminal advice and assistance**

17 **Contributions in respect of automatically available criminal advice and assistance**

In the Legal Aid (Scotland) Act 1986 (c. 47) (“the 1986 Act”), in section 8A (criminal advice and assistance: automatic availability in certain circumstances) —

(a) after subsection (1) insert—

“(1A) Regulations under subsection (1) may also provide that, in such circumstances as may be prescribed in the regulations, section 11(2) is not to apply in respect of advice and assistance made available to a relevant client.”,

(b) in subsection (2), for “subsection (1)” insert “subsections (1) and (1A)”.

**Assistance by way of representation in relation to criminal matters**

18 **Availability of criminal assistance by way of representation**

(1) In section 9(2) of the 1986 Act (regulations may apply Part 2 to representation), after paragraph (dd), insert—

“(dda) provide that, in relation to assistance by way of representation which relates to such criminal proceedings as may be prescribed, sections 9A and 11A are to apply instead of sections 8 and 11;”.

(2) After section 9 of the 1986 Act insert—

“9A **Availability of specified criminal assistance by way of representation**

(1) Assistance by way of representation to which this section applies by virtue of regulations made under section 9(1) is to be available to a client where—

(a) the solicitor—

(i) has considered the financial circumstances of the client, and

(ii) is satisfied as to the criteria mentioned in subsection (2), or

(b) the Board has approved the provision of the assistance.

(2) The criteria are—

(a) the scheme of eligibility provides that the fees and outlays of the assistance cannot be met without undue hardship to the client or the dependants of the client, and

(b) any further criterion prescribed in pursuance of section 9(2)(c).

(3) The Board must establish a procedure for a client to apply to the Board for approval under subsection (1)(b) in circumstances where assistance by way of representation has not been made available under subsection (1)(a).
(4) For the purposes of this section, “scheme of eligibility” means a scheme approved under section 9B(3).

(5) This section is subject to any provision made in regulations under section 8A(1).

9B Scheme of eligibility

(1) The Board must, for the purposes of section 9A, prepare and publish a scheme of eligibility setting out financial circumstances in which the Board considers that paying the fees and outlays in respect of assistance by way of representation will result in undue hardship for a client or the dependants of a client.

(2) Before publishing a scheme of eligibility the Board must submit the scheme to the Scottish Ministers for approval.

(3) The Scottish Ministers may approve a scheme of eligibility submitted to them under subsection (2) with or without modification.

(4) The Scottish Ministers may at any time—

(a) approve a modification of an approved scheme of eligibility proposed by the Board or withdraw approval of such a scheme or modification,

(b) require the Board to prepare and publish a scheme under subsection (1).

(5) In preparing and publishing the scheme of eligibility under subsection (1) the Board must comply with any direction given by the Scottish Ministers.

(6) A scheme of eligibility may make different provision for different cases or classes of case.”.

19 Clients’ contributions for criminal assistance by way of representation

(1) In section 11(1) of the 1986 Act (clients’ contributions), after “below” insert “or, where applicable, section 11A”.

(2) The title of section 11 becomes “Clients’ contributions: general”.

(3) After section 11 insert—

“11A Clients’ contributions: specified criminal assistance by way of representation

(1) This section applies where—

(a) assistance by way of representation has been made available to a client under section 9A(1) (“the assistance”), and

(b) the client—

(i) has disposable income of, or exceeding, £68 per week and is not (directly or indirectly) in receipt of any of the benefits mentioned in section 11(2)(b), or

(ii) has disposable capital of, or exceeding, £750.

(2) The client is liable to pay a contribution in respect of the assistance provided of up to, but not in aggregate exceeding, such amount as may be prescribed by regulations made under section 33ZA(1).
(3) Except where regulations made under section 33ZA(1) otherwise provide—

(a) in a case where the assistance is being provided—

(i) by a solicitor employed by the Board by virtue of sections 26 and 27 or, as the case may be, section 28A, or

(ii) by counsel instructed by such a solicitor,

it is for the Board to determine the amount of and collect any contribution payable by the client under subsection (2), and

(b) in any other case, it is for the solicitor to determine the amount of and collect any contribution payable by the client under subsection (2).

(4) A contribution collected by the solicitor is to be treated as payment of a fee or outlay properly chargeable (in accordance with section 33).”.

Contributions for criminal legal aid

20 Contributions for criminal legal aid

After section 25AB of the 1986 Act insert—

“25AC Legal aid: contributions

(1) A person (A) is not to be required to pay any sums in respect of criminal legal aid received in pursuance of this Part except in accordance with subsection (3) or section 25AA(5).

(2) Subsection (3) applies where—

(a) the legal aid is not being provided in any of the circumstances described in section 22(1) or under section 23(1), and

(b) A—

(i) has disposable income of, or exceeding, £68 a week and is not (directly or indirectly) in receipt of any of the benefits mentioned in section 11(2)(b), or

(ii) has disposable capital of, or exceeding, £750.

(3) A is liable to pay a contribution in respect of the criminal legal aid provided of up to, but not in aggregate exceeding, such amount as may be prescribed by regulations made under section 33ZA(1).

(4) Except where regulations made under section 33ZA(1) otherwise provide—

(a) in a case where the criminal legal aid is being provided—

(i) in relation to solemn proceedings, proceedings relating to an appeal or proceedings relating to the Supreme Court,

(ii) by a solicitor employed by the Board by virtue of sections 26 and 27 or, as the case may be, section 28A, or

(iii) by counsel instructed by such a solicitor,

it is for the Board to collect any contribution payable by A under subsection (3), and

(b) in any other case, it is for the solicitor to collect any contribution payable by A under subsection (3).
(5) A contribution collected by the solicitor is to be treated as payment of a fee or outlay properly chargeable (in accordance with section 33).

(6) For the purposes of subsections (4)(b) and (5), “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.

25AD Payment of fees or outlays otherwise than through contributions

(1) Except in so far as regulations made by the Scottish Ministers under this section or section 33ZA(1) otherwise provide, any fees and outlays payable to the solicitor in respect of criminal legal aid are to be paid as follows—

(a) first, out of any contribution payable by the person receiving the criminal legal aid in accordance with section 25AA(5) or section 25AC(3),

(b) second, in priority to all other debts, out of any expenses which by virtue of an order of a criminal court are payable to that person by any other person in respect of the matter in connection with which the criminal legal aid was given, and

(c) third, by the Board out of the Fund, following receipt by it of a claim submitted by the solicitor.

(2) In subsection (1), the reference to fees and outlays is a reference to any fees and outlays properly chargeable (in accordance with section 33) in respect of criminal legal aid given to a person under this Part (but does not include the salary payable to a solicitor employed by the Board under sections 26 and 27 or section 28A).

(3) For the purposes of this section, “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.”.

Contributions for appeals where appellant deceased

In section 25AA of the 1986 Act (legal aid in respect of appeals under section 303A of the Criminal Procedure (Scotland) Act 1995), after subsection (4) insert—

“(5) Where legal aid is being made available to an authorised person under this section (in either of the circumstances described in subsection (2) or (3)), the Board may require the payment of a contribution in respect of the expenses of the criminal legal aid of such amount as the Board may determine.

(6) The Board may require the contribution to be paid from the estate of the deceased person or by the authorised person.

(7) The amount determined by the Board under subsection (5) must not exceed the whole expenses of the criminal legal aid provided.

(8) The Board must take into account any contribution made by the deceased person prior to death in assessing the amount of contribution payable.”.
22 Regulations about contributions for criminal legal assistance

After section 33 of the 1986 Act insert—

“33ZA Regulations about contributions for criminal legal assistance

(1) The Scottish Ministers may by regulations make provision in connection with the amount, determination and collection of any contribution payable under section 11 (in so far as relating to criminal matters) or section 11A, 25AA or 25AC.

(2) Regulations made under subsection (1) may, in particular—

(a) make provision permitting a lower contribution to be payable where otherwise the person liable to pay the contribution, or the dependants of such person, would suffer undue hardship,

(b) make provision for determining appropriate contributions where the person is in receipt of criminal legal assistance in respect of two or more distinct proceedings,

(c) specify whether it is for the Board or the solicitor providing the assistance to determine the amount of, or collect, a contribution,

(d) specify how a person’s contributions are to be transferred or accounted for in relation to proceedings which are—

(i) instituted by way of summary complaint but which are subsequently dealt with under solemn procedure, or

(ii) instituted by way of indictment but which are subsequently dealt under summary procedure,

(e) make provision about the payment of contributions by instalments.

(3) Regulations made under subsection (1) may provide for different provision in relation to different cases or classes of case.

(4) In this section “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.”.

23 Consequential modifications

(1) The 1986 Act is amended as follows.

(2) In section 4(3)(aa) (Scottish Legal Aid Fund), after “11” insert “, 11A, 25AA or 25AC”.

(3) In section 8 (availability of advice & assistance), after “8A(1)” insert “or 9(1)”.

(4) In section 8A(1) (criminal advice and assistance: automatic availability in certain circumstances)—

(a) the words “the financial limits in section 8” become paragraph (a),

(b) after that paragraph insert “; or—

(b) the criteria mentioned in section 9A(2)”.

(5) In section 9(2) (regulations may apply Part 2 to representation), in paragraph (de), after “11(2)” insert or “11A”.

30
(6) In section 11 (clients’ contributions)—
   (a) in subsection (1)—
      (i) after “(2)” insert “or”,
      (ii) the words “or (3)” are repealed,
   (b) in subsection (2A)—
      (i) for the words from “criminal” where it first occurs to “assistance” where it
          third occurs substitute “advice and assistance (other than assistance by way
          of representation to which section 9A applies)”,
      (ii) after “27” insert “or section 28A”,
   (c) in subsection (3A), after “27” insert “or section 28A”, and
   (d) subsections (3) and (4) are repealed.
(7) In section 12(3) (payment of fees and outlays otherwise than through clients’
     contributions), in paragraph (a), after “11(2)” insert “or, as
     the case may be, section
     11A(2)”.“
(8) In section 33A(5)(a) (contracts for the provision of criminal legal assistance), after
     “11(2)” insert “, 11A(2), 25AA(5) or 25AC(3)”.
(9) In section 36(2) (regulations)—
   (a) in paragraph (b)—
      (i) after “11(2),” insert “11A(1),”,
      (ii) for “and 17(2)” substitute “, 17(2) and 25AC(2)”,
      (iii) for “amount specified in section 10(2)” substitute “amounts specified in
           sections 10(2), 11A(1) and 25AC(2) and, in so far as relating to criminal
           matters, sections 8 and 11(2)”.
(10) In section 37(2) (parliamentary procedure) after “24(4)” insert “, 33ZA(1)”.

PART 3
GENERAL

24 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental,
    consequential, transitional, transitory or saving provision as they consider necessary or
    expedient for the purposes of or in connection with this Act.
(2) The power of Scottish Ministers to make an order under subsection (1) includes power
    to make different provision for different purposes.
(3) An order under subsection (1) may modify this or any other enactment.
(4) Subject to subsection (5), an order under subsection (1) is subject to the negative
    procedure.
(5) An order under subsection (1) which adds to, replaces or omits any part of the text of an
    Act (including this Act) is subject to the affirmative procedure.
25  **Commencement**

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under this section may include transitional, transitory or saving provision.

26  **Short title**

The short title of this Act is the Scottish Civil Justice Council and Criminal Legal Assistance Act 2012.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

Introduced by:  Kenny MacAskill
On:  2 May 2012
Bill type:  Executive Bill
CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Scottish Civil Justice Council and Criminal Legal Assistance Bill introduced in the Scottish Parliament on 2 May 2012.

   - Explanatory Notes;
   - a Financial Memorandum;
   - a Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 13-PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as priorities:

- the establishment of a Scottish Civil Justice Council to replace the Sheriff Court Rules Council and the Court of Session Rules Council. It will also have a new, wider, role to advise and make recommendations on improving the civil justice system in Scotland.
- introducing financial contributions in criminal legal aid thereby ensuring that those who are able to pay towards the cost of their defence do so. The Bill will also make changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

CRIMINAL LEGAL ASSISTANCE – OVERVIEW

5. In order to further assist the reader and to help inform debate on part 2 of the Bill in particular, an overview is provided below of the current criminal legal assistance scheme in Scotland, including in which circumstances, and how, financial contributions are required, and how part 2 of the Bill proposes to change this.

6. Publicly funded legal assistance in Scotland is potentially available for virtually all types of criminal cases, as it is for virtually all types of civil disputes. Eligibility for both civil and criminal legal assistance is controlled by tests set out in the Scottish legal assistance legislation. There are various forms of criminal legal assistance provision currently available, appropriate for different situations and cases. These forms of criminal legal assistance as they currently operate are described below.

Advice and Assistance

7. The advice and assistance (A&A) scheme allows a client to receive publicly funded preliminary advice and assistance from a solicitor on a criminal matter. It does not provide for representation of the client by the solicitor. The solicitor is responsible for determining whether the client is eligible for A&A, the test for which is financial and is set out in section 8 of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). The client may have to pay a contribution
towards the cost of the advice and assistance. Again, it is up to the solicitor to determine the level of the contribution and to collect it from the client. The levels of contributions are prescribed in Regulations, the most recent of which are the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011.

8. In order to allow the solicitor to calculate any contribution due, or in fact to assess whether an individual is eligible for A&A, the solicitor uses guidance from the Scottish Legal Aid Board (“the Board”), called a keycard which is published on the website of the Board.¹

9. Where A&A is provided at a police station, A&A will be given without reference to the financial limits set out in section 8 of the 1986 Act, although a contribution may still be due.

10. The Bill makes no changes to the A&A scheme as it is described here. However, section 17 of the Bill allows Scottish Ministers to bring forward regulations to remove the requirement to pay a contribution to the costs of A&A when it is provided in certain circumstances, such as at a police station.

**Assistance by Way of Representation**

11. Assistance by Way of Representation (ABWOR) is an extension of the A&A scheme, which is used when the solicitor is required to take any step on behalf of their client in instituting, conducting or defending certain proceedings. In criminal cases ABWOR is most commonly used where a client is pleading guilty. Again, in respect of ABWOR it is the solicitor who applies the eligibility test (which is financial) and it is the solicitor who calculates and collects any contribution which may be due from the client.

12. In certain proceedings, the eligibility test may be both based on the financial means of the client and whether it is in the interests of justice that ABWOR be granted, and the solicitor must determine this.

**Summary Criminal Legal Aid**

13. Summary criminal legal aid is used following a plea of not guilty in custody and cited cases. Summary criminal legal aid is used for less serious criminal offences, such as road traffic matters, breach of the peace and some assaults, which are prosecuted in the district or sheriff courts. Unlike for A&A and ABWOR, it is the Board which assesses applications for summary criminal legal aid for eligibility. The Board assesses both whether paying the full costs of the case would cause undue hardship to the applicant and whether it is in the interests of justice to make legal aid available.

14. In deciding what would be undue hardship in a case, the Board looks at an applicant’s and their dependants’ unique circumstances. The Board publishes full guidance on its website on how it carries out the “undue hardship” test.²

¹ [www.slab.org.uk](http://www.slab.org.uk)

²
15. When assessing whether it is in the interests of justice to make summary criminal legal aid available the Board is required to consider a number of factors, including:

- the likelihood of a sentence which would deprive the applicant of liberty or livelihood,
- any complexities involved in the case,
- the ability of the applicant to understand the proceedings,
- the possible interests of third parties, and
- whether the applicant has a defence to the charge.

16. At present, if an applicant has been found eligible to receive summary criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

**Solemn Criminal Legal Aid**

17. The responsibility for granting solemn criminal legal aid in most cases transferred from the courts to the Board on 25 November 2010. The test the Board applies to determine whether an applicant is financially eligible for solemn criminal legal aid is the same undue hardship test as is used in part for summary criminal legal aid. For solemn criminal legal aid, however, the Board does not determine what would be in the interests of justice.

18. At present, if a client has been found eligible to receive solemn criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

**Court Grants of Legal Aid**

19. The courts still retain the power to grant legal aid in the following circumstances:

- Under section 23(1)(b) of the 1986 Act, in summary cases, where following conviction a first custodial sentence is being considered,
- Under section 30(1) of the 1986 Act in contempt of court cases.

20. No contributions to the costs of legal aid are currently payable in these cases and the Bill makes no proposals to change this.

**Automatic Criminal Legal Aid**

21. Criminal legal aid is automatically available to an accused person in certain situations. It is available without application and without enquiry as to the accused’s financial means. The

---

situations in which automatic criminal legal aid is available are set out in section 22 of the 1986 Act. In summary, they are:

- Representation at an identification parade;
- Certain proceedings under solemn or summary procedure where the accused has been taken into custody;
- Cases involving insanity, including an examination of facts;
- Sexual offences;
- Trials in absence (in solemn and summary cases) and
- Cases where on appeal the High Court has granted authority for a new prosecution for the same or similar offence.

22. Contributions are not currently due where an accused is in receipt of automatic criminal legal aid and the Bill makes no changes in this respect.

Criminal appeals

23. Most appeals go through a “sift” process, which is a court procedure to identify cases where it is considered there is merit to proceed to a full appeal hearing. Legal aid may be available for appeal cases. The Board only assesses these applications by looking at the financial means of the applicant and whether undue hardship would be caused. The Board is not required to consider whether the interests of justice mean that the applicant should receive the legal aid. If legal aid had been granted for the case at first instance, the undue hardship test of the applicant’s financial means is not required to determine the application for legal aid for the appeal.

24. For other appeals such as petitions to the nobile officium, or applications for special leave to appeal to the Supreme Court, the Board requires to apply both the undue hardship test as regards the applicant’s financial means and the interests of justice test to these applications.

Introducing financial contributions in criminal legal aid

25. As described above, currently recipients of criminal legal aid are not required to pay a contribution towards the cost of their case even if they could afford to do so. The Bill will amend this by introducing the requirement, with some exceptions, to pay a contribution in summary and solemn criminal legal aid first instance cases and in criminal appeals. This will ensure that there is as much consistency as is practicable across all of the various forms of criminal legal assistance, with contributions being required for A&A, ABWOR and criminal legal aid.

Changes to financial eligibility

26. In order to take forward further the principle of consistency described above, the Bill also aligns the eligibility test of the applicant’s financial means across the various forms of criminal legal assistance. At present, the eligibility test for criminal legal aid is the undue hardship test described above. The eligibility test for ABWOR on the other hand is based on the guidance as set out in the Board’s keycard. These different tests mean that some people would be eligible for
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

one type of criminal legal assistance and would not be eligible for the other. The Bill will change this, by moving to a single undue hardship test for all types of criminal legal assistance (in which the financial means of the applicant must be considered).

COMMENTARY ON SECTIONS

Part 1 - Scottish Civil Justice Council

Section 2 – Functions of the Council

27. This section sets out what the functions of the Council are. In carrying out its functions the Council must have regard to the principles set out in subsection (3) and any guidance issued by the Lord President.

28. Whereas the functions in subsections (1)(b) and (c) relate to the rules of civil procedure, (continuing the broad remit of the existing rules councils) three of the functions (1)(a),(d) and (e) specifically relate to the wider “civil justice system”. This is intended to bear its ordinary meaning, and would include matters such as arrangements for the administration of the courts by the Scottish Court Service, the availability of legal assistance in pursuing disputes, and the law governing civil procedure in the courts.

29. Subsection (3) sets out the principles which the Council must have regard to in carrying out its functions. Subsection (3)(c) provides that one of the principles is that, where appropriate, practice and procedure should be as similar as possible in all civil courts. This recognises that there may be instances where a distinct procedure is necessary, for example, where legislation provides that a case must be raised in a particular court.

30. The principle at subsection (3)(d) - that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted - would include methods such as arbitration, mediation or adjudication.

Section 3 – Powers of the Council

31. Subsection (1) makes it clear that the Council may take any action it considers necessary or desirable in pursuance of its functions. Subsection (2) sets out specific actions that the Council may take.

32. Subsections (2)(a) and (b) enable the Council to take into account proposals for future legislation which might affect the civil justice system and to draft rules before the Court of Session is explicitly given the power to regulate the matters governed by those rules.

33. Under subsection 2(e) the Council will be able to take into account the civil justice system’s interaction with the criminal justice system.

34. Under subsections (2)(d) and (e), the Council may consult and work with other persons in order to carry out its functions. These provisions will enable the Council to, for example, seek the views of and commission non-governmental organisations to carry out research on matters relating to the civil justice system.
35. Subsection (2)(f) makes it clear that the Council may make recommendations for change to the Scottish Ministers, for example, if it considered primary legislation was necessary.

36. The Council must publish a summary of any recommendations it makes under subsection (2)(f) by including these in its annual report, provided for at section 5. It may however, publish any (and all) of its recommendations under subsection (2)(g).

**Section 4 – Court of Session to consider rules**

37. This section provides that any draft civil procedural rules submitted by the Council must be considered by the Court of Session. The Court of Session may approve (with or without modification) or reject the rules, and if it approves them must embody them in an act of sederunt. The Bill does not however affect the ability of the Court of Session to prepare or make civil procedure rules of its own initiative, or under any other enactment.

**Section 5 – Annual programme and report**

38. This section provides that the Council must, before 1 April each year, prepare a programme which sets out its objectives and priorities for the following year. As soon as is reasonably practicable after 31 March each year it must also prepare a report on its activities for the preceding year.

39. Subsection (4) requires the Council to lay a copy of its programme and report before the Scottish Parliament. Under subsection (5) the documents can be combined when doing so. The programme and report may therefore be laid before Parliament after 31 March each year, once the Council’s report is prepared.

**Section 6 – Composition of the Council**

40. Section 6 makes provision for the composition of the Council, setting the maximum number of members at 20 and the minimum at 14. The section is to be read in conjunction with sections 7 (Lord President appointment process), 8 (Tenure), 9 (Disqualification and removal from office), 10 (Expenses and remuneration) and 16 (Interpretation of Part 1).

41. The section provides for the following types of member who, with the exception of the office holder members (listed in subsection (1)(a) to (c)) and the Scottish Ministers’ appointee (appointed under subsection (2)), are all appointed by the Lord President.

- **Office holder members:** these are set out at subsection (1)(a) to (c) and are: the Lord President, the Chief Executive of the Scottish Court Service and the principal officer (who is the Chief Executive) of the Scottish Legal Aid Board (“the Board”). Each of these offices is defined at section 16. Section 8(1) provides that these individuals are members by virtue of their office and therefore are not appointed for any fixed period. These members are not eligible for remuneration for time served on the Council or any of its committees, as provided for by subsection 10(2). Sections 12(6) and 12(7) (Proceedings) allow the Chief Executive of the Scottish Court Service and the principal officer of the Board to send representatives to Council meetings in their place.

- **Judicial members:** under subsection (1)(e), the Council is to include at least four judges as members, including at least one judge of the Court of Session and at least one Sheriff
Principal or sheriff. Section 8(3) provides that judicial members are to be appointed for three years, unless replaced, or unless removed under that section. These members are not eligible for remuneration, as provided for by section 10(2).

- **Advocate members:** under subsection (1)(f), the Council is to include at least two practising advocates as members. An advocate is defined at section 16 as a member of the Faculty of Advocates. The statement of appointment practice to be prepared under subsection 7(2) will provide that the Lord President must consult the Faculty of Advocates before appointing advocate members. Advocate members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **Solicitor members:** under subsection (1)(g), the Council is to include at least two practising solicitors as members. A “solicitor” is defined at section 16 as a person qualified to practise as a solicitor under section 4 of the Solicitors (Scotland) Act 1980 and includes solicitor advocates. The statement of appointment practice to be prepared (under section 7(2)) will provide that the Lord President must consult the Law Society of Scotland before appointing solicitor members. Solicitor members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **Consumer representative members:** the Council is to include at least two individuals who, in the Lord President’s opinion, between them, fulfil the criteria set out at subsection (1)(h)(i) to (iii). Persons with knowledge of the non-commercial advice sector include both lawyers and non-lawyers with knowledge of the not-for-profit provision of legal advice and services. The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing a consumer representative member. Consumer representative members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **LP members:** the Lord President may appoint up to a further six persons as members of the Council under subsection (1)(i). The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing LP members. LP members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2), unless they fall within the categories set out at section 10(3).

- **Scottish Ministers’ appointee:** under subsection (2), the Scottish Ministers must appoint a Scottish Government member of staff to the Council. Under section 8(2), the Scottish Ministers’ appointee holds office until such time as a replacement member is appointed. Section 10(2) excludes the member appointed by the Scottish Ministers from being eligible for remuneration. Subsection 12(8) allows the Scottish Ministers to send another member of Scottish Government staff to representative to attend Council meetings in place of that member.

42. Under subsection (3), the Scottish Ministers have power, after consulting the Lord President, to amend the overall number of Council members and the numbers referred to in each
category of membership. This would allow Ministers to alter the composition of the Council but, as specified at subsection (6), would not allow Ministers to modify the description of a category of membership (including the repeal of a category).

Section 7 – Lord President appointment process

43. This section places a duty on the Lord President to appoint the members in section 6(1)(e) to (i). That is, all members other than the office holders (referred to under section 6(1)(a) to (c) and the Scottish Ministers’ appointee (appointed under section 6(2)). The Lord President must also ensure the number of members in section 6(1)(e) to (i) stays at the required level.

44. Subsection (2) requires the Lord President to publish a statement of appointment practice which sets out the process which will be followed in appointing the advocate, solicitor, consumer representative and LP members.

45. Subsection (3) specifies which bodies and persons the Lord President must consult before appointing certain members.

Section 8 – Tenure

46. This section should be read with section 9 (Disqualification and removal from office). It provides that all members, except the Scottish Ministers’ appointee and office holder members, hold office for a period of three years. It also deals with various circumstances in which members cease to hold office.

47. Judicial members hold office for three years unless either replaced, or removed by the Lord President under subsection (3).

48. Under subsections (5)(d) and (6), a LP member ceases to hold office if, in the Lord President’s opinion, the basis of their appointment has materially changed. This might occur where, for example, the person had been appointed on account of holding a post in a representative body and, since appointment, had stepped down from that post.

49. Subsection (7) provides that members are eligible for reappointment.

Section 9 – Disqualification and removal from office

50. Subsection (1) sets out certain categories of persons who are disqualified from being appointed as Council members. Subsection (2) provides for the circumstances in which persons appointed by the Lord President (under section 6(1)(e) to (i)) may be removed.

Section 10 – Expenses and remuneration

51. This section makes provision for expenses and remuneration. It provides that the Scottish Court Service (“the SCS”) may, but need not, remunerate certain specified types of Council members or persons appointed as a member of a committee of the Council. Section 10(3) provides that members of staff of the Scottish Administration are not eligible for remuneration.
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

This would exclude, for example, court clerks from remuneration as well as any Scottish Government staff.

52. All Council members and persons serving on committees (whether or not they are a Council member) are eligible to be paid such expenses as the SCS thinks fit.

Section 11 – Chairing of meetings

53. Under section 11 the Lord President may appoint as chair of the Council the Lord President or any Senator member of the Council.

Section 12 – Proceedings

54. Except for subsections (1) and (2) under which the Lord President may specify the number of members which constitutes a quorum for Council meetings, section 12 provides that the Council may determine its own procedure and the procedure of any committees established by it.

55. Subsections (5) to (7) enable the office holder members to nominate persons to attend and participate in meetings on their behalf. Similarly, the Scottish Ministers may appoint an alternative member of Scottish Government staff to attend meetings in place of their appointed member. Under subsection (5) in particular, the Lord Justice Clerk may attend meetings on behalf of the Lord President, including as chair, whether or not the Lord Justice Clerk is a member of the Council.

Section 13 – Committees

56. This section makes provision for the establishment of committees. Under section 13(2), individuals may be appointed to committees although they are not Council members.

Section 14 – Dissolution of existing rules councils

57. Section 14 provides for the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council and the repeal of the relevant statutory provisions under which those bodies were established.

Section 15 – Modification of enactments

58. Section 15 provides for various statutory amendments arising from the establishment of the Scottish Civil Justice Council and the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council.

59. Subsection (1) makes amendment to the Legal Aid (Scotland) Act 1986 which makes clear that the Court of Session is to consult the Scottish Civil Justice Council before making procedural rules in relation to legal aid and assistance.

60. Subsection (2) makes an amendment to the Sheriff Courts (Scotland) Act 1971 to provide that the Court of Session must consult the Council before making rules of civil procedure in the sheriff court, except where those rules were submitted by the Council.
61. Subsection (3) makes an amendment to the Judiciary and Courts (Scotland) Act 2008 which provides that the Scottish Court Service has the function of providing administrative support for the Council.

Part 2 – Criminal Legal Assistance

Section 17 – Contributions in respect of automatically available criminal advice and assistance

62. Section 17 inserts a new subsection (1A) in section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 8A was introduced following the decision of the Supreme Court in Cadder v HMA by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Section 8A currently provides that Scottish Ministers may make regulations prescribing the circumstances in which A&A in relation to criminal matters can be provided without reference to the financial limits in section 8. Section 8 prescribes the eligibility test for A&A which is based on a person’s financial circumstances.

63. The new subsection allows regulations to prescribe the circumstances in which A&A in relation to criminal matters may be provided without payment of a contribution in terms of section 11 of the 1986 Act.

Section 18 – Availability of criminal assistance by way of representation

64. Section 18 amends provisions in Part II of the 1986 Act about the availability of criminal A&A. Specifically, section 18 inserts a new paragraph (dda) in section 9(2) and inserts sections 9A and 9B. A consequential modification to section 9(2)(de) is made in section 23.

65. Section 9 of the 1986 Act provides that Scottish Ministers may make regulations in relation to the availability of assistance by way of representation (“ABWOR”) under Part II of the 1986 Act. Section 9(2)(de) provides that regulations can prescribe the proceedings at which ABWOR is available without contributions being levied under section 11 of the 1986 Act. Under section 11 a person may have to pay a contribution towards the A&A received where the person’s disposable income is over a certain specified limit or where the person is in receipt of certain benefits.

66. A related amendment to section 9 is in section 23(5) of the Bill which amends section 9(2)(de) of the 1986 Act to include reference to the new section 11A (which is inserted by section 19 of the Bill). As a result of the amendment the Scottish Ministers will have power under section 9(2)(de) to prescribe the proceedings at which ABWOR is available without being subject to contributions under section 11 or contributions for criminal ABWOR under section 11A.

67. Section 18 inserts a new paragraph (dda) into section 9(2) of the 1986 Act. This new paragraph provides that regulations can prescribe the criminal proceedings to which the new sections 9A and 11A are to apply instead of sections 8 and 11 in relation to criminal ABWOR.

68. Section 18 inserts a new section 9A into the 1986 Act. Section 8 of the 1986 Act provides the current eligibility test which determines whether A&A can be provided to a person. A&A can include ABWOR. The section 8 test is based on the financial circumstances of the
applicant: whether the person has disposable income or capital exceeding certain amounts or whether the person is in receipt of certain benefits.

69. The new section 9A(1), inserted by section 18, sets out a new eligibility test for criminal ABWOR. The proceedings in respect of which criminal ABWOR may be provided will be prescribed by regulations made under section 9(2)(dda). The solicitor must consider the financial circumstances of the applicant, under section 9A(1)(a)(i), and must be satisfied that the criteria in section 9A(2) are met before criminal ABWOR can be provided to the person. The criteria in subsection (2) are that the scheme of eligibility (set out in section 9B) provides that the fees and outlays of the assistance cannot be met without causing undue hardship to the person or his/her dependants, and any other criteria that are prescribed by Scottish Ministers under section 9(2)(c) of the 1986 Act.

70. Separately, under section 9A(1)(b), criminal ABWOR can be provided to a person where the Board has approved the grant of ABWOR to that person. In addition, a person can ask the Board to consider his/her application under the procedure created by the Board under section 9A(3).

71. Once criminal ABWOR has been granted under section 9A it is intended that the client will be obliged to alert his/her solicitor to a change in his/her financial circumstances, in order to ensure that the client is still eligible for criminal ABWOR. This obligation will be set out in regulations made under the existing powers in section 36(1) of the 1986 Act.

72. The “scheme of eligibility” is defined in subsection (4) for the purposes of the references to it in sections 9A and 9B to mean any scheme which has been approved by Scottish Ministers, or any part or modification of such a scheme.

73. Section 9A(5) provides that the availability of criminal ABWOR in terms of section 9A may be subject, by means of regulations, to the provisions of section 8A(1). Section 8A allows for criminal A&A to be made automatically available in certain circumstances.

74. Section 9B, also inserted by section 18 of the Bill, makes provision about the scheme of eligibility referred to in section 9A. Under subsection (1), it is for the Board to prepare and publish the scheme of eligibility. The Board must submit the draft scheme, under subsection (2), for approval by the Scottish Ministers. The Scottish Ministers may, by virtue of subsection (3), modify or approve the draft scheme. Under subsection (4) the Scottish Ministers have power to approve the scheme (including a modification of a scheme) or withdraw approval of a scheme or a modification, and to require the Board to prepare and publish a scheme under subsection (1). Under subsection (5), the Board must comply with any directions given by Scottish Ministers when preparing and publishing a scheme. Subsection (6) allows the scheme to make different provisions for different cases or classes of case.

Section 19 – Clients’ contributions for criminal legal assistance by way of representation

75. Section 19 amends section 11 of the 1986 Act. Section 11 of the 1986 Act provides for the levying of contributions in respect of A&A, which currently includes criminal ABWOR. Section 11(1) provides that a person is not liable to pay a contribution where the person does not
meet the test in section 11(2) of having disposable income or capital of a certain amount, or where the person is in receipt of certain benefits. Section 19(1) amends section 11(1) to refer to the new section 11A and subsection (2) changes the title of section 11. The effect of the amendments is that a person is not required to pay a contribution under section 11 in respect of A&A (excluding criminal ABWOR) or a contribution under section 11A in respect of criminal ABWOR unless the test in section 11(2) or 11A(1) is met.

76. Section 19(3) inserts section 11A which makes provision about contributions due in respect of criminal ABWOR. The proceedings to which section 11A will apply can be prescribed by regulations made under section 9(2)(dda) of the 1986 Act, as inserted by section 18 of the Bill. A contribution is due where a person has disposable income over a certain prescribed amount and is not in receipt of certain benefits or capital, above a prescribed amount as provided for in section 11A(1). Section 11A(2) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers can, under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill), specify by regulations the amount payable by way of contribution and the maximum amount payable.

77. Section 11A(3) provides that, unless regulations prescribe otherwise, where criminal ABWOR is provided by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to determine the amount of the contribution under subsection (2) and to collect it. In all other situations, the contribution for ABWOR due under subsection (2) will be determined, and collected, by the solicitor. Section 11A(4) provides that a contribution collected by the solicitor is treated as a contribution towards fees or outlays properly incurred by the solicitor.

Section 20 – Contributions for criminal legal aid

78. Section 20 inserts a new section 25AC into the 1986 Act in respect of contributions for criminal legal aid. Section 25AC(1) provides that contributions are only due for criminal legal aid by virtue of subsection (3) or section 25AA(5) (which makes provision in respect of appeals under section 303A of the Criminal Procedure (Scotland) Act 1995).

79. Section 25AC(2)(a) provides that no contribution will be payable where a person is in receipt of legal aid under section 22(1) or section 23(1) of the 1986 Act. Section 22 concerns the automatic availability of criminal legal aid in certain circumstances and section 23(1) provides for the court to grant criminal legal aid in certain circumstances.

80. In proceedings where a contribution is due, a person is only liable to pay a contribution where, under section 25AC(2)(b), he or she has income above a certain prescribed amount and is not in receipt of certain benefits or capital above a prescribed amount.

81. Section 25AC(3) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers have power under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill) to specify by regulations the amount of contribution due and the maximum amount payable.

82. Section 25AC(4) makes provision about who collects the contribution. Unless otherwise provided for by regulations, where criminal legal aid is provided in connection with solemn or
appeal proceedings, or by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to collect the contribution. In all other cases, the solicitor collects the contribution due.

83. Section 25AC(5) provides that a contribution collected by the solicitor is to be treated as a contribution towards any fees or outlays incurred by the solicitor.

84. “The solicitor” as referred to in section 25AC is defined in subsection (6) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

85. Section 20 of the Bill also inserts new section 25AD into the 1986 Act. Section 25AD sets out how the fees and outlays of a solicitor who has provided criminal legal aid are to be paid. Under subsection (1), unless regulations provide otherwise, the order of payment should be, first, from any contribution due, second, (in priority to all other debts) from any expenses payable by order of a criminal court and third, by the Board from the legal aid Fund.

86. Subsection (2) of section 25AD provides that the fees and outlays referred to in subsection (1) are those properly chargeable in accordance with section 33 of the 1986 Act, but do not include a salary payable to a solicitor employed under section 26, 27 or 28A of the 1986 Act. “The solicitor” as referred to in section 25AD is defined in subsection (3) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

Section 21 – Contributions for appeals where appellant is deceased

87. Section 21 of the Bill inserts additional subsections into section 25AA of the 1986 Act. Section 303A of the Criminal Procedure (Scotland) Act 1995 makes provision about the transfer of the rights of a deceased person to an authorised person. The authorised person is the deceased’s executor or a person the court considers has a legitimate interest. Section 25AA of the 1986 Act sets out the circumstances where criminal legal aid is available to the authorised person to institute or continue with such an appeal.

88. Subsection (5) of section 25AA, as inserted by section 21 of the Bill, provides that the Board may require the payment of a contribution, determined by the Board, for the criminal legal aid provided. Subsection (6) provides that either the estate of the deceased or the authorised person may be liable to pay the contribution, and subsection (7) provides that the contribution determined by the Board cannot exceed the whole expenses of the criminal legal aid being provided. Subsection (8) provides that the Board, when determining the contribution due, must take into account any contribution paid by the deceased prior to his or her death.

Section 22 – Regulations about contributions for criminal legal assistance

89. Section 22 inserts a new section 33ZA into the 1986 Act. This section gives the Scottish Ministers power to make regulations in connection with the amount, determination and collection of contributions (in relation to criminal legal assistance) due under sections 11 (only insofar as relating to criminal matters), 11A, 25AA or 25AC. Particular types of regulations which may be made under subsection (1) are listed in subsection (2). These are as follows:
under subsection (2)(a) making provision to allow a lesser contribution to be levied where it can be shown that to levy such a contribution would result in undue hardship to the person or his/her dependants; under subsection (2)(b), making provision about determining contributions where a person is in receipt of criminal legal assistance for two or more distinct proceedings; under subsection (2)(c) specifying whether the Board or the solicitor determines or collects a contribution; under subsection (2)(d) specifying how contributions are to be transferred or accounted for where the contribution is in respect of proceedings which, whilst still live, change procedure; and under subsection (2)(e) making provisions about payment of contributions by instalments.

90. In terms of subsection (3), any regulations made under subsection (1) can make different provision for different cases or classes of case. “The solicitor” as referred to in section 33ZA is defined in subsection (4) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

Section 23 – Consequential modifications

91. Section 23 makes consequential modifications to the 1986 Act as a result of the amendments and insertions made in sections 17 to 21 of the Bill. Subsection (2) amends section 4 of the 1986 Act to allow contributions paid to the Board in respect of criminal legal assistance to be paid into the legal aid fund.

92. Subsection (5) amends section 9(2)(de) to provide that section 11A shall not apply as respects ABWOR received in relation to such proceedings as Scottish Ministers may prescribe under section 9(1).

93. Subsection (6) amends section 11 of the 1986 Act to reflect changes made both by previous legislation to the legal status of solicitors employed by the Board under sections 26, 27 and 28A of the 1986 Act, and by Part 2 of this Bill.

94. Subsection (9) amends section 36(2)(b) of the 1986 Act to provide that regulations can be made to substitute different amounts for the amounts referred to in all the sections concerning criminal legal assistance (as currently provided for in the 1986 Act and as inserted by the Bill). The amendments also allow regulations to prescribe different amounts for different cases or classes of case in respect of all the current and inserted provisions.

95. Subsection (10) amends section 37(2) of the 1986 Act to provide that any regulations made under section 33ZA(1) will be subject to the affirmative resolution of the Parliament.

Part 3 – General

Section 24 – Ancillary provisions

96. This section provides ancillary order making powers for Scottish Ministers. Exercise of the powers will be subject to negative procedure, unless an order adds to, replaces or omits any part of the text of an Act in which case the order would be subject to affirmative procedure.
FINANCIAL MEMORANDUM

INTRODUCTION

99. This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill introduced in the Scottish Parliament on 2 May 2012.

PART 1 OF THE BILL - SCOTTISH CIVIL JUSTICE COUNCIL

Background

100. The costs of the Scottish Civil Justice Council (“the Council”) will fall upon the Scottish Court Service.

101. The creation of a Scottish Civil Justice Council was suggested by Lord Gill’s Scottish Civil Courts Review. It will replace the Sheriff Court Rules Council and the Court of Session Rules Council as the body responsible for drafting civil rules of court. It will therefore be critical in implementing the review’s recommendations when the Scottish Government introduces legislation for civil courts reform in the later stages of this Parliament. This body will also have a broader remit, following the completion of the civil courts rules projects.

102. The current operational costs of the Court of Session Rules Council and Sheriff Court Rules Council amount to around £226k per year.

103. The net additional cost of the new Council is therefore projected at around £87k - £149k per year, as outlined in table 1. That figure is based on the current operational costs of the existing civil rules councils, plus the estimated costs of carrying out additional policy functions. The estimated total cost of the body is around £313k - £375k per year. Table 1 reflects the projected direct costs of the Bill provisions. Paragraphs 108 to 124 provide further detail as to how these costs have been calculated.

---

These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 1: Net yearly costs of the Scottish Civil Justice Council*

<table>
<thead>
<tr>
<th></th>
<th>Cost per year (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>min</td>
</tr>
<tr>
<td>Staff</td>
<td>274,000</td>
</tr>
<tr>
<td>Other costs (inc. Members’ expenses, IT, admin. costs etc.)</td>
<td>39,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>313,000</strong></td>
</tr>
<tr>
<td>Current costs of existing Councils</td>
<td>226,000</td>
</tr>
<tr>
<td><strong>NET TOTAL</strong></td>
<td><strong>87,000</strong></td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand

104. The Scottish Government’s planned programme of reform of the civil courts is expected to give rise to additional costs for the Scottish Court Service including in relation to the operational costs of the Council. The potential costs of the Council in relation to implementation of civil courts reform are provided, for illustrative purposes only, at paragraphs 125 to 144 below.

105. The estimated costs are based on assumptions about how the Council secretariat and legal drafting team might be structured, which have been made in consultation with the Scottish Court Service as the body responsible for providing secretariat support for the Council. These assumptions take account of the costs of the existing civil rules councils in Scotland as well as the costs of similar bodies, such as the Civil Justice Council and Civil Procedure Rules Committee, which perform a similar role in relation to England and Wales.

Court of Session Rules Council and Sheriff Court Rules Council

106. The total staffing costs of the Court of Session Rules Council and Sheriff Court Rules Council amount to c.£211k per year. These are the costs for staff at the following grades: 0.6 FTE HEO (£22k), 1 FTE SEO (£47k), 1.6 FTE C1 solicitor (£102k) and 0.5 FTE (£40k) C2 solicitor.

107. There may be some savings arising from the replacement of the Court of Session and the Sheriff Court Rules Councils with a single body. Estimates have not been included in these projections as any are expected to be comparatively small.
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 2: Current costs of the Court of Session and the Sheriff Court Rules Councils*

<table>
<thead>
<tr>
<th></th>
<th>Cost per year</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Staff</strong></td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>0.5</td>
</tr>
<tr>
<td>C1</td>
<td>1.6</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
</tr>
<tr>
<td>HEO</td>
<td>0.6</td>
</tr>
<tr>
<td><strong>Publishing</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Members’ expenses</strong></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand

Similar bodies in England and Wales

108. By way of comparison, the current Civil Procedure Rules Committee in England and Wales is made up of one FTE policy official and between 0.6 and 2 lawyers, depending on priorities. At the upper end, the equivalent staffing costs in Scotland might be in the region of £130k annually. It should be noted that the figures provided are only in respect of staffing costs.

109. The budget of the Civil Justice Council in England and Wales for 2008-09 was £316k, of which £211k was salary costs and £105k was operational running costs.

110. The Civil Justice Council in England and Wales performs its functions through a network of committees and oversight groups comprising almost 100 volunteers who receive travel expenses, but are not remunerated. Similarly, the chair and members of the Civil Procedure Rules Committee are not remunerated, but are paid travel expenses for attending meetings and committee meetings.

Scottish Civil Justice Council costs

111. It is anticipated that there might be costs for the new Council in the following areas: appointments; staff, remuneration and expenses; judicial time; consultation; publishing; administration; staff training; accommodation and IT.

Appointments

112. Some set up costs will be incurred in appointment of members. These have been estimated at around £10k in 2013-14 (year one) and £5k in 2014-15 (year two). Thereafter the costs of appointments are expected to be in the region of £1k per year. This could vary depending, for instance, on whether vacancies are advertised separately or all at once, and the procedure under which the Lord President determines appointments should be made. The estimated costs allow for there being two initial rounds of appointments – the first when the Council is established, and the second once it has determined its workplan for implementation of
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

the rules revisions. Costs would then be expected to decrease as it is envisaged appointments would be made to fill vacancies as they arose.

Staff

113. It is expected the Council could be staffed by 0.5 FTE C2 lawyer, 2 FTE C1 lawyers, 1 FTE SEO, 1-2 FTE HEO and 1 FTE AO. Making salary assumptions based on the Scottish Government’s current pay and grading structure, it is estimated that total staffing costs for those staff would amount to between £274k and £311k per year.

Remuneration and expenses

114. Under the provisions of this Bill, the Scottish Court Service would be able, but not obliged, to pay such remuneration as it thinks fit to certain categories of member (up to a maximum of 12, if the Council has a full complement of members and all 12 are eligible for remuneration). However, this document proceeds on the assumption that the Council will be able to recruit volunteers on the same basis as England and Wales and remuneration is therefore not included in the projected costs.

115. Were the Scottish Court Service to remunerate any members, the maximum potential cost could be up to £72k per year, depending on the level of the Council’s activity. That is based on 12 eligible members each attending one Council meeting and one committee meeting per month (the maximum number of meetings which might be expected during the Council’s busiest period) at a daily rate of £250. The figure of £250 is considered a reasonable assumption for the purposes of estimation in light of rates paid by other bodies: members of the Scottish Legal Complaints Commission are remunerated at £212 per day, and members of the Judicial Appointments Board for Scotland at £290 per day. (Again, however, it is envisaged that members and those serving on committees would be unpaid and these costs are, therefore, not included in the estimated financial implications.)

116. It is estimated that members’ expenses could be between £5k and £10k per year. The current expenses for the Sheriff Court and Court of Session Rules Councils are c. £5k per year. It is reasonable to expect an increase in expenses arising from the additional policy role for the new Council, which may appoint additional members or set up working groups to assist it in carrying out this function.

Judicial time

117. It is anticipated that the Council will sit on a Monday, which is a non-sitting day for the Court of Session. However, as the sheriff courts sit on this day, there may potentially be some indirect costs arising from the need to cover shrieval duties. The level of these costs would depend on the numbers of sheriffs appointed to the Council and how frequently the Council met. It is anticipated that any costs incurred would be as a result of the civil courts reform project work (which will likely necessitate more frequent meetings and therefore potentially, additional cover for shrieval duties) rather than the general work of the Council.

118. There are currently five shrieval members of the Sheriff Court Rules Council, which meets four times per year, amounting to around 20 sitting days. In addition, there are six positions, held by sheriffs or sheriffs principal, on four working groups concerned with civil
court procedures. Those working groups meet on average every quarter, amounting to around 24 sitting days. These costs are currently absorbed within the Sheriff Court Rules Council budget. Assuming there are two shrieval members of the Council (a minimum of one is required), on the basis that each would attend one Council meeting and one committee meeting per month, that amounts to around 48 total sitting days which might require to be covered during the Council’s busiest period of activity. It is considered that this could be managed by arranging committee meetings around court time.

119. For illustrative purposes only, it is estimated that a third shrieval appointment to the Council could result in additional indirect costs in terms of judicial time of up to £14k per year. That is based on the daily rate of £583 for a part-time sheriff for 24 sitting days (one Council and one committee meeting per month) per year. However, decisions about the judicial membership and composition of the Council may include consideration of these costs (in the context of the overall Scottish Court Service budget) and as such, are not included in the projected operational costs as outlined in this paper.

**Consultation costs**

120. The existing Rules Councils currently carry out consultations on rules changes internally and with relevant external bodies. It is anticipated that the frequency and extent of these consultations may increase given the remit of the new Council. It is, therefore, estimated that the Council might require up to £10k annually to fund these consultations.

**Administrative and training costs**

121. In light of the new remit, it is also anticipated that there might be some additional administration costs for staff training. These have been estimated at around 10k and £3k respectively.

**Accommodation**

122. The estimated costs of the new Council assume some accommodation costs of up to around £10k per year (for example to hold Council meetings in alternative premises on occasion).

**IT**

123. The cost of additional IT equipment required is expected to be c. £10k per year, regardless of the Council’s activity.

**Possible budget**

124. Table 3 provides an outline of what the Council’s budget might look like in its steady position of rule drafting and keeping the civil justice system under review (i.e. following the completion of the rules revisions).
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 3: Scottish Civil Justice Council possible yearly budget*

<table>
<thead>
<tr>
<th>Staff</th>
<th>FTE</th>
<th>min</th>
<th>FTE</th>
<th>max</th>
</tr>
</thead>
<tbody>
<tr>
<td>C2</td>
<td>0.5</td>
<td>40,000</td>
<td>0.5</td>
<td>40,000</td>
</tr>
<tr>
<td>C1</td>
<td>2</td>
<td>127,000</td>
<td>2</td>
<td>127,000</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
<td>47,000</td>
</tr>
<tr>
<td>HEO</td>
<td>1</td>
<td>37,000</td>
<td>2</td>
<td>74,000</td>
</tr>
<tr>
<td>AO</td>
<td>1</td>
<td>23,000</td>
<td>1</td>
<td>23,000</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td></td>
<td><strong>274,000</strong></td>
<td></td>
<td><strong>311,000</strong></td>
</tr>
<tr>
<td>Training</td>
<td></td>
<td>3,000</td>
<td></td>
<td>3,000</td>
</tr>
<tr>
<td>Consultation</td>
<td></td>
<td>0</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Appointment of members</td>
<td>1,000</td>
<td></td>
<td>1,000</td>
<td></td>
</tr>
<tr>
<td>Members’ expenses</td>
<td></td>
<td>5,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>IT</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Accommodation</td>
<td></td>
<td>0</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Admin. costs</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>313,000</strong></td>
<td></td>
<td><strong>375,000</strong></td>
</tr>
<tr>
<td>Costs of existing Councils (see Table 2)</td>
<td></td>
<td>226,000</td>
<td></td>
<td>226,000</td>
</tr>
<tr>
<td><strong>NET TOTAL</strong></td>
<td></td>
<td><strong>87,000</strong></td>
<td></td>
<td><strong>149,000</strong></td>
</tr>
</tbody>
</table>

*All costs have been rounded to the nearest thousand

Civil courts reform

125. The following information (paragraphs 126 to 144) is provided to illustrate what the possible costs might be for the Council to implement civil courts reform. These are only potential costs and are not associated with this Bill – such costs would only arise if future legislative proposals required action by the Council.

126. The Scottish Government’s planned programme of reform of the civil courts is expected to give rise to additional costs for the Scottish Court Service, including in relation to the operational costs of the Council (which would be responsible for the rules revisions associated with the reforms). Currently, it is anticipated the first phase of a rules revision project could take between two and three years. Costs would then be expected to decrease until the completion of the rules revision project, which may take a further two to three years.
127. The new Council will significantly assist in modernising the Scottish civil justice system, in particular civil procedure. Modern civil procedures will make Scotland a more attractive place to do business, and improve the efficiency, effectiveness, fairness and accessibility of the civil justice system. The costs of establishing the body should, therefore, be considered in the context of the role it will have in the wider programme of civil courts reform. The Scottish Government will undertake detailed assessments of the financial implications of that programme of work before introducing proposals for legislation.

128. The work of the Council is anticipated to be two-fold in its initial years: to undertake and complete the “core” civil procedure rules project and to ensure all necessary instruments are made to allow the courts to continue to function. Following the establishment of the Council, and the abolition of the existing Rules Councils, the current budget for the latter will be subsumed into the overall budget for the new body.

129. It is not possible to estimate the costs the new Council will incur in taking forward the rules changes for civil courts reform before legislation in that regard is passed by the Scottish Parliament. However, taking into account the costs of the current civil rules councils and the costs attached to similar rules reforms in England and Wales, initial projections suggest that net costs might be as set out in tables 4, 5 and 6 below.

130. Although the new Council will focus primarily on the rules revisions associated with civil courts reform, it will continue the care and maintenance work of the existing Councils in ensuring the rules are amended in line with legislative requirements. Not all of the costs of the existing civil rules councils have therefore been offset against the costs of the rules revision project. Details of those costs are provided at tables 4, 5 and 6.

131. The costs are expected to decrease as the Council changes its focus to keeping under review the civil justice system, and the practice and procedure followed in civil proceedings. Those costs are set out at Table 1 above.

**Scottish Civil Justice Council costs for civil courts reform implementation**

132. The following sets out potential operational and staffing costs of the new Council for implementation of civil courts reform.

133. The most significant costs are expected to be for the additional staff required. However, there would also be additional costs associated with, in particular, consulting on draft rules and in relation to members’ expenses.

134. The figures provided are only estimates; there are number of variables and matters that are yet to be determined which may affect the figures provided. The most significant of these is the scope, timing and implementation of civil courts reform and the speed at which this is taken forward. Budgetary pressures will need to be taken into account when making decisions in that regard. The Scottish Ministers intend to consult on legislative proposals towards the end of 2012 and it is, therefore, anticipated that in its first year the Council will undertake a full scoping exercise in relation to the first phase of the rules revision project.
Staff

135. The staffing complement in the Council’s early years would be higher than in its steady position of rule-drafting and keeping the civil justice system under review. This will ultimately depend on the speed and extent to which civil courts reform is implemented. For the duration of that programme of work it is estimated that the Council secretariat would require between seven and eleven staff depending on its work programme. The highest staffing costs are expected to be around £414k - £572k for year 2 and also for year 3. Further details are provided in tables 4, 5 and 6 below.

136. By way of comparison, the project team which took forward the civil procedure “core” rules project in England and Wales consisted of a lead senior lawyer, four drafting lawyers and four policy support officers. The team took approximately two years to complete this project, following the enactment of legislation. A separate project team operated in respect of the Family Procedure Rules (2.5 FTE posts), which took two years and six months to complete that project.

Remuneration and expenses

137. As it is anticipated that the Council will be able to recruit volunteers on the same basis as the Civil Justice Council and the Civil Procedure Rules Committee in England and Wales. Remuneration is, therefore, not included in the projected costs.

138. During implementation of civil courts reform, Council members’ and committee members’ expenses could be up to £46k for the duration of the project. This figure is based on the five to six year projection of the rules project, with Council meetings taking place every 6six to 8weeks during the first year and monthly from year two with working groups meeting in addition to this.

Consultation

139. In undertaking the rules revisions required to implement civil courts reform there will be significant costs attached to consulting on proposals for draft rules of court. That is estimated at between £15k - £50k in both year two and year three, reducing to £15k in each of years four, five and six. The year two and three provision would allow for extensive consultation and stakeholder engagement.

Accommodation

140. In the new Council’s first few years, when the secretariat would be largest, it may be necessary to identify premises outwith the Scottish Court Service estate. The Scottish Government will explore the possibility of providing premises free of charge to accommodate the additional staff. It is estimated that accommodation costs could otherwise be in the region of £25k per year.

Administrative costs

141. The Rules Councils currently spend £10k annually in Scottish statutory instrument registration costs. The same provision might require to be made for registration of the rules to implement civil courts reform, if a high volume of instruments were required. There are likely to
be printing and publication costs although it is difficult to estimate the level of funding required at this stage.

142. Tables 4, 5 and 6 provide an outline of what the Council’s budget might look like for implementation of civil courts reform. It should be noted that this represents what is expected to be the highest estimate for the Council costs for the rules revision project. The Scottish Court Service will develop a range of options for delivery of courts reform in preparation for that programme of work.

143. Tables 7, 8 and 9 provide a breakdown as to how much of the current costs of the existing civil Rules Councils might be apportioned to the new Council during civil courts reform implementation (the remaining proportion of the current financial provision being required to take forward any rules changes not associated with civil courts reform – for example, to effect UK legislation).

144. The figures included in the following tables are for illustrative purposes only and are not intended to presuppose the actual budget which will be determined by the Scottish Court Service which will be dependent on plans for implementation.
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 4: Possible budget for implementation of civil courts reform Y1 and Y2*

<table>
<thead>
<tr>
<th></th>
<th>Y1** (2013/14)</th>
<th></th>
<th>Y2 (2014/15)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>min</td>
<td>max</td>
<td>FTE</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>1</td>
<td>79,000</td>
<td>1</td>
</tr>
<tr>
<td>C1</td>
<td>1.6</td>
<td>102,000</td>
<td>1.6</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
</tr>
<tr>
<td>HEO</td>
<td>1</td>
<td>37,000</td>
<td>1</td>
</tr>
<tr>
<td>AO</td>
<td>1</td>
<td>23,000</td>
<td>1</td>
</tr>
<tr>
<td>Subtotal</td>
<td>288,000</td>
<td>288,000</td>
<td>414,000</td>
</tr>
<tr>
<td>Training</td>
<td>3,000</td>
<td>10,000</td>
<td>3,000</td>
</tr>
<tr>
<td>Consultation</td>
<td>5,000</td>
<td>5,000</td>
<td>15,000</td>
</tr>
<tr>
<td>Publishing</td>
<td>2,000</td>
<td>2,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Appointment of members</td>
<td>10,000</td>
<td>10,000</td>
<td>5,000</td>
</tr>
<tr>
<td>Members’ expenses</td>
<td>8,000</td>
<td>8,000</td>
<td>10,000</td>
</tr>
<tr>
<td>IT</td>
<td>10,000</td>
<td>10,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Accommodation</td>
<td>0</td>
<td>25,000</td>
<td>0</td>
</tr>
<tr>
<td>Admin. costs</td>
<td>10,000</td>
<td>10,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Subtotal of non-staff costs</td>
<td>48,000</td>
<td>80,000</td>
<td>63,000</td>
</tr>
<tr>
<td>TOTAL</td>
<td>336,000</td>
<td>368,000</td>
<td>477,000</td>
</tr>
<tr>
<td>Costs of existing Councils (see also Table 7)</td>
<td>226,000</td>
<td>226,000</td>
<td>146,000</td>
</tr>
<tr>
<td>NET TOTAL</td>
<td>110,000</td>
<td>142,000</td>
<td>331,000</td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand

**Y1 reflects the potential full costs of the Council, i.e. it includes the current work of the existing civil Rules Councils on rule maintenance as well as civil courts reform implementation.
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 5: Possible budget for implementation of civil courts reform Y3 and Y4*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>min</td>
<td>max</td>
<td>min</td>
<td>max</td>
</tr>
<tr>
<td>Staff</td>
<td>FTE</td>
<td>£</td>
<td>FTE</td>
<td>£</td>
</tr>
<tr>
<td>C2</td>
<td>1</td>
<td>79,000</td>
<td>1.25</td>
<td>99,000</td>
</tr>
<tr>
<td>C1</td>
<td>3</td>
<td>191,000</td>
<td>4</td>
<td>255,000</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
<td>47,000</td>
</tr>
<tr>
<td>HEO</td>
<td>2</td>
<td>74,000</td>
<td>4</td>
<td>148,000</td>
</tr>
<tr>
<td>AO</td>
<td>1</td>
<td>23,000</td>
<td>1</td>
<td>23,000</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td></td>
<td>414,000</td>
<td>572,000</td>
<td></td>
</tr>
<tr>
<td>Training</td>
<td></td>
<td>3,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>Consultation</td>
<td></td>
<td>15,000</td>
<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>10,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>Appointment of members</td>
<td>1,000</td>
<td>1,000</td>
<td>1,000</td>
<td>1,000</td>
</tr>
<tr>
<td>Members’ expenses</td>
<td></td>
<td>10,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>IT</td>
<td></td>
<td>10,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>Accommodation</td>
<td></td>
<td>0</td>
<td>25,000</td>
<td></td>
</tr>
<tr>
<td>Admin. costs</td>
<td></td>
<td>10,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal of non-staff costs</strong></td>
<td>59,000</td>
<td>126,000</td>
<td>55,000</td>
<td>80,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td>473,000</td>
<td>698,000</td>
<td></td>
</tr>
<tr>
<td>Costs of existing Councils (see also Table 8)</td>
<td>141,000</td>
<td>141,000</td>
<td>141,000</td>
<td>141,000</td>
</tr>
<tr>
<td><strong>NET TOTAL</strong></td>
<td></td>
<td>332,000</td>
<td>557,000</td>
<td></td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 6: Possible budget for implementation of civil courts reform Y5 and Y6*

<table>
<thead>
<tr>
<th></th>
<th>Y5 2017/18</th>
<th></th>
<th>Y6 2018/19</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>min</td>
<td>FTE</td>
<td>£</td>
<td>max</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>1</td>
<td>79,000</td>
<td>1.25</td>
<td>99,000</td>
</tr>
<tr>
<td>C1</td>
<td>2</td>
<td>127,000</td>
<td>3</td>
<td>191,000</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
<td>47,000</td>
</tr>
<tr>
<td>HEO</td>
<td>2</td>
<td>74,000</td>
<td>3</td>
<td>111,000</td>
</tr>
<tr>
<td>AO</td>
<td>1</td>
<td>23,000</td>
<td>1</td>
<td>23,000</td>
</tr>
<tr>
<td>Subtotal</td>
<td></td>
<td>350,000</td>
<td></td>
<td>471,000</td>
</tr>
<tr>
<td>Training</td>
<td></td>
<td>3,000</td>
<td></td>
<td>3,000</td>
</tr>
<tr>
<td>Consultation</td>
<td></td>
<td>15,000</td>
<td></td>
<td>15,000</td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Appointment</td>
<td></td>
<td>1,000</td>
<td></td>
<td>1,000</td>
</tr>
<tr>
<td>of members</td>
<td></td>
<td>6,000</td>
<td></td>
<td>6,000</td>
</tr>
<tr>
<td>Members’</td>
<td></td>
<td>1,000</td>
<td></td>
<td>1,000</td>
</tr>
<tr>
<td>expenses</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>IT</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Accommodation</td>
<td></td>
<td>0</td>
<td></td>
<td>25,000</td>
</tr>
<tr>
<td>Admin. costs</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Subtotal of</td>
<td></td>
<td>55,000</td>
<td></td>
<td>80,000</td>
</tr>
<tr>
<td>non-staff</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>405,000</td>
<td></td>
<td>551,000</td>
</tr>
<tr>
<td>Costs of</td>
<td></td>
<td>141,000</td>
<td></td>
<td>141,000</td>
</tr>
<tr>
<td>existing</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Councils(see</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>also Table 9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NET TOTAL</td>
<td></td>
<td>264,000</td>
<td></td>
<td>410,000</td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 7: Costs of the Court of Session and Sheriff Court Rules Councils apportioned to the Scottish Civil Justice Council for implementation of civil courts reform – Y1 and Y2*

<table>
<thead>
<tr>
<th></th>
<th>Y1 (2013/14)</th>
<th></th>
<th>Y2 (2014/15)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTE</td>
<td>£</td>
<td>FTE</td>
<td>£</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>0.5</td>
<td>40,000</td>
<td>0.25</td>
<td>20,000</td>
</tr>
<tr>
<td>C1</td>
<td>1.6</td>
<td>102,000</td>
<td>1</td>
<td>64,000</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
<td>47,000</td>
</tr>
<tr>
<td>HEO</td>
<td>0.6</td>
<td>22,000</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>10,000</td>
<td></td>
<td>10,000</td>
</tr>
<tr>
<td>Members’ expenses</td>
<td>5,000</td>
<td></td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>226,000</td>
<td></td>
<td>146,000</td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand

Table 8: Costs of the Court of Session and Sheriff Court Rules Councils apportioned to the Scottish Civil Justice Council for implementation of civil courts reform*

<table>
<thead>
<tr>
<th></th>
<th>Y3 (20115/16)</th>
<th></th>
<th>Y4 (2016/17)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTE</td>
<td>£</td>
<td>FTE</td>
<td>£</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>0.25</td>
<td>20,000</td>
<td>0.25</td>
<td>20,000</td>
</tr>
<tr>
<td>C1</td>
<td>1</td>
<td>64,000</td>
<td>1</td>
<td>64,000</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
<td>47,000</td>
</tr>
<tr>
<td>HEO</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>5,000</td>
<td></td>
<td>5,000</td>
</tr>
<tr>
<td>Members’ expenses</td>
<td>5,000</td>
<td></td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>141,000</td>
<td></td>
<td>141,000</td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand
Table 9: Costs of the Court of Session and Sheriff Court Rules Councils apportioned to the Scottish Civil Justice Council for implementation of civil courts reform*

<table>
<thead>
<tr>
<th></th>
<th>Y5 (2017/18)</th>
<th></th>
<th>Y6 (2018/19)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTE</td>
<td>£</td>
<td>FTE</td>
</tr>
<tr>
<td>C2</td>
<td>0.25</td>
<td>20,000</td>
<td>0.5</td>
</tr>
<tr>
<td>C1</td>
<td>1</td>
<td>64,000</td>
<td>1</td>
</tr>
<tr>
<td>SEO</td>
<td>1</td>
<td>47,000</td>
<td>1</td>
</tr>
<tr>
<td>HEO</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Publishing</td>
<td></td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>Members’ expenses</td>
<td></td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>141,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

* All costs have been rounded to the nearest thousand

Costs on the Scottish Administration

145. The additional costs of the Council, which are expected to be £87k - £149k per year, will be met by the Scottish Court Service. The total costs of civil courts reform for the Scottish Court Service, including for the Council, are expected to be significantly higher. Scottish Ministers intend to increase civil court fees later in 2012, covering the three year period up to 2014-15. Court fees may be increased by Scottish Statutory Instrument under the Courts of Law Fees (Scotland) Act 1895 – this Bill makes no provision in respect of court fees. The Scottish Government expects the overall increase in fees, if approved by the Parliament, to enable the Scottish Court Service to meet the additional costs associated with the Council as well as other aspects of civil courts reform over the three years.

Costs on local authorities

146. It is not anticipated that the provisions will impose any direct costs on local authorities.

Cost on other bodies, individuals and businesses

147. The operational costs of the Council will fall upon the Scottish Court Service as outlined above. There may be some indirect costs for individuals or organisations in terms of the time committed by persons who volunteer as members of the Council or any of its committees.

PART 2 OF THE BILL – CRIMINAL LEGAL ASSISTANCE

Background

148. The Bill introduces contributions into criminal legal aid and makes some changes to financial eligibility, thereby both ensuring broad parity between the different aid types and helping to maintain as much as possible existing levels of access to justice in economically challenging times. At present summary and solemn criminal legal aid is available to accused persons with no contributions towards the cost of the case being payable. Scotland is fairly
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

unusual in this regard. In 2010-11 there were 153,962 grants of criminal legal assistance. Total cost to the taxpayer in 2010-11 for criminal legal assistance was £104 million. Contributions are currently payable in civil legal aid cases and across civil and criminal advice and assistance including, within a fairly narrow range, in criminal cases funded by ABWOR (assistance by way of representation).4

149. The total cost of the legal aid fund in 2010-11 was £161.4m. As a result of the drop in Scotland’s overall budget following the UK Government’s Comprehensive Spending Review in 2011, the budget for legal aid will fall to £132.1m in 2014-15.

150. The Scottish Government has not approached this financial challenge by proposing major changes to the scope of legal aid. The Government’s view remains that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society. Instead, the Scottish Government paper “A Sustainable Future for Legal Aid”, published on 5 October 2011, set out the intention to maintain access to justice in the current economic climate, including by taking forward a series of legal aid reforms on top of reforms taken forward in 2010-11.5 The ambition as set out in the paper is to maintain a fair, high quality and equitable system which maintains public confidence at an affordable and sustainable level of expenditure. The introduction of contributions into criminal legal aid is a key part of these reforms.

Introducing contributions into criminal legal aid and changes to financial eligibility

151. The Board has estimated that introducing financial contributions into criminal legal aid could produce savings of up to a maximum of £3.9 million per annum, based on roughly the existing volume and profile of cases and applicants. This is split between the different aid types. Contributions in solemn criminal legal aid will be collected by the Board, with estimated savings of up to a maximum of £0.8 million. Contributions in summary criminal legal aid and in ABWOR will be collected by solicitors, with estimated savings of up to a maximum of £2.0 million and £1.1 million respectively. The figures arrived at are based on current grant rates across the aid types and these could fluctuate as a result of more or fewer cases going to court, collection rates in solemn criminal legal aid and some other factors. Based on current trends savings are likely to be lower than the maximum possible.

152. The Policy Memorandum to the Bill sets out the details of the way in which contributions are expected to be introduced, the changes to financial eligibility and the likely level of contributions. In order to put in place a single streamlined system for the collection of contributions in criminal legal assistance, the financial eligibility test for ABWOR in relation to criminal matters and the existing “undue hardship” test for criminal legal aid will be aligned. The Policy Memorandum also sets out details of how disposable income and capital and eligibility and contributions will be assessed. The Bill sets thresholds for disposable income and capital below which no contributions will be payable. In addition, those on passporting benefits

4 ABWOR is a form of advice and assistance and is advice and assistance given to someone by taking on their behalf any step in instituting, conducting or defending certain proceedings (and in criminal cases is most commonly used where a plea of guilty is made).

5 http://www.scotland.gov.uk/Publications/2011/10/04161029/1
will pay no contribution from income. The maximum contribution payable will be the whole cost of the case.

153. Table 10 below sets out in more detail the estimated level of savings from each aid type.

Table 10: Estimated level of savings (full year)

<table>
<thead>
<tr>
<th></th>
<th>Solemn</th>
<th>Summary</th>
<th>ABWOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saving from those deemed ineligible on disposable capital</td>
<td>£135,000</td>
<td>£25,000</td>
<td>£20,000</td>
</tr>
<tr>
<td>Saving contributions from disposable capital</td>
<td>£70,000</td>
<td>£45,000</td>
<td>£25,000</td>
</tr>
<tr>
<td>Saving from those deemed ineligible on disposable income</td>
<td>£50,000</td>
<td>£295,000</td>
<td>£30,000</td>
</tr>
<tr>
<td>Saving contributions from disposable income</td>
<td>£575,000</td>
<td>£1,650,000</td>
<td>£1,075,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£830,000</strong></td>
<td><strong>£2,015,000</strong></td>
<td><strong>£1,075,000</strong></td>
</tr>
</tbody>
</table>

154. Contributions for summary criminal legal aid and ABWOR cases will be collected by the solicitor. As such, any fees due from the legal aid fund are paid following deduction of the contribution. For example, in these cases if a client is found liable to pay a contribution of £100 then the Board would pay the solicitor the current fixed payment due for the type of case covered minus £100. The Board will collect the larger contributions in solemn and appeals cases, as they do currently in civil legal aid cases.

155. The Board has no way of separately modelling savings from introducing contributions in appeals cases so these are simply incorporated in the table above. The number of appeals cases is very much smaller than other aid types and it is likely that a fairly high proportion of those who were assessed with a contribution at first instance will have had a change in circumstance by the time their appeal comes around. It is not therefore thought likely that savings from introducing contributions into appeals cases are likely to be high.

156. Contributions are already collected across advice and assistance, including in ABWOR cases. But currently in these cases contributions are assessed over only one week’s income and are (more or less) based on taking 100% of the weekly disposable income above the lower income limit. The new system will apply lower and graduated marginal rates but to a longer assessment period (up to 20 weeks now for ABWOR cases in the Sheriff Court). This means that the contributions will be higher than currently for any given level of disposable income. The
modelling done by the Board took account of the existing levels of contributions so the figures given in table 10 above reflect the extra contributions that will be levied once the new system is introduced in ABWOR cases.

157. Table 11 below details the number of cases the Board analysed in order to calculate the estimated savings. The modelling was based on the 12 month period up to November 2011, in order to be as up to date as possible, and represent a slight falling off from the figures seen in the financial year 2010-11. This downwards trend is likely to continue, suggesting that the savings are likely to be lower than the maximum suggested by looking at this sample of cases. Table 11 also includes average contribution figures for income and capital.

Table 11: Breakdown of number of cases analysed, average contribution costs and savings derived:

<table>
<thead>
<tr>
<th></th>
<th>ABWOR</th>
<th>Summary</th>
<th>Solemn</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total number of cases analysed</strong></td>
<td>40,030</td>
<td>54,040</td>
<td>11,847</td>
</tr>
<tr>
<td>Number of cases “passported” with no contribution due</td>
<td>21,928</td>
<td>29,602</td>
<td>5,319</td>
</tr>
<tr>
<td>Number of non-passported cases where no contribution due</td>
<td>10,746</td>
<td>14,507</td>
<td>4,614</td>
</tr>
<tr>
<td>Number of cases ineligible on capital</td>
<td>46</td>
<td>39</td>
<td>27</td>
</tr>
<tr>
<td>Number of cases ineligible on income</td>
<td>165</td>
<td>449</td>
<td>24</td>
</tr>
<tr>
<td>Number of cases where a capital contribution will be due</td>
<td>134</td>
<td>208</td>
<td>82</td>
</tr>
<tr>
<td>Number of cases where an income contribution will be due</td>
<td>7,011</td>
<td>9,235</td>
<td>1,781</td>
</tr>
<tr>
<td>Average contribution payable from income</td>
<td>£143</td>
<td>£179</td>
<td>£323</td>
</tr>
<tr>
<td>Average contribution payable from capital</td>
<td>£187</td>
<td>£216</td>
<td>£854</td>
</tr>
</tbody>
</table>

158. In order to arrive at the figures outlined above, data from the Board’s applications system was used to estimate the impact of the changes in eligibility and contributions rules. For each case in the data, the declared benefit, income, dependent and expenditure details were compared
These documents relate to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

to the thresholds set out in the scheme. Where the resulting disposable income was below the £68 threshold, or the applicant was passported by virtue of receipts of qualifying benefits, they were excluded from the analysis as no contribution would be payable.

159. Where disposable income was above the lower threshold, a contribution was calculated according to the different assessment periods (weekly multipliers) and graduated rates as set out in the examples provided in the Policy Memorandum. Where disposable income would be over £222, the applicant was recorded as ineligible. Because the Board was applying a new test to current grant data, anyone found ineligible represents a change and therefore a saving. Where disposable income was under £222, but the assessed contribution would be more than twice the average cost of the relevant case type, the applicant was also recorded as ineligible.

160. Having identified the changes (those newly found ineligible and those newly found liable for a contribution), further calculations were undertaken to achieve the savings figures. For those found ineligible, the saving was calculated as the total average cost of the relevant case type. For those with a contribution, the initial saving was calculated as the amount of the contribution or the total average cost of the case if this was lower than the contribution.

161. The Board then made an adjustment to reflect the fact that the current data in its system does not always fully reflect ‘outgoings’. This is because, currently, the level of outgoings will often not have a material bearing on the applicant’s eligibility (because their income is low enough to qualify in any event) and so no (or few) outgoings are reported. Having analysed the existing data, i.e. where outgoings are reported, the Board assumed a certain level of underreporting. This resulted in a reduction in the savings estimate to 61% of that originally calculated for income contributions. This is a reasonable assumption but one that will have to be monitored carefully once the system is in place. If it turns out that the data is more complete than assumed, the savings will be higher as more applicants will have higher levels of disposable income than assumed.

162. The above tables set out the estimated number of fewer cases, broken down by aid type, as a result of an individual being ineligible through income and/or capital. There are two main reasons for this. Firstly, that under the new system of alignment of the eligibility test between all the aid types the resources of spouses and partners will be aggregated. At present this only happens in ABWOR cases. Aggregation will not happen when spouses or partners have a contrary interest in the case or where they are living separately. Secondly, in future in the new aligned eligibility test, non-passporting benefits will not be disregarded as income in calculating disposable income and capital (although in practice some may be cancelled out as allowable outgoings). At present, some non-passporting benefits are disregarded in both ABWOR and criminal legal aid – although not the same ones in each aid type.

163. The Board estimates that with the change to the ‘undue hardship’ test more people overall will be eligible for ABWOR than before. Analysis by the Board has suggested that about 6% of clients who were eligible for summary criminal legal aid would not have been eligible for ABWOR. These tend to be clients with partners who have reasonable incomes and reasonably high essential household outgoings which can be taken into account in the undue hardship test in summary criminal legal aid but not in the assessment for ABWOR. Some of these cases will not be eligible for either ABWOR or summary criminal legal aid but some will transfer over to
ABWOR. Of the cases that are shown to drop out of ABWOR in table 11 above many are in the Justice of the Peace Court, which has low average case costs, and drop out as a result of the fact that their contribution will be assessed at more than twice the case cost.

Costs on the Scottish Administration

164. It is not anticipated that the provisions will impose any costs on the Scottish Administration.

Costs on local authorities

165. It is not anticipated that the provisions will impose any costs on local authorities.

Costs on other bodies, individuals and businesses

Scottish Legal Aid Board

166. Table 12 below sets out the Board’s administrative budget for the next three years. In 2014-15 grant in aid has been set at £10.3m. Grant in aid relates to the Board’s running costs. Even though the Board now has more responsibilities, its running costs in 2009-10 were around £1m less in real terms than three years previously following a freeze in its grant in aid. In 2011-12 the Board’s running costs were further reduced by £1.1m in cash terms. The Board has been able to achieve these reductions through an ongoing review of its processes to find areas where expenditure could be reduced, and through its continued simplification of the legal aid system and expansion of its online systems, which provides a faster and more effective service to legal businesses and their clients.

<table>
<thead>
<tr>
<th>Grant in aid</th>
<th>2012-13</th>
<th>2013-14</th>
<th>2014-15</th>
</tr>
</thead>
<tbody>
<tr>
<td>£11.3m</td>
<td>£10.8m</td>
<td>£10.3m</td>
<td></td>
</tr>
</tbody>
</table>

167. As a result of the Bill, the Board estimates that four additional assessment officers will be required to assist in the assessment and collection of contributions. Table 13 below shows the associated staff costs to the Board, which will be met from within the Board’s existing grant in aid as a result of its ongoing reviews to reduce expenditure. As the Board processes all legal aid applications online there will be no requirement to print new forms, other than those produced internally for the purpose of facilitating the use of the online process. The Board frequently provides updates to the profession through mailshots and guidance, including when legislative changes are made to the legal aid system. A new leaflet for applicants will be produced but the cost of this is will be minimal. As such, we do not expect there to be any notable additional costs beyond the staff costs already identified.
Table 13: Staff costs

<table>
<thead>
<tr>
<th>Grade</th>
<th>Number of staff</th>
<th>Cost £</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Applications Assessment Officers</td>
<td>2</td>
<td>51,504</td>
</tr>
<tr>
<td>Treasury Department Assessment Officers</td>
<td>2</td>
<td>51,504</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4</strong></td>
<td><strong>103,008</strong></td>
</tr>
</tbody>
</table>

Costs on criminal legal aid firms

168. There are currently 1,432 individual solicitors on the criminal legal assistance register, linked to 587 firms. We do not anticipate significant additional costs to solicitors firms as a result of the provisions in this Bill. Most firms already have procedures in place to collect fees from private clients and from clients under the advice and assistance scheme. As the summary table below shows, while there may be some variable costs to criminal legal aid firms these are not expected to be significant as costly payment enforcement actions are unlikely to be pursued due to the low level of the majority of contributions.

Costs on the Crown Office and Procurator Fiscal Service

169. We do not anticipate that there will be any additional costs on the Crown Office and Procurator Fiscal Service.

Costs on the Scottish Court Service

170. We do not anticipate that there will be any additional costs on the Scottish Court Service.

SUMMARY

171. Table 14 below provides a summary of the known additional costs associated with the Bill. Costs of the Scottish Civil Justice Council will be incurred from the date of its establishment, currently anticipated to be around May 2013. Cost and savings in relation to Part 2 of the Bill are likely to be incurred/realised from April 2013 onwards.
Table 14: Summary of additional costs per year

<table>
<thead>
<tr>
<th>Part of the Bill</th>
<th>Costs to the Scottish Legal Aid Board</th>
<th>Costs to Scottish Government</th>
<th>Costs to local authorities</th>
<th>Costs to the Crown Office and Procurator Fiscal Service</th>
<th>Costs to the Scottish Court Service</th>
<th>Costs to criminal legal aid firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>£87,000 to £149,000 (recurring)</td>
<td>Nil</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>£15,000 (one off costs)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>£103,008</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>Variable (but not expected to be high)</td>
</tr>
</tbody>
</table>

172. Table 15 below provides a summary of the estimated maximum savings associated with the criminal legal assistance parts of the Bill.

Table 15: Summary of estimated savings from changes to criminal legal assistance

<table>
<thead>
<tr>
<th>Year</th>
<th>Solemn</th>
<th>Summary</th>
<th>ABWOR</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-13</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>2013-14</td>
<td>£0.38m</td>
<td>£1.159m</td>
<td>£0.683m</td>
<td>£2.222m</td>
</tr>
<tr>
<td>2014-15</td>
<td>£0.83m</td>
<td>£1.958m</td>
<td>£1.031</td>
<td>£3.819m</td>
</tr>
<tr>
<td>2015-16</td>
<td>£0.83m</td>
<td>£2.008m</td>
<td>£1.068</td>
<td>£3.906m</td>
</tr>
<tr>
<td>Full savings year</td>
<td>£0.83m</td>
<td>£2.015m</td>
<td>£1.075m</td>
<td>£3.920m</td>
</tr>
</tbody>
</table>
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

173. On 2 May 2012, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Scottish Civil Justice Council and Criminal Legal Assistance Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

174. On 1 May 2012, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Scottish Civil Justice Council and Criminal Legal Assistance Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Scottish Civil Justice and Criminal Legal Assistance Bill introduced in the Scottish Parliament on 2 May 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 13–EN.

OVERVIEW OF THE BILL

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as Scottish Government priorities:

   • The establishment of a Scottish Civil Justice Council to replace the Court of Session Rules Council and Sheriff Court Rules Council. The new Council will also have a wider policy role to advise and make recommendations on improving the civil justice system in Scotland.

   • Introducing financial contributions in criminal legal aid to ensure those who are able to pay towards the cost of their defence do so and making changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

BACKGROUND- PART 1 OF THE BILL – SCOTTISH CIVIL JUSTICE COUNCIL

Overview

3. The *Scottish Civil Courts Review*¹ (“the Review”), chaired by Lord Gill, reported in 2009 and made a total of 206 recommendations for reform of the civil court system. The Scottish Government has accepted the majority of these in principle.²

4. A combination of legislative and administrative measures is needed to implement the Review’s recommendations in full. To assist delivery, implementation is being taken forward in

---


phases under the Scottish Government’s *Making Justice Work* programme,³ representing the largest programme of Scottish civil courts reform in a century.

5. Many of the Review’s recommendations will need new rules of court. To prepare those, the Review recommended a new, single body should be established with oversight of the entire civil justice system.

6. The Scottish Government agrees. This Bill will therefore establish a new body, the Scottish Civil Justice Council, which will replace the Court of Session⁴ and Sheriff Court⁵ Rules Councils. In line with the Scottish Government’s phased approach under *Making Justice Work*, the Bill will establish the Scottish Civil Justice Council before later court reform legislation is introduced – in order that the Council can be up and running and able to consider, then help to implement, that later legislation as soon as possible.

7. However, the Review envisaged the new Council should ultimately do more than draft rules of court to implement the Review’s recommendations. The Bill is intended to give effect to that vision: giving the Council a wider function of contributing to the ongoing improvement of the civil justice system, making it more adaptive and fostering a culture of continuous improvement. Therefore, once implementation of the Review’s court reform recommendations is complete, the intention is that the Council will take on the new functions of keeping the civil justice system under review and advising and making recommendations for future change.

**POLICY OBJECTIVES – PART 1 OF THE BILL – SCOTTISH CIVIL JUSTICE COUNCIL**

8. The Scottish Civil Justice Council will replace and expand upon the functions of the Sheriff Court and Court of Session Rules Councils, under the direction and oversight of the Lord President and with secretariat support from the Scottish Court Service.

9. Their current functions may be summarised as follows:

- *Sheriff Court Rules Council* – under section 34 of the Sheriff Courts (Scotland) Act 1971, the Council has the function of reviewing the procedure and practice followed in civil proceedings in the sheriff court and of preparing draft rules to govern them. These draft rules are then submitted to the Court of Session to be made as an act of sederunt, subject to the Court's approval, and with such modifications, if any, that the Court considers appropriate. The Court of Session can also act without draft rules having been submitted, under section 32(3) of the 1971 Act, but in such a case, must consult with the Sheriff Court Rules Council and take into consideration any views expressed by it.

- *Court of Session Rules Council* – performs a similar function to the Sheriff Court Rules Council and, under section 8 of the Court of Session Act 1988, can formulate new rules of court, which are submitted to the Court of Session to be passed as an act of sederunt, subject to the Court's approval.

⁴ Originally established under section 18 of the Administration of Justice Act 1933 and continuing under section 8 of the Court of Session Act 1988.
⁵ Established under section 33 of the Sheriff Court (Scotland) Act 1971.
Functions of the Scottish Civil Justice Council

10. The new Council’s functions will be as follows:
   - to keep the civil justice system under review;
   - to review the practice and procedure followed in the Court of Session and in civil proceedings in the sheriff court;
   - to prepare draft civil procedure rules and submit them to the Court of Session;
   - to provide advice and make recommendations to the Lord President on the development of and changes to the civil justice system; and
   - to provide advice on any matter relating to the civil justice system as the Lord President may request.

11. In carrying out these functions the Council must have regard to any guidance issued by the Lord President and to the following principles (which have been developed with the principles which the Review considered fundamental to the civil justice system\(^6\) in mind):
   - the civil justice system should be fair, accessible and efficient;
   - rules relating to practice and procedure should be as clear and easy to understand as possible;
   - practice and procedure in the civil courts should be as similar as possible, where appropriate; and
   - alternative methods of dispute resolution should be promoted.

12. The Council will be able to take such action as it considers necessary or desirable to pursue its functions. This includes being able to:
   - have regard to proposals for reform which may affect the civil justice system;
   - prepare draft civil procedure rules, before the law changes, to allow the Court of Session to make rules on the changes proposed to the civil justice system (the Court will only make the rules once the law changes, however);
   - consult such persons as it considers appropriate; and
   - co-operate with, and seek the assistance and advice of, such persons or bodies as it considers appropriate.

Status

13. The Lord President, as head of the Scottish judiciary and Chair of the Scottish Court Service, already has various statutory responsibilities in relation to the efficient disposal of business in the Scottish courts.\(^7\) The responsibility in terms of governance, accountability, appointments and direction of the Council, will largely rest with the Lord President rather than Ministers. The Council (which will be a statutory advisory body) will not therefore fall to be classified as a non-departmental public body (NDPB).

---

\(^6\) Ch. 1, para. 5, Report and Recommendations of the Scottish Civil Courts Review (2009), Ibid.

\(^7\) Section 2 Judiciary and Courts (Scotland) Act 2008.
**Membership**

14. Membership of the Council will include at a minimum:

- The Lord President;
- the Chief Executive of the Scottish Court Service;
- the Chief Executive of the Scottish Legal Aid Board (“the Board”);
- a person appointed by the Scottish Ministers;
- four members of the judiciary;
- two advocates;
- two solicitors; and
- two consumer representative members.

15. The Scottish Government believes it is necessary to keep the Council membership to a workable limit and that there should be flexibility in the membership in order that it may reflect the Council’s changing priorities. That flexibility is achieved by allowing the Lord President up to six further discretionary appointments.

16. It is anticipated that others will contribute to the Council’s work through its committees, which the Scottish Government would expect to reflect the full range of interests across Scotland’s civil justice system.

17. In order to ensure that the most suitable individuals are appointed to the Council, the Lord President is to set up an appointments process for the non-judicial members that the Lord President appoints.

18. The Lord President currently chairs the Court of Session Rules Council and may chair the new Council or designate a judge of the Court of Session as chair. The Lord Justice Clerk, whether or not a member, may deputise for the Lord President at Council meetings, including chairing duties. It is expected that, especially during the period of civil courts reform, chairing duties will be particularly onerous and that delegation may therefore be necessary.

19. The Scottish Court Service will be able to pay such expenses as it thinks fit to members of the Council or persons serving on committees. However, it is envisaged that members and those serving on committees would normally be unpaid. It may nevertheless be appropriate in some circumstances to pay remuneration. However, members of the Civil Justice Council and the Civil Procedure Rules Committee in England and Wales are not remunerated and it is envisaged that volunteers would generally be recruited to the Scottish Council on the same basis.

**Reporting Arrangements**

20. The Council is to prepare an annual report and business programme and, as soon after 31 March as is reasonably practicable, lay copies before the Scottish Parliament. This is a standard requirement of transparency and accountability for many public bodies and it is considered that it would also provide a good opportunity for the Council to promote and publicise its work.
Alternative approaches considered

21. Arguably, the changes required to implement civil courts reform could be taken forward by the existing civil rules councils. However, the Review argued that they were not well placed to do this. To provide the necessary overview and to achieve harmonisation of the rules, Lord Gill recommended the establishment of a Civil Justice Council for Scotland, with a remit similar to that of the civil Justice Council in England and Wales alongside responsibility for drafting rules of court.8

22. The Scottish Government agrees that a new body is required to take all of this work forward.

23. Consideration was given to adopting in Scotland a model similar to that in England and Wales, with a policy body separate and distinct from the technical rule-making body. However, the Scottish Government considers, given the scale of the Scottish jurisdiction and the need for a co-ordinated package of major reforms, that a single body should be responsible both for the strategic overview and for taking forward the technical changes to achieve their strategic aims.

24. The Scottish Government considered whether some, or all, of the Council’s proposed functions should be conferred on a different body. The Scottish Government considered in particular conferring additional functions on the Scottish Law Commission (“the SLC”).9

25. The Scottish Government, however, favours conferring new functions on the Council only. Although the SLC’s functions include keeping “under review all the law with which they are respectively concerned with a view to its systematic development and reform”, the SLC is required to report to Ministers.10 The Scottish Government considers the more 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. It may be appropriate, however, for the Council and the SLC to work together on particular projects.

26. The Scottish Government also considered whether it would be appropriate to set up a non-statutory body. However, a formal statutory basis and remit will give the necessary authority and direction to drive forward civil court reform and other changes needed to the civil justice system.

Consultation

27. A public consultation on proposals for the new Council closed on 22 December. There was overwhelming support for the creation of a single body to create a more coherent rules structure and to implement civil courts reform, with respondents generally in favour of a Council with a rules function, a policy remit and a role to play in administrative justice and rule making functions for tribunals. However, opinion varied as to when the Council should take on the additional functions and to what extent. Almost all responses offered views on alternatives to

---

8 Recommendation 206, Report and Recommendations of the Scottish Civil Courts Review (2009), Ibid.
9 Established by section 2 of the Law Commissions Act 1965.
10 Under section 3 of the 1965 Act.
the membership proposed - mainly for better representation of the particular interest or the group for which the respondents speak.

28. Most respondents 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). The Lord President, pointing out that the focus in the early years will be on rules changes for civil courts reform, was of the view that the Council should have only a rules-based remit at first. Also, some respondents indicated that rule making for tribunals should come at a later stage.

29. Respondents generally supported transferring the functions of the Scottish Committee of the Administrative Justice and Tribunal Council. The Scottish Committee itself was supportive in principle, but expressed concerns that the proposed focus of the Council was weighted too heavily towards issues of the civil courts and of rule-making. The judiciary generally took the opposite view, having concerns about conferring this responsibility on a body which will initially concentrate on civil rules revision. It is therefore proposed that the Council should take over functions in this regard, once judicial leadership for tribunals is transferred to the Lord President.11

30. It is considered appropriate that, in addition to the originally proposed membership, a representative of the Scottish Legal Aid Board should sit on the Council. It is not considered necessary to extend the membership further, given that the Lord President will have a number of discretionary appointments. That will provide sufficient flexibility to ensure that the membership reflects an appropriate cross-section of interests in the civil justice system in light of the Council’s priorities at any given time, and will keep the number of members at a workable level.

BACKGROUND - PART 2 OF THE BILL – CONTRIBUTIONS FOR CRIMINAL LEGAL ASSISTANCE AND CHANGES TO FINANCIAL ELIGIBILITY

Overview

31. The Scottish Government set out its intention to legislate for the introduction of contributions in criminal legal aid in the paper A Sustainable Future for Legal Aid, which was published on 5 October 2011.12 The paper argued 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.

32. Contributions are already payable in Scotland in civil legal aid and across advice and assistance, including in a fairly narrow range in criminal cases involving legal assistance in the

11 Further information, including how to contribute to the Scottish Government’s Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland (which closes on 15 June 2012) are available at: http://www.scotland.gov.uk/Topics/Justice/legal/Civil/TribunalReform
12 http://www.scotland.gov.uk/Publications/2011/10/04161029/1
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

form of Assistance By Way of Representation (ABWOR). Where ABWOR is available the level of contribution is assessed and collected by the solicitor.

33. Introducing contributions 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.

The current cost of legal aid in Scotland

34. The total cost of the legal aid fund in Scotland in 2010-11, the last full year for which figures are currently available, was £161.4m. This is £10.9m more than in 2009-10. The rise in expenditure was due to a number of factors including the increases in value added tax, a larger numbers of cases paid in summary criminal legal aid and an increase in the gross cost of civil legal aid as a result of the 20% increase in applications received in the previous two years and a large rise in payments on account claimed by solicitors.

35. Total grants relating to summary criminal cases (including ABWOR and legal aid grants by the Board and the courts) fell by 9% in 2010-11 to 85,481. Grants by the Board of summary criminal legal aid fell by 9% to 50,603. ABWOR grants fell by 9% to 42,853. The decrease in grants is in the main due to fewer cases being brought through the courts. During 2010-11 there were 6% fewer summary complaints registered by the Scottish Court Service. Criminal advice and assistance fell by 1.1% to 27,545, representing a levelling off following the steep decline associated with the summary justice reforms. Grants of solemn legal aid (made by the courts and by the Board from November 2010) fell by 2.8% to 11,724. Grants for all types of criminal legal assistance fell by 8% to 153,962.

36. The total cost of criminal legal assistance increased by £5.9 million (6%) in 2010-11 to £104 million. Expenditure on criminal advice and assistance fell by £0.1 million (10%) to £1 million. The cost of ABWOR remained virtually the same as the previous year at £20.1 million. Summary criminal legal aid increased by £3.6 million (12%) to £35.3 million as a result of an increased volume of summary accounts processed. Solemn criminal legal aid costs increased by £1.7 million (4.4%) to £40.8 million, largely as a result of fee increases introduced by the Scottish Government. £2.1 million of the increase in expenditure was due to the UK’s increases in VAT.

Moving to a sustainable future for legal aid

37. The scale of the financial challenge facing the legal aid system in Scotland was set out in A Sustainable Future for Legal Aid. Reflecting the drop in Scotland’s overall budget as a result of the UK Government’s Comprehensive Spending Review in 2010, the outcome of the Scottish Government Spending Review 2011 will be extremely challenging for all areas of government expenditure. The budget for legal aid will fall to £132.1m in 2014-15. The financial challenge would have been much greater and the savings that need to be made now would have been much deeper and more difficult if the Government had not acted quickly in 2010 to make immediate reforms to legal aid.

ABWOR is a form of advice and assistance, involving taking on a person’s behalf any step in instituting, conducting or defending certain proceedings (and in criminal cases is most commonly used where a plea of guilty is made).
38. However, the challenge is clear. We need to arrive at a sustainable level of legal aid spending within the next two to three years. This is all the more difficult given the underlying increase in civil and criminal expenditure, driven by factors including the continued high demand for civil legal assistance resulting from the economic downturn. Further pressures are likely to arise on legal aid.

39. The Scottish Government has not approached this challenge by proposing major changes to the scope of legal aid. The Government’s view remains that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.

40. The legal aid reforms that the Government has taken forward so far have been designed to preserve access to justice as much as possible. The reforms have included reductions in fees for summary criminal cases in a number of areas, the reduction by half of the fees for solicitors’ travelling time, a limited expansion of the Public Defence Solicitors’ Office and the updating of the existing table of fees for counsel acting in civil legal aid cases in the Court of Session and the introduction, for the first time, of a table of fees for counsel acting in civil legal aid cases in the sheriff court. Some changes were made to financial eligibility and verification, in order to obtain best value and protect the taxpayer. The Board also undertook a wide ranging and thorough programme of best value reviews of different areas of its work in this period, including in the fields of mental health, immigration and asylum and in its approach to child contact cases. Finally, the Board’s grant in aid was cut by £1.1m in 2011-12, a bigger percentage cut than for the fund. The Board’s grant in aid will be cut further over the course of the spending review period.

41. *A Sustainable Future for Legal Aid* sets out details of a second package of legal aid reforms under a series of four themes. The introduction of contributions in criminal legal aid comes under the first theme, which is ‘focussing legal aid on those who need it most’.

**Contributions: practice in other jurisdictions**

42. Many other jurisdictions already have contribution regimes in place in their systems of criminal legal aid:

- In England and Wales, a contributory system has operated for more serious cases (those held in the Crown Court) for a number of years now. Those on certain benefits are “passported” and those with an income and assets below certain levels are assessed with a nil contribution, with disposable income and capital thresholds above which applicants are not eligible for legal aid. The criminal contribution is paid monthly and for the length of the case, or six months, whichever is the lesser.

- In New Zealand, criminal legal aid is usually only available for those facing a sentence of six months or more. All grants of legal aid are subject to a contribution, although this may be nil depending on the financial circumstances of the applicant. Income repayments can be collected in instalments (weekly, fortnightly or monthly), starting once legal aid has been granted.

- In Finland, legal aid can be given both in court proceedings and in other matters. All those who have contributory legal aid are charged a small (about £30) fee in addition to any contribution. For more serious criminal proceedings (where conviction would result
in a sentence of four months or more), the defendant is usually entitled to request a public
defender regardless of his or her financial situation. The State covers the costs of this. However, if the defendant is convicted he or she is obliged to pay for or contribute to the costs.

- In the Netherlands, free legal assistance is provided for more serious crimes (where defendants are detained in police custody). For other defendants eligibility is assessed on the same financial criteria as civil legal aid. There are both upper income limits, above which applicants are ineligible for legal aid, and lower income limits, below which applicants are entitled to non-contributory legal aid.

Availability of criminal legal assistance

43. The forms of criminal legal assistance currently available in Scotland in different situations are as follows:

- Advice and assistance or ABWOR may be available subject to two tests: financial eligibility and whether the issue is a matter of Scots law. Solicitors initially grant advice and assistance or ABWOR. A financial contribution may be payable to the solicitor. ABWOR is available in criminal proceedings where the applicant pleads guilty or for some particular categories of court proceedings. For some types of ABWOR there are other more detailed tests to be applied.14

- Summary criminal legal aid is granted by the Board and is used in summary cases in the Justice of the Peace Courts, Stipendiary Magistrates’ Courts and Sheriff Courts. The applicant must be eligible under a test based on undue financial hardship and the interests of justice. No financial contribution is currently due.

- Solemn legal aid is available only in solemn cases in the Sheriff Court and High Court. The power to grant it was transferred from the courts to the Board in November 2010 (although the courts may still make it available in some circumstances in summary and contempt of court cases). Granting solemn legal aid is subject to an eligibility test based on undue financial hardship. No financial contribution is currently due.

- Criminal legal aid for appeals is also granted by the Board. If legal aid had been granted for the first instance proceedings, a financial eligibility test is not applied in respect of the appeal. For other applications, depending on the type of appeal, an eligibility test based on undue hardship may be applied. In some types of appeal, leave to appeal must also have been granted by the courts and in others the Board must consider if it is in the interests of justice that legal aid is made available.

14 More detailed information on the tests applied in ABWOR cases can be found in Part III of the Criminal Legal Assistance Handbook published on the Board’s website: 
Governing principles for contributions for criminal legal assistance and changes to financial eligibility

44. In its ‘Consultation on the introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility’, the Scottish Government set out the following governing principles which should guide the proposed changes:

- **Practicality of application** - the financial eligibility tests should be straightforward and easy to apply and minimise differences between different aid types. The collection of contributions should be straightforward and efficient.

- **Fairness to the accused and the taxpayer** - the interests of the taxpayer and the accused must be balanced to provide value for money and access to justice. Applicants who are able to pay a contribution should do so but they should be able to spread payments of contributions across the likely lifetime of a case or have access to a system of graduated contributions.

- **Supporting the efficient operation of the justice system** - it is essential that there are no perverse incentives which damage the efficient and effective operation of the justice system; and the legal aid process should fit the timescales set for the summary justice process.

- **Minimising complexity for solicitors, applicants and the Board** - the system should be streamlined and easy to apply. The system should be designed to be easily processed using Legal Aid Online.

- **Proportionality** - the system will need to balance the likely savings to be made from collecting contributions against the cost of collection and the systemic changes that will need to be introduced.

45. The Government believes that the system for collecting contributions in criminal cases that will be introduced by this Bill is in accordance with these governing principles.

POLICY OBJECTIVES OF PART 2 OF THE BILL – CRIMINAL LEGAL ASSISTANCE

46. The main policy objectives of introducing contributions for criminal legal aid and making changes to financial eligibility in criminal legal assistance are as follows:

- It will contribute to focussing criminal legal assistance on those who need it most by ensuring that those who can afford to pay a contribution to the costs of their criminal case do so, without compromising an accused’s rights under article 6 ECHR to a fair trial and free representation where he/she cannot afford it.

- It will provide for a more equitable system that no longer, as at present, obtains contributions in civil cases but not in criminal cases.

- It will contribute to making the justice system more efficient by removing the current anomaly in criminal cases whereby applicants can be liable to pay a contribution when they plead guilty to a charge (because they are in receipt of ABWOR) but they do not

15 http://www.scotland.gov.uk/Publications/2011/03/08135507/16
have to pay a contribution if they plead not guilty (because they are in receipt of criminal legal aid).

Assessing financial eligibility for criminal legal assistance and the level of any contribution payable from disposable income

47. In order to put in place a single streamlined system for the collection of contributions in criminal legal assistance (i.e. both criminal legal aid and ABWOR), section 18 of the Bill will align the financial eligibility test for ABWOR in relation to criminal matters with the existing eligibility test for criminal legal aid, by making amendments to section 9 of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). The existing test for summary and solemn legal aid applications is based on ‘undue hardship’. As regards the aim of alignment, the Scottish Government has been developing and implementing a policy for a number of years of moving towards greater consistency, where appropriate, across the legal aid system in order to simplify its operation.

48. There is currently a difference in summary cases between eligibility for ABWOR for guilty pleas and for criminal legal aid for not guilty pleas. A solicitor who assesses eligibility for ABWOR uses the figures that are set by Scottish Ministers and contained in the Board’s Advice and Assistance Keycard assessment, which takes into account the income of the applicant and any spouse or partner and only gives allowances for dependants.16 This assessment can result in a one-off contribution towards the cost of the case. The contribution is collected by the solicitor. Summary criminal legal aid requires tests of undue hardship and the interests of justice to be applied, the former of which does not aggregate the resources of a spouse or partner but can take into account essential household outgoings. If a client is eligible under this test, no contribution is payable. As a result, summary criminal legal aid can be easier to obtain than ABWOR for applicants with a reasonable income (and/or with a spouse or partner with a reasonable income) and outgoings such as a mortgage. The Board has estimated that about 6% of applicants who received summary criminal legal aid would not have been eligible for criminal ABWOR, thereby creating a perverse incentive which could be seen to encourage not guilty pleas.

49. The Bill ensures that consistent financial eligibility tests based on undue hardship will be applied across the aid types of ABWOR, summary criminal and solemn criminal legal aid. Sections 23A, 24 and 25 of the 1986 Act already set out that in relation to legal aid for summary, solemn and appeal cases, the assessment of the applicant’s financial means is based on ‘undue hardship’ – that is, that after consideration of the financial circumstances of the accused person, that the expenses of the case cannot be met without undue hardship to him/her or his/her dependants. Aligning the assessment of the financial means of applicants across all of the criminal legal assistance aid types will ensure consistency in the assessment of disposable income and capital and the levels of contributions that applicants may be assessed to pay. The solicitor will continue to assess eligibility and contributions payable for criminal ABWOR cases and the Board will continue to assess eligibility, and will begin to assess contributions payable, for summary and solemn criminal legal aid.

50. Although the aim is alignment, in relation to criminal ABWOR only the Bill provides that a person may be granted it in two ways. This is necessary both to ensure that solicitors are

16 The Keycard can be found at: http://www.slab.org.uk/profession/index.html [Link no longer active]
granting ABWOR in a uniform manner and so that, if any discretion is required to ensure no undue hardship is caused to the applicant, then it is the Board that exercises it. Summary and solemn criminal legal aid will continue to be granted by the Board in accordance with guidance which it publishes in its Criminal Legal Assistance Handbook.\(^\text{17}\)

51. There are two ways in which criminal ABWOR will be granted by the solicitor. First, if the solicitor assesses the person’s financial circumstances and considers that criteria are met including whether, according to a scheme of eligibility, undue hardship would be caused if ABWOR were not granted. Second, if the Board exercises its discretion to grant criminal ABWOR to the person. The Bill also provides that the Board must set up a mechanism to allow a person to apply to the Board to consider making a grant, where the solicitor has not granted the person criminal ABWOR.

52. The scheme of eligibility, created by section 18 of the Bill, will be prepared and published by the Board. The Board has to show a draft of the scheme to Scottish Ministers and Scottish Ministers must approve it. The scheme of eligibility, although having to be approved by Scottish Ministers, does not in any way impinge on the Board’s independence in determining applications for legal assistance under section 3 of the 1986 Act”.

53. As at present, the Bill, by virtue of sections 19 and 20, will ensure that an applicant in receipt of “passported” benefits (currently income support, income-related jobseeker’s allowance and income based employment and support allowance) will be eligible for criminal ABWOR or criminal legal aid with no contribution from income. However, a contribution might still be required from any disposable capital.

54. 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.

55. The Bill, at sections 19 and 20, specifies that the threshold for disposable income at or above which contributions are payable, is £68 per week. This is the weekly equivalent of the lower income threshold in civil legal aid. The equivalent annual threshold for criminal contributions in England and Wales is £3,398, which would give a rounded weekly equivalent of £65. If the applicant’s disposable income is less than £68, then he or she will be eligible for

\(^{17}\) The handbook can be found on the Board’s website: http://www.slab.org.uk/profession/index.html
ABWOR or criminal legal aid with no contribution. The threshold is effectively designed to cover other living expenses, as allowances are already made for spouse or partner and children.

56. 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 respects of ABWOR will be set out in the scheme of eligibility prepared by the Board. 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.

57. Once an applicant is eligible for criminal legal assistance the amount of contribution payable, if any, will be determined by a combination of factors, including the applicant’s disposable income and the typical length and cost of the type of cases he/she is paying towards. Broadly speaking, this means that the longer a case is likely to last and/or the higher the likely cost, the longer the period of assessment for liability for a contribution and the higher the total assessed amount.

58. For the purposes of calculating the contribution to be paid, it is intended that cases will be grouped into several broad categories based on the type of case and type of legal aid, which broadly determines the length and cost. Within each category, contributions will be calculated by reference to an assessment period (in effect a weekly multiplier) and a series of contribution rates. The contribution rates will be graduated so that the more disposable income the applicant has, the higher the rate of contribution they would have to pay. In other words, different percentage rates will apply to different slices of income with the highest rates applying only to the highest levels of income.

59. If the applicant’s weekly disposable income exceeds £222 then legal assistance would only be offered (with a contribution payable) if the Board considered that it still would cause undue hardship to expect the applicant to pay for his/her own legal costs. In criminal ABWOR and criminal legal aid cases a number of factors could make the case more expensive than average including the number of witnesses involved, the likelihood that expert evidence would be required, the legal complexities involved and any aspects of the case likely to lead to the requirement for significant preparation time. In ABWOR cases, the solicitor would need to ask the Board to apply this discretion to make legal assistance available in line with the scheme of eligibility.

60. Table 1 below shows an example of the different contributing factors that could be used to determine the overall level of contribution assessed. For example, a person being prosecuted under solemn proceedings and with a disposable income of between £68 and £100 would pay a contribution assessed as 5% of that part of his/her weekly disposable income above £68, multiplied by 52. A person receiving ABWOR in relation to a Justice of the Peace Court case (“JP Court”) with a disposable income of £110 would pay 20% of his/her income between £68 and £100 plus 40% of their income between £100 and their actual disposable income of £110, with the total amount multiplied by eight. Where the case turns out to cost less than the assessed contribution, the applicant would either stop paying and/or be refunded any excess. The
maximum contribution that will be paid is, therefore, either the assessed contribution or the cost of the case, whichever is lower.

Table 1: Showing the different contributing factors that determine the overall level of contribution assessed

<table>
<thead>
<tr>
<th>Assessment periods and contribution rates</th>
<th>Justice of the Peace Court ABWOR</th>
<th>Justice of the Peace Court Legal Aid</th>
<th>Stipendiary Magistrates’ Court ABWOR</th>
<th>Stipendiary Magistrates’ Court Legal Aid or Sheriff Court ABWOR</th>
<th>Sheriff Court Summary Criminal Legal Aid</th>
<th>Solemn Legal Aid</th>
<th>Appeals Legal Aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment Period (weeks)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>10</td>
<td>13</td>
<td>20</td>
<td>26</td>
<td>52</td>
<td>52</td>
</tr>
<tr>
<td>Contribution rate applied to each band of applicant’s weekly disposable income</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disposable Income between</td>
<td>£68-£100</td>
<td>20%</td>
<td>17.5%</td>
<td>15%</td>
<td>12.5%</td>
<td>10%</td>
<td>5%</td>
</tr>
<tr>
<td></td>
<td>£100-£130</td>
<td>40%</td>
<td>32.5%</td>
<td>25%</td>
<td>22.5%</td>
<td>20%</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>£130-£160</td>
<td>55%</td>
<td>50%</td>
<td>45%</td>
<td>37.5%</td>
<td>30%</td>
<td>20%</td>
</tr>
<tr>
<td></td>
<td>£160-£222</td>
<td>70%</td>
<td>65%</td>
<td>60%</td>
<td>50%</td>
<td>40%</td>
<td>30%</td>
</tr>
</tbody>
</table>

Note: the bands are effectively based on £68.00 to £100.00 and then £100.01 to £130.00 and so on to ensure there are no gaps.

Note for both table 1 and table 2: if disposable income exceeds £222 the applicant will normally be ineligible for assistance, unless the circumstances of the case suggest that its costs could not be met without undue hardship. In such circumstances, an additional contribution will be payable from disposable income above the £222 threshold, resulting in a higher maximum contribution.

61. Table 2 below details the likely level of total contributions that could be due from a person, depending on their weekly disposable income and the type of case. These contributions levels, again, will be set out in regulations rather than on the face of the Bill as they are likely to be subject to change from year to year and perhaps even on a more regular basis. The applicant will be able to pay the contribution in a number of instalments depending on the type of case and total contribution. For example, in a solemn case the contribution could be paid in up to 12 monthly instalments.
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

Table 2: Maximum assessed contribution (actual amount payable may be lower if case costs less than maximum assessed contribution)

<table>
<thead>
<tr>
<th>Assessment periods and contribution rates</th>
<th>Justice of the Peace Court ABWOR</th>
<th>Justice of the Peace Court Legal Aid</th>
<th>Stipendiary Magistrates Court ABWOR</th>
<th>Stipendiary Magistrates Court Legal Aid or Sheriff Court ABWOR</th>
<th>Sheriff Court Summary Criminal Legal Aid</th>
<th>Solemn Legal Aid</th>
<th>Appeals Legal Aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment Period (weeks)</td>
<td>8</td>
<td>10</td>
<td>13</td>
<td>20</td>
<td>26</td>
<td>52</td>
<td>52</td>
</tr>
<tr>
<td>Resulting maximum contribution payable from each band of disposable income (all weeks accumulated)</td>
<td>£51</td>
<td>£56</td>
<td>£62</td>
<td>£80</td>
<td>£83</td>
<td>£83</td>
<td>£83</td>
</tr>
<tr>
<td>Disposable Income between £68-£100</td>
<td>£96</td>
<td>£98</td>
<td>£98</td>
<td>£135</td>
<td>£156</td>
<td>£156</td>
<td>£156</td>
</tr>
<tr>
<td>Total, including sum from lower band</td>
<td>£147</td>
<td>£154</td>
<td>£160</td>
<td>£215</td>
<td>£239</td>
<td>£239</td>
<td>£239</td>
</tr>
<tr>
<td>Disposable Income between £100-£130</td>
<td>£132</td>
<td>£150</td>
<td>£176</td>
<td>£225</td>
<td>£234</td>
<td>£312</td>
<td>£312</td>
</tr>
<tr>
<td>Total, including sum from lower band</td>
<td>£279</td>
<td>£304</td>
<td>£335</td>
<td>£440</td>
<td>£473</td>
<td>£551</td>
<td>£551</td>
</tr>
<tr>
<td>Disposable Income between £130-£160</td>
<td>£347</td>
<td>£403</td>
<td>£484</td>
<td>£620</td>
<td>£645</td>
<td>£967</td>
<td>£967</td>
</tr>
<tr>
<td>Total, including sum from lower band</td>
<td>£626</td>
<td>£707</td>
<td>£819</td>
<td>£1060</td>
<td>£1118</td>
<td>£1518</td>
<td>£1518</td>
</tr>
</tbody>
</table>

Assessing financial eligibility for criminal legal assistance and the level of any contribution payable from disposable capital

62. Contributions could also be due from capital although this is likely to affect only a very small percentage of applicants in criminal cases. Capital includes savings and anything else of value owned by the client including money in the bank, investments, money due from a trust fund and redundancy payments. 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. As with disposable income, an allowance will be given for each dependant at the rates given by the current Advice and Assistance Keycard. If the client is of a pensionable age then various additional disregards will be allowed.

63. The capital threshold is set on the face of the Bill at £750. An applicant with disposable capital below £750 will not pay a contribution from capital.
64. 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.

Assessing financial eligibility for criminal legal assistance and the level of any contribution payable in cases where disposable income and capital is available

65. If contributions are due from capital and income, the capital will be used to defray the contribution liability first, with any remainder of the contribution due being collected from income. The income element of the contribution could be made in a series of monthly instalments, depending on the type of case.

Percentage of individuals who may have to pay a contribution

66. Those on passported benefits and those who have less than £68 disposable weekly income will not be liable to pay a contribution. The table below sets out the estimated percentage of individuals who will not be liable to pay a contribution, based on an analysis of all the cases which the Board dealt with in the year up to November 2011.

Table 3: Cases where no contribution will be due

<table>
<thead>
<tr>
<th></th>
<th>Total cases analysed by the Board</th>
<th>Total percentage of those eligible with no contribution payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABWOR</td>
<td>40030</td>
<td>82%</td>
</tr>
<tr>
<td>Summary</td>
<td>54040</td>
<td>82%</td>
</tr>
<tr>
<td>Solemn</td>
<td>11874</td>
<td>84%</td>
</tr>
</tbody>
</table>

Level of contribution assessed potentially causing undue hardship

67. It is intended that the system for calculating disposable income and capital and the graduated table of contributions should ensure that no-one should be asked to pay a contribution that would cause them undue hardship. However, the Bill gives Ministers a regulation making power at section 22 to make provision in case instances are foreseen in which the level of contribution determined could cause undue hardship.

Process for assessing eligibility and contribution payable

68. All applications for legal aid (civil and criminal) are made on-line through the Board’s online system. For the solicitor, it will be crucial that the system can accommodate the changes. It is envisaged that once all financial details are registered the online system will calculate the contribution due to be collected from the applicant.
Multiple cases

69. Regulations will make provision for determining appropriate contributions where the person is in receipt of criminal legal assistance in respect of two or more distinct proceedings. The intention is that where the individual has more than one case the liability to pay a contribution will be assessed on the first case. In determining any contribution which may be payable under the second case, regard will be had to the first contribution – i.e. this will be considered an outgoing for the purposes of calculation. The same method will be used to assess any further liability on any subsequent cases.

Contributions payable under Advice and Assistance

70. Currently an individual may be assessed as liable to pay a contribution where receiving advice and assistance. Where the advice is in relation to a criminal matter, and the case then proceeds and a grant of ABWOR or summary criminal legal aid is made, any work done by the solicitor under the initial advice and assistance is subsumed into a fixed payment to the solicitor for the overall case. In these circumstances any contribution assessed and paid under advice and assistance will be deducted from the contribution due for the criminal ABWOR or criminal legal aid. For example, where an individual is assessed as being liable to pay a contribution of £20 under advice and assistance and then assessed as being liable to pay a contribution of £100 under a grant of criminal ABWOR or summary criminal legal aid, only £100 in total will fall to be collected.

Payment of fees or outlays otherwise than through contributions

71. Section 20 inserts section 25AD into the 1986 Act which makes provision for the order in which the solicitor is paid any fees and outlays due. This mirrors the provisions in section 12 of the 1986 Act in respect of A&A. First, the solicitor must seek any fees and outlays from any contribution which is due; second, the solicitor must seek to recover any fees due from expenses, although it is acknowledged that it is extremely rare for expenses to be awarded in criminal cases. If the first two are insufficient to meet the full fees and outlays of the solicitor, the solicitor is then entitled to seek to recover any amount due from the legal aid fund. This is consistent with the operation of other contributions regimes in the 1986 Act.

Contributions for appeals where appellant deceased

72. Section 21 of the Bill provides that where an individual has died after being convicted of an offence it is open to a person, under section 303A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), to apply to the High Court for an order to allow that person to either institute an appeal, or if an appeal was ongoing, to effectively “step into the deceased’s shoes”. They can also apply for legal aid in order to allow them to carry on or raise the appeal. In that situation, the Bill provides that the Board may require the payment of a contribution in respect of the expenses of the criminal legal aid of such amount as the Board may determine and that the Board may also require either the estate of the deceased person or the authorised person to pay the contribution. This allows for the individual circumstances of what are likely to be rare and complicated cases to be taken into account by the Board.
Outcome of the case

73. The Bill ensures that contributions are to be paid for criminal legal assistance regardless of the outcome of the case. This reflects the fact that those who currently pay privately do not get their legal expenses refunded if they are acquitted. Unlike in England and Wales, the refunding of expenses of acquitted persons has never formed part of the Scottish criminal law system. 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. Also, it is felt to be fair that those who can afford to pay a contribution to their criminal legal assistance costs do so.

Exceptions to the contributions regime

74. There will continue to be some criminal cases in which contributions are not due regardless of the means of the accused. Contributions will not be levied where criminal legal aid is granted under section 22 of 1986 Act (automatic criminal legal aid) or in the limited situations where the courts have the power to grant legal aid. To introduce contributions into these areas would cause practical problems. Criminal legal aid in these cases is most commonly used for those appearing from custody at court. Custody courts are very busy and introducing an eligibility test involving assessment of the applicant’s financial resources and contribution due might cause unacceptable delay in the court process. Most accused who may be eligible for criminal legal assistance will in any case, following an appearance from custody, go on either to apply for criminal ABWOR, or summary or solemn criminal legal aid and at that point they can be assessed for their ability to pay a contribution.

75. Section 17 of the Bill will also provide a regulation making power to allow Scottish Ministers to disapply contributions, should they need to do so, in relation to police station advice. Section 8A was inserted into the 1986 Act by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The 2010 Act followed the Supreme Court’s ruling in the case of Cadder v HMA. The purpose of section 8A of the 1986 Act is to allow for advice and assistance to be made available without reference to the financial limits in section 8 of the 1986 Act to a person to whom section 15A of the 1995 Act applies, in such circumstances as may be provided in regulations. This regulation-making power was used in the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations in April last year in order to facilitate the provision of legal advice in police stations. The Bill takes a similar regulation making power in respect of contributions in these circumstances in order to give the Scottish Ministers the flexibility to respond to future developments in the provision of police station advice following the Cadder v HMA case.

Collection of contributions

76. Currently solicitors collect contributions for advice and assistance (including ABWOR). This will not change. Where a contribution is levied in respect of a summary criminal matter, section 20 (which inserts section 25AC(4)(b) into the 1986 Act) will require the solicitor, after the Board has assessed the amount of the contribution, to collect it. The solicitor has a direct solicitor/client relationship, which can in some cases allow for potentially easier collection of contributions. Solicitors employed by the Board under sections 26, 27 or 28A of the Act will also collect contributions and then pay them to the Board.

---

18 [2010] UKSC 43
77. Where a contribution is levied in respect of a solemn case, or in respect of a criminal appeal, section 20 of the Bill (which inserts section 25AC into the 1986 Act) will require the Board to collect any contribution due. The Board already collects contributions in civil cases. Contributions in solemn and appeals cases are likely to be higher than the contributions collected in summary cases – reflecting the enhanced ability of the Board to handle these risks in comparison to smaller criminal firms. This splitting of the responsibility for collecting contributions between solicitors and the Board spreads the burden of collection.

78. Section 20 of the Bill also allows for contributions collected by the solicitor to be treated as fees and as such they will be able to be banked straight away, thereby helping cash-flow for solicitors’ firms. Being able to treat contributions as fees also means that firms do not have to set up separate client accounts, which can increase insurance premiums paid by firms.

79. Consideration has been given as to whether or not the Board would require new powers of recovery in order to maximise the potential savings. However, given that the Board already collects contributions in civil cases using its existing powers with considerable success and that the Board will only be collecting contributions in solemn criminal and appeal cases. The Government has concluded that special powers of recovery are not justified.

Issues for the wider justice system

80. Officials have consulted with the Crown Office and Procurator Fiscal Service and the Scottish Court Service in preparing these proposals. The main issue raised was the possibility that introducing contributions into criminal legal aid might in some way result in delays to the system. However, in the latter half of last year the majority of summary criminal applications were being received via the Board’s online system and were processed within 4 days. The Board will ensure that applications are processed as quickly as possible. The Scottish Court Service will provide guidance to clerks and provide contact details for the Board so that enquiries can be made during court proceedings to establish the position of any pending legal aid applications.

Alternative approaches

81. One option the Scottish Government considered was to maintain the status quo and do nothing. However, this would not address the perceived unfairness that contributions are already liable to be paid in civil legal aid cases and across advice and assistance, and will soon be liable to be paid in children’s legal aid cases (which is a distinct category of legal aid), but no contribution is liable to be paid in criminal legal aid cases. Without legislative change the operation of criminal legal aid would continue as it is. However, given the current economic climate and the need to make savings, the aim of the Scottish Government to extend the principle of ‘those who can afford to pay, should pay’, and the desire to maintain the current broad scope of the legal aid system in Scotland, this was discounted as an option. The inevitable consequence of doing nothing would have been that it would have been necessary either to make further reductions in the fees paid to solicitors or to dramatically reduce the scope of the legal aid system in Scotland.
CONSULTATION

82. The Scottish Government carried out a public consultation on the introduction of contributions into criminal legal aid and changes to financial eligibility in March 2011. The majority of the responses to the consultation were broadly in favour of the principle that those who can afford to pay towards the cost of their case should do so. There was also wide support for aligning the financial eligibility tests, if contributions were introduced. The consultation responses were published on 6 July 2011\(^\text{19}\) and the consultation report was published on 20 April 2012\(^\text{20}\).

83. The Faculty of Advocates (“the Faculty”) raised concerns that an applicant for legal aid would not, on acquittal, receive a refund of any contribution they may have made. This issue was subsequently discussed with the Faculty. The rationale is that, considering that those who currently pay privately for their criminal case do not get their expenses refunded if they are acquitted, refunding contributions in legally aided cases would mean that those receiving legal aid would be receiving preferential treatment to those paying privately.

84. Following the consultation the Scottish Government issued a ‘key principles’ paper to certain stakeholders, including the Law Society of Scotland (“the Society”) and the Faculty. Officials met with both organisations. At meetings with the Society’s criminal legal aid negotiating team in October 2011 and February 2012 it became clear that a key issue for the profession was who was to collect the contributions. As a result of these meetings a compromise was proposed involving solicitors collecting contributions in ABWOR (as they do already) and summary cases (which will be new) and the Board collecting contributions in the more expensive solemn and appeals cases.

85. In addition, the Scottish Government also discussed a range of issues in relation to the Bill with the Crown Office and Procurator Fiscal Service and the Scottish Court Service.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

86. The Bill’s provisions do not discriminate on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

87. In carrying out its functions, the Council must have regard to certain principles, including that the civil justice system should be “fair, accessible and efficient”. The Scottish Civil Justice Council will therefore aim for the development of a fairer, more accessible civil justice system for all types of person, from across Scotland. It is envisaged that the membership where possible would therefore be drawn appropriately to help foster and protect those interests.

\(^{19}\) [http://www.scotland.gov.uk/Publications/2011/07/06111349/0](http://www.scotland.gov.uk/Publications/2011/07/06111349/0)

\(^{20}\) [http://www.scotland.gov.uk/Publications/2012/04/2519](http://www.scotland.gov.uk/Publications/2012/04/2519)
88. The provisions of Part 1 requiring the Lord President to set out an appointments process for the non-judicial members appointed by the Lord President are intended to ensure that appointments are made on merit and that the process is transparent and independent.

89. It is expected that organisations and individuals representing the interests of disabled people and others with characteristics protected under the Equality Act 2010 will be able to contribute to the Council’s work through its committees, which we would expect to reflect the full range of interests across Scotland’s civil justice system.

90. The Council’s programme of work - particularly in relation to implementation of civil courts reform but also in advising and making recommendations in relation to developments to the civil justice system – will include consultation of a wide variety of individuals and representative bodies with an interest in Scotland’s civil justice system.

91. An Equality Impact Assessment will be published in relation to both aspects of the Bill.

**Human Rights**

92. The introduction of contributions into criminal legal assistance is relevant to Article 6 of the European Convention on Human Rights. Article 6 guarantees the right to a fair trial and in particular Article 6(3)(c) provides that everyone charged with a criminal offence is entitled to defend himself or herself in person or through legal assistance of his or her own choosing, or if he or she does not have sufficient means to apply for legal assistance to be given it free when the interests of justice so require. There is nothing in the provisions of the Bill which has a practical effect on the extent and quality of the preparations for the trial and the right of the accused to have effective legal assistance. There is nothing which puts the fairness of the trial at risk. The introduction of contributions is compatible with Article 6 of the Convention because an individual receives free legal assistance to the extent that he or she cannot afford it. An individual will contribute to the cost of legal assistance if he or she can afford to do so. Some relevant cases are M v UK (1983) 6 EHRR 345, Pakelli v Germany (1983) 6 EHRR 1, Melin v France (1993) 17 EHRR 1, In Artico v Italy (1980) 3 EHRR 1, Croissant v Germany (1992) 16 EHRR 135, Granger v UK (1990) 12 EHRR 469 and Maxwell v UK (1995) 19 EHRR 97.

**Islands and rural communities**

93. The Bill has no differential impact upon island or rural communities. The provisions of the Bill apply equally to all communities in Scotland.

**Local Government**

94. The Bill has no detrimental impact on local authorities.

**Sustainable development**

95. The Bill will have no negative impact on sustainable development.
Business and Regulatory Impact Assessment

96. A Business and Regulatory Impact Assessment is being carried out in relation to the criminal legal assistance provisions.

97. The creation of the Scottish Civil Justice Council is not expected to have any direct financial effect on businesses, the voluntary sector or the public sector. However, there will be indirect financial implications arising from the planned uplift in civil court fees which will, in part, go towards financing the forthcoming package of civil court reform. As part of the wider Making Justice Work programme, those reforms will be designed to bring efficiencies and savings within the justice system wherever possible. A Business and Regulatory Impact Assessment will not therefore be carried out in relation to the Council at this stage. An impact assessment will be conducted by the Scottish Court Service prior to any change to court fees. In addition, a partial impact assessment will inform consultation on legislative proposals for civil courts reform, and a further assessment will be carried out before bringing any legislation to the Scottish Parliament.
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Scottish Civil Justice Council and Criminal Legal Assistance Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as priorities: first, the establishment of a Scottish Civil Justice Council to replace the existing civil Rules Councils, and with a wider policy role to advise and make recommendations on improving the civil justice system in Scotland; and second, introducing financial contributions in criminal legal aid thereby ensuring that those who are able to pay towards the cost of their defence do so. The Bill will also make some changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

Rationale for subordinate legislation

3. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation; and
- ensure the proper use of parliamentary time is made.
Delegated powers

Section 6(3) – Power to substitute number of members

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative procedure

Provision

4. Section 6 of the Bill makes provision for the membership of the Scottish Civil Justice Council. Subsection (1) specifies the maximum number of members who may be on the Council and also specifies certain numbers relating to specified categories of membership. Subsection (3) provides that Scottish Ministers may by order amend subsection (1), substituting any number specified there for another number.

5. The power to make an order under subsection (3) includes the power to make such supplementary, incidental, consequential, transitional, transitory or saving provision as Scottish Ministers consider appropriate.

6. Subsection (6) provides that the power may not be used to modify the categories of membership themselves (including the removal of a category of membership), nor to add a category of membership.

7. This power can be used to vary:
   - the maximum number of members of the Council (section 6(1)),
   - the maximum number of members which may be appointed by the Lord President under section 6(1)(i)),
   - the number of members appointed by the Scottish Ministers, (section 6(1)(d)), and
   - the minimum number of members in a category of membership (section 6(1)(e)-(h)).

Reason for taking this power

8. The use of subordinate legislation is appropriate to provide for limited adjustments to Council membership numbers, ensuring that there are sufficient members in each category to allow it to carry out its wide-ranging functions, the scope of which may require greater or fewer members to be appointed to a category from time to time. This will also ensure the Council continues to reflect the Lord President and the Scottish Court Service’s responsibilities. The power to amend the maximum number of members is required so that the power to vary numbers in each category can be used flexibly to achieve that purpose.

9. Variation in the numbers of members in subsection (1) will interact with other provisions in the Bill; accordingly, the powers taken in subsection (5) are thought to be a sensible addition to facilitate such interaction.
10. By way of example:
   - An order reducing the minimum number of members in a category or the overall numbers of the Council may require transitional or savings provisions relative to the tenure of existing members whose continued membership in terms of section 8 may run contrary to the effect of the variation of numbers.
   - An order increasing numbers in a particular category may require the Lord President to appoint more members: the effect of section 7(1) may require to be subject to consequential, transitional or transitory provisions to allow the Lord President the appropriate time to select such members or to phase in such appointments.
   - An increase in the number of Scottish Ministers’ members or number in a category of member where there is to be no permanent increase in the total number of members may require transitional provisions.

Choice of procedure

11. The Scottish Ministers, under subsection (4), must consult the Lord President before making any order under section 6(3). As the power enables the Scottish Ministers to vary the composition of the Council the affirmative procedure is considered appropriate.

Section 17 – Contributions in respect of automatically available criminal advice and assistance

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

12. Section 17 of the Bill amends section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 8A concerns the automatic availability of criminal advice and assistance. It was introduced following the Supreme Court’s ruling in Cadder v HMA in 2010. As currently operated section 8A allows the automatic provision of advice and assistance to people detained under section 15A of the Criminal Procedure (Scotland) Act 1995. The amendment made by section 17 of the Bill inserts a power into a new subsection (1A) which allows Scottish Ministers to disapply the requirement to pay a contribution under section 11 to such advice and assistance.

Reason for taking this power

13. At present, as generally across both civil and criminal advice and assistance, solicitors are required to collect contributions in the circumstances in which section 8A applies even though applicants are at present automatically eligible for advice and assistance. The power to disapply the requirement to pay a contribution is needed to ensure that going forward flexibility is available in respect of the collection of contributions in these circumstances in the same way as flexibility is available in respect of eligibility for advice and assistance. Those who can afford to pay a contribution to the costs of their criminal legal assistance ought to do so. But a pragmatic and flexible approach might need to be taken in these particular circumstances in future.
Choice of procedure

14. Regulations made under this new subsection of section 8A will be subject to the same procedure as applies to the existing power in section 8A – affirmative procedure. The Scottish Government consider that affirmative procedure is appropriate when exercising a power in respect of something as fundamental as whether or not someone has to contribute to the costs of publicly funded legal assistance.

Section 18 – Availability of criminal assistance by way of representation

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

15. Section 18 inserts a new paragraph (dda) into section 9(2) of the 1986 Act. The new section 9(2)(dda) allows regulations to prescribe when the eligibility test, set out in section 9A, should apply to assistance by way of representation (“ABWOR”) provided in certain criminal proceedings, rather than the eligibility test in section 8. The new section 9A eligibility test is based on consideration of a person’s financial circumstances and whether legal representation can be met without causing undue hardship. The section 8 eligibility test is based on the person’s income, capital or receipt of certain benefits.

Reason for taking this power

16. The insertion of section 9(2)(dda) allows Scottish Ministers to prescribe the proceedings in which the new provisions in section 9A about eligibility for criminal ABWOR are to apply. This will allow Scottish Ministers to list all those proceedings where ABWOR is considered to be provided in relation to a criminal matter. As noted above, the eligibility test which will apply to ABWOR in those proceedings, as set out in section 9A, is based on a person’s financial circumstances and the risk of undue hardship being caused.

Choice of procedure

17. The power in section 9(2)(dda) will be subject to the affirmative procedure which already applies to section 9. The Scottish Government recognises that extending or altering eligibility for criminal legal assistance requires thorough parliamentary scrutiny. This is consistent with the approach taken throughout Part II of the 1986 Act, and specifically in section 9, in relation to powers which modify the eligibility criteria in relation to advice and assistance.
Section 20 – contributions for criminal legal aid

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative procedure

**Provision**

18. Section 20 of the Bill inserts section 25AD into the 1986 Act. Section 25AD(1) sets out the order of priority in which a solicitor can claim payment of his/her fees and outlays incurred in providing criminal legal aid. In accordance with the section, the funder of last resort in any case is the legal aid fund. This section mirrors section 12 of the 1986 Act, which applies to advice and assistance. Regulations may be made under section 25AD(1) to alter the order of priority. Regulations may also be made under section 33ZA(1) (referred to below) which would affect the way in which a solicitor is paid for the criminal legal aid provided.

**Reason for taking this power**

19. The regulation-making power in section 25AD(1) mirrors section 12 of the 1986 Act. The power is required to adapt the order of priority in subsection (1) to any change in circumstances. For example, the order of priority might need to be changed if the provisions in section 25AC(4) about who collects the contribution are changed in the future (using the powers under section 33ZA(1)).

**Choice of procedure**

20. The Scottish Government considers that negative procedure is appropriate. The regulation-making power in section 25AD(1) is about the order of priority in which a solicitor gets paid. It does not alter a person’s eligibility for criminal legal aid, or whether or how a contribution is due for that legal aid. As a result, the Scottish Government’s view is that the power does not merit the same degree of scrutiny as powers to alter those provisions would. In addition, section 12, which section 25AD mirrors, contains a similar regulation-making power which is subject to negative procedure. As a result, the choice of negative procedure in this case is consistent with the existing approach of the 1986 Act.

Section 22 – Regulations about contributions for criminal legal assistance

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** affirmative procedure

**Provision**

21. Section 22 of the Bill inserts section 33ZA into the 1986 Act. Section 33ZA(1) provides the Scottish Ministers with the power to make regulations about the amount, determination and collection of contributions in respect of all types of criminal legal assistance. The power in section 33ZA(1) would be used when specifying the amount payable by way of contribution and the maximum amount payable by a person, both in accordance with sections 11A(2) and 25AC(3). It is expected that this power will be used in regulations to set out a sliding scale of contributions based on the person’s financial circumstances, which would indicate the amount of...
contribution due by a person whose financial circumstances falls within certain bands. Such regulations are also expected to specify the maximum contribution payable.

22. Particular ways in which subsection (1) may be exercised are indicated in subsections (2) and (3). These are that regulations may make provision about: a lower contribution being payable where the person or his/her dependents would suffer undue hardship; how to determine the contributions due where the same person is receiving criminal legal assistance in respect of two or more distinct proceedings; whether the Board or the solicitor is to determine or collect contributions (thereby altering the arrangements set out in sections 11A(3) and 25AC(4)), specify how contributions to be dealt with where a case changes procedure whilst proceedings are still live; and for contributions to be payable by instalments. Subsection (3) provides that the power in subsection (1) can make different provisions for different cases or class of case.

Reason for taking this power

23. The power in section 33ZA(1) is needed in order to specify in greater detail than is appropriate in primary legislation how the system of determining and collecting contributions for ABWOR in criminal matters and criminal legal aid will work in practice. The approach – of leaving to regulations much of the detailed operation – is consistent with the approach throughout the 1986 Act.

24. The provisions of subsection (2) are specific illustrations of the power in subsection (1) and do not prevent the exercise of the power in subsection (1) other than in relation to the particular illustrations given in subsection (2). The provision in subsection (3) is required to allow, so far as possible, for regulations to cover a wide variety of situations in which contributions may be due or collectable.

25. In addition to regulations under this section, it is expected that detailed guidance will be provided by the Board to practitioners, as is currently the case in respect of advice and assistance and criminal legal aid.

Choice of procedure

26. The Scottish Government recognises that the detail about the new contributions regime for criminal legal assistance will require thorough parliamentary scrutiny. The affirmative procedure is therefore considered appropriate. This choice of procedure is consistent with the approach taken throughout the 1986 Act in relation to powers which modify the criteria for contributions under advice and assistance and civil legal aid. The necessary amendment to section 37 of the 1986 Act, which prescribes the parliamentary procedure, is made in section 23(10) of the Bill.

27. The powers in section 33ZA as regards whether it is the Board or the solicitor who collects the contribution may affect how the solicitor is paid for the work provided. In comparison to the negative procedure which will apply to the exercise of powers under section 25AD (in section 20 of the Bill) about priority of payment of the solicitor, this power is subject to affirmative procedure. Affirmative procedure is considered appropriate as the power affects which person/body has the obligation to collect and not just how payment is made.
Section 23 – Consequential modifications

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

28. Section 23(4) amends section 8A of the 1986 Act to enable provision to be made by regulations to allow ABWOR to be available to a person without reference to the eligibility test in section 9A(2). Section 8A concerns the automatic availability of criminal advice and assistance. It was introduced following the Supreme Court’s ruling in Cadder v HMA in 2010. As currently operated section 8A allows the automatic provision of advice and assistance to people detained under section 15A of the Criminal Procedure (Scotland) Act 1995.

29. Section 23(5) of the Bill amends section 9(2)(de) of the 1986 Act by inserting reference to the new section 11A(2). Section 9(2)(de) currently provides that regulations may prescribe when section 11(2) of the 1986 Act will not apply to ABWOR. Section 11(2) is about contributions which are due for advice and assistance (including ABWOR). The effect of the amendment to section 9(2)(de) is to allow regulations to also prescribe when section 11A(2), which is about contributions for ABWOR in criminal matters, should not apply.

30. Section 23(9) amends the existing regulation-making power in section 36(2)(b) of the 1986 Act. The current power allows Scottish Ministers to substitute different amounts for those specified in various sections of the 1986 Act, all of which concern eligibility, or contributions, for legal assistance. The amendments made by section 2(8) allow Scottish Ministers to similarly vary the amounts specified in the new provisions (in sections 11A and 25AC). In addition, in relation to the existing provisions (in so far as they relate to criminal matters) and the new provisions, the amendments allow Scottish Ministers to specify different amounts for different cases or classes of case.

Reason for taking this power

31. In relation to the amendment to the power in section 8A of the 1986 Act, it is not currently intended to use the power to make criminal ABWOR automatically available. However, the Scottish Government feels it is prudent to have this power, should it be felt in the future that ABWOR should be automatically available in certain circumstances in criminal matters.

32. The amendment to section 9(2)(de) allows Scottish Ministers to disapply the requirement to pay a contribution in proceedings in which criminal ABWOR is available. The amendment to section 9(2)(de) in respect of section 11A(1) mirrors the existing power in the same provision in respect of section 11(2) of the 1986 Act. There is no particular intention at this stage to use this power in the near future. However, taking the power is considered necessary to allow Ministers the flexibility to adapt the criminal legal assistance regime to changing circumstances over time without the need for primary legislation. Practical reasons may, for example, emerge once the contributions regime established by the Bill is in operation which lead Scottish Ministers to conclude that contributions should not be due in certain proceedings.
33. The reason for taking the powers in section 36(2)(b), as amended by section 23(8) of the Bill, is to give the Scottish Ministers greater flexibility to adjust the criminal legal assistance regime, including contributions, as necessary over time without the need to resort to primary legislation to make each adjustment. The need for adjustment might arise at short notice or be so minor in nature as to not justify primary legislation. At present, the power in section 36(2)(b) is exercised at regular intervals to alter the amounts specified for eligibility and contributions for legal assistance, because of the changing wider economic situation. The flexibility that the amendments provides will allow the Scottish Ministers to tailor even more, in relation to different classes of case, the eligibility and contribution requirements of the 1986 Act in respect of criminal matters.

**Choice of procedure**

34. Section 8A is already subject to affirmative procedure, and the new power inserted into it by section 23(4) of the Bill will be too. As the availability of criminal ABWOR is a significant part of the legal aid regime, the Scottish Government considers it should be open to thorough parliamentary scrutiny.

35. Section 9(2)(de) is already subject to affirmative procedure, and the new power inserted into it will be too. The Scottish Government recognises that extending or altering eligibility for criminal legal assistance requires thorough parliamentary scrutiny. This is consistent with the approach taken throughout Part II of the 1986 Act, and specifically in section 9, in relation to powers which modify the eligibility criteria in relation to advice and assistance.

36. The power in section 36(2)(b) is currently, and once amended by section 23(8) of the Bill will be, subject to affirmative procedure. Alterations to the amounts which prescribe who may be eligible for criminal legal assistance or who may be liable to pay a contribution are significant factors in the overall legal aid regime and require the thorough scrutiny of Parliament. Affirmative procedure is, in the Scottish Government’s view, appropriate.

**Section 24 – Ancillary provision**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order making power  
**Parliamentary procedure:** Affirmative procedure

**Provision**

37. The provision empowers the Scottish Ministers to make such supplementary, incidental, consequential, transitional, transitory or saving provisions by order as they think necessary or expedient for the purposes of, in connection with or under the Bill.

**Reasons for taking this power**

38. As regards the criminal legal assistance part of this Bill, the legal aid legislative regime is highly complex. The Scottish Government takes the view that a power to make supplementary, incidental, consequential provision, and to make different provision for different cases, is required to ensure that all necessary amendments are made to any legislation affected by changes to the regime, such as are made by this Bill. The Bill’s provisions on criminal legal assistance,
whilst few in number, make detailed technical changes to the primary legislation. In many cases, the primary legislation has been used to make a wide range of subordinate legislation, or fits into the complex interaction of primary and secondary legislation which is the legal aid regime.

39. This power is necessary to allow amendment to this body of legislation to give proper effect to the provisions of the Bill, and to deal with any unintended consequences of the provisions. The power may be particularly key where an unintended consequence affects a person’s access to legal representation in a criminal matter. Scottish Ministers are mindful that lack of access or a delay in accessing representation may affect the timely conduct and possibly the outcome of a case. Different provision is required for different cases to cater for the situation where provisions may be required for one type of criminal legal assistance, and not for other types.

40. The transitional, transitory and savings powers in section 24(1) of the Bill are necessary, in respect of the criminal legal assistance provisions of the Bill, to provide for the changeover from the current system of eligibility for criminal ABWOR and the contributions due for it, to the new eligibility test for criminal ABWOR (in section 9A), the new basis upon which contributions are due for it (in section 11A) and the new contributions for criminal legal aid (in sections 25AC and 25AD) which might not be linked to commencement depending upon the way in which the new system is brought in or where a need for transitional and savings provisions is identified after commencement. Transitional, transitory and savings provisions might also be needed as a consequence of the exercise of supplemental and incidental powers, for example in relation to legal aid.

Choice of procedure

41. Orders of the type under section 24(1) are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of the text of an Act. In that case, affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in other Bills and there are not considered to be any reasons for a different approach in this case.

Section 25 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order making power
Parliamentary procedure: Laid, no procedure

Provision

42. Section 25 of the Bill provides for commencement of the Bill. Part 3 of the Bill comes into force on the day after Royal Assent. The Scottish Ministers have the power under subsection (2) to appoint by order other days on which the other provisions of the Bill come into force, and such an order may make transitional, transitory or saving provision by virtue of subsection (3).
Reason for taking this power

43. The power of Scottish Ministers to appoint the days when provisions (other than in Part 3) of the Bill come into force allows the Scottish Ministers to commence such provisions as can be implemented with less preparatory work before those provisions which will require more work. As Parts 1 and 2 of the Bill – the Scottish Civil Justice Council and criminal legal assistance – are quite independent of each other, separate plans for commencement will be appropriate. Within Parts 1 and 2 some provisions will require considerable implementation planning and the ability to prescribe the days when provisions will commence is appropriate. Transitional, transitory and savings provisions are likely to be required in association with the commencement of the Scottish Civil Justice Council in connection with the changeover of work between the existing rules Councils and the new Council. Transitory, transitory and savings provisions are also likely to be required in respect of the criminal legal assistance provisions of the Bill, to provide for the changeover from the current system

Choice of procedure

44. The power of Scottish Ministers to appoint the days for commencement of provisions of the Bill is subject to no procedure. A commencement order will be laid in the Scottish Parliament once made. This is in accordance with the current practice as regards commencement orders for other primary legislation.
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
CONTENTS

Remit and membership

Report .................................................................................................................................... 1

Summary of conclusions and recommendations .......................................................... 1
   General principles of the Bill ...................................................................................... 1
   Part 1: Scottish Civil Justice Council .................................................................... 1
   Part 2: Criminal legal assistance ......................................................................... 3

Introduction .................................................................................................................... 7

Part 1: Scottish Civil Justice Council ........................................................................ 7
   Background ................................................................................................................. 7
   Evidence received on Part 1 .................................................................................... 8

Part 2: Criminal legal assistance ................................................................................ 27
   Introduction ................................................................................................................ 27
   Proposals under Part 2 of the Bill ....................................................................... 30
   Key themes arising in evidence ............................................................................ 33

General principles of the Bill....................................................................................... 50

Annexe A: Reports from other Committees .............................................................. 52

Annexe B: Extracts from the Minutes ......................................................................... 53

Annexe C: Index of oral evidence ............................................................................... 55

Annexe D: Index of written evidence ......................................................................... 56
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. 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.¹

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, focused 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 Courts² 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.”³

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.⁴ The Scottish Government subsequently consulted on the creation of a Scottish Civil Justice Council,⁵ and Part 1 is the first in a series of legislative

---

¹ See Annexe A for the Subordinate Legislation Committee’s report and the Convener of the Finance Committee’s letter
measures to be taken forward under the Scottish Government’s four-year Making Justice Work programme.

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.”

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. 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). While the Scottish Civil Courts Review recommended that the Council should be an advisory NDPB, the Scottish Government was “not persuaded” that the creation of a new NDPD was required.
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.”¹² For the public law professors, the issue was significant because particular accountability mechanisms and public appointment procedures¹³ would ensue where a body was designated an NDPB.¹⁴

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.”¹⁵ 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.¹⁶

¹³ Public appointment procedures are discussed further in this report, in relation to section 7 – Lord President appointment process.
¹⁴ Senior public law professors in Scotland. Written submission.
¹⁶ 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 quite 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).”

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.”

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” 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”.


17 Policy Memorandum, paragraph 28.
18 Scottish Legal Aid Board. Written submission.
19 Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 2(3)(b).
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”.21 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”.22 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.”23 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.24

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.”25

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.

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. Gemma Crompton from Consumer Focus Scotland said that where draft rules were modified or rejected, there should be a “clear rationale” for having done so. Which? said that a requirement to give reasons for rejecting any draft rules “must be made explicit within the Bill”.26

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.”29

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);

26 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?
28 Which? Written submission.
• 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”).

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.” 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.

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. 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” while Which? said that lay members would be more likely to “challenge existing systems and ideas.”

68. A number of stakeholders pointed to the recommendations of the recent Commission on the Future Delivery of Public Services that “effective public

---

31 Faculty of Advocates. Supplementary written submission.
32 ie Consumer Focus Scotland. Written submission.
33 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?
34 Consumer Focus Scotland. Supplementary written submission.
35 Which? Written submission.
36 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.\textsuperscript{38} 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.”\textsuperscript{39}

69. The submission from six senior public law professors in Scotland\textsuperscript{40} 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\textsuperscript{41}) 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.”\textsuperscript{42}

71. Submissions on behalf of the insurance sector\textsuperscript{43} 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”\textsuperscript{44} of court users, provide a “natural balance”\textsuperscript{45} to consumer representative members on the Council, and add “emphasis and credibility”\textsuperscript{46} 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.”\textsuperscript{47}


\textsuperscript{38} Consumer Focus Scotland. Supplementary written submission.

\textsuperscript{39} Traprain Consultants Ltd. Written submission.

\textsuperscript{40} Senior Public Law Professors in Scotland. Written submission.


\textsuperscript{42} Capability Scotland. Written submission.

\textsuperscript{43} Written submissions from Simpson and Marwick, Forum of Scottish Claims Managers and the Association of British Insurers.

\textsuperscript{44} Forum of Scottish Claims Managers. Written submission.

\textsuperscript{45} Simpson and Marwick. Written submission.

\textsuperscript{46} Simpson and Marwick. Written submission.

\textsuperscript{47} 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.” 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.” 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.” 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.”

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.”

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. 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.

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.” 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...
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.\(^{56}\)

**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.\(^{57}\)

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.\(^{58}\) 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.\(^{59}\)

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.”\(^{60}\)

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.”\(^{61}\) Consumer Focus Scotland also noted this inconsistency, suggesting that section 7 be widened to include judicial members.\(^{62}\)

---

\(^{56}\) Correspondence from the Lord President and Lord Justice General received on 24 September 2012.

\(^{57}\) Namely: the Faculty for advocate members, the Law Society Council for solicitor members, and the Scottish Ministers for consumer representative or LP members.

\(^{58}\) 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 an 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]

\(^{59}\) Written submissions from Friends of the Earth Scotland and the Environmental Law Centre Scotland and Senior Public Law Professors in Scotland.


\(^{61}\) Scottish Woman’s Aid. Written submission.

\(^{62}\) 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.” 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” 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.

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.

---

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.68 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.67 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.68 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.69

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.70

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”71.

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.

66 Traprain Consultants. Written submission.
67 Written submissions from Consumer Focus Scotland and Friends of the Earth Scotland and the Environmental Law Centre Scotland.
69 The Faculty of Advocates. Supplementary written submission.
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, 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.”

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.”

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.

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
committees which would “reflect the full range of interests across Scotland’s civil justice system”\textsuperscript{76} 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.\textsuperscript{77}

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.”\textsuperscript{78}

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.”\textsuperscript{79} 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.”\textsuperscript{80}

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.”\textsuperscript{81}

\textsuperscript{76} Policy Memorandum, paragraph 16.
\textsuperscript{78} Friends of the Earth Scotland and the Environmental Law Centre Scotland. Written submission.
\textsuperscript{80} Scottish Parliament Justice Committee. Official Report, 4 September 2012, Col 1621.
\textsuperscript{81} 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.”

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.”

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)).

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. Each referenced a mediation project in Edinburgh Sheriff Court 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”. 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.

---

63 Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 2(3)(d).
64 Written submissions from Citizens Advice Scotland, Consumer Focus Scotland and Traprain Consultants Ltd.
65 Written submissions from Traprain Consultants and Consumer Advice Scotland.
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.”

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

113. Louise Johns on 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.”

**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.” However, a number of witnesses questioned this approach, believing that this might create a possible conflict of interests. 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.”

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. 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

---

91 Policy Memorandum, paragraph 25.
92 Written submissions from Consumer Focus Scotland, Scottish Women’s Aid and Friends of the Earth Scotland and the Environmental Law Centre Scotland.
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.” 95

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.” 96

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.” 97

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.” 98

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

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.”

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.

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, including the Faculty of Advocates, who suggested a “two stage approach”. 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” 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.

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

---

99 Policy Memorandum, paragraph 29.
100 Scottish Memorandum, paragraph 29.
101 Written submissions from Consumer Focus Scotland, Which? and Friends of the Earth Scotland and the Environmental Law Centre Scotland.
102 Faculty of Advocates. Supplementary written submission.
104 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.\(^{105}\)

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.”\(^{106}\)

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.”\(^{107}\)

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\(^{108}\) 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.

---


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. 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.

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”.

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. 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” the figures in the Financial Memorandum.

---


111 Consumer Focus Scotland. Written submission to the Finance Committee.

112 Scottish Court Service. Written submission to the Finance Committee.

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."  

138. The Justice Committee heard that remunerating Council members could open up membership to a wider category of people. 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.” 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.”

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, 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

---

116 Policy Memorandum, paragraph 31.
117 Policy Memorandum, paragraph 33.
(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. 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

---

119 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 that 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. 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;  

---

120 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).

121 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. (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 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.123
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. 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. How much of a contribution those falling within these parameters would pay is to be set out in regulations. (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.

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.

---

124 Policy Memorandum, paragraph 51.
125 These figures may be amended by order (section 22)
126 Scottish Civil Justice Council and Criminal Legal Assistance Bill, section 22.
127 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.\textsuperscript{128}

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;

\textsuperscript{128} 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.”

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. 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?”

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

---

129 The Faculty of Advocates. Written submission.
Justice Committee, 11th Report, 2012 (Session 4)

charge and prosecute herself, remand herself in custody, and chooses to try herself in court.”

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. 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.”

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.”

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…”

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. (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”. The Scottish Government argued that this would make the legal aid system “more

---

132 Dr Cyrus Tata. Written submission.
133 Edinburgh Bar Association. Written submission.
134 Law Society of Scotland. Written submission.
135 Scottish Legal Aid Board. Written submission.
136 Scottish Women’s Aid. Written submission.
138 Policy Memorandum, paragraph 33.
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.

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 (i.e., 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.”

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.”

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

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.”

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.

---

139 Policy Memorandum, paragraph 46.
140 The Faculty of Advocates. Written submission.
141 Policy Memorandum, paragraph 73.
143 Dr Cyrus Tata. Written submission.
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.\footnote{Scottish Parliament Justice Committee. \textit{Official Report, 18 September 2012}, Col 1734.}

\textit{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.

\textit{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.\footnote{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.} 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.”\footnote{Policy Memorandum, paragraph 56.}
180. The Memorandum goes on to set out, in two tables, the Scottish Government’s current proposals for determining contributions. 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.”

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.”

149 Policy Memorandum, pages 14 and 15.
150 Policy Memorandum, paragraph 64.
151 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.”

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. (The Policy Memorandum states that the figures come from analysis of all the cases dealt with by SLAB in 2011.)

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?”

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.”

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.

---

152 Policy Memorandum, paragraph 62.
154 Policy Memorandum, paragraph 66.
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.\textsuperscript{157}

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.\textsuperscript{158} (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.\textsuperscript{159}

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.\textsuperscript{160}

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
of that, the board has discretion to waive a contribution if undue hardship is caused.\textsuperscript{161}

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.\textsuperscript{162}

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”.\textsuperscript{163}

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.\textsuperscript{164}

197. In relation to Capability Scotland’s concerns about (amongst other things) imminent changes to “passported” 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.\textsuperscript{165} 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.\textsuperscript{166}

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

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.”

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

---

167 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.”

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. 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.

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. 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.

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. (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

---

170 The Law Society of Scotland. Written submission.
172 The Law Society of Scotland. Written submission.
173 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 (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.

207. Unfortunately, the Financial Memorandum does not provide any real assistance on the likely cost to private firms. 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. Both SLAB and the Cabinet Secretary 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…”

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.

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.”

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).

---

175 The Law Society of Scotland. Written submission.
176 No figure is provided in the relevant table. Instead the entry reads “Variable (but not expected to be high)”. [Financial Memorandum, table 14.]
177 Scottish Legal Aid Board. Supplementary written submission.
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.”

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. 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.

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.

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

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 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.”

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

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.”

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…”

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”.

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. 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. (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. 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.

---

193 The Law Society of Scotland. Written submission.
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.”

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”, 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. (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. (This is despite the Bill allowing SLAB to collect contributions on behalf of the PDSO.) 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.

196 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.
199 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.  

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.”

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. However it was crucial that the eligibility criteria drawn up should not

---

200 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.


202 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.”

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.

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. 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.”

205 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).
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:


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—
- Elspeth 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

Elspeth Molony, Senior Policy and Consultancy Manager, Capability Scotland;
James Wolfe 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:
Dear Christine,

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL: FINANCIAL MEMORANDUM

The Finance Committee took evidence at its meeting on 5 September 2012 from the Scottish Government Bill team on the Financial Memorandum (FM) to the Scottish Civil Justice Council and Criminal Legal Assistance Bill which was introduced by the Scottish Government on 2 May 2012.

There were a number of points discussed with the Bill team (Official Report 5 September 2012) and I hope these are of interest and use to your Committee in its examination of the Bill.

Finance Committee role
As you know, our role is to scrutinise the financial implications of all Bills introduced in the Parliament. The FM must distinguish separately costs that would fall on—

(a) the Scottish Administration (i.e. the Executive, in the broad sense of Ministers, departments and agencies);
(b) local authorities; and
(c) other bodies, individuals and businesses.

It must set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates.
Approach
The Committee sought responses to specific ‘FM’ questions and received responses from—
(www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45633.aspx)

- Consumer Focus Scotland
- Lord Justice General and Lord President of the Court of Session
- Scottish Court Service
- Scottish Legal Aid Board

The responses of Consumer Focus Scotland, the Lord Justice General and the Scottish Court Service focus on Part 1 of the Bill while that from the Scottish Legal Aid Board focuses on Part 2. Key points made in the submissions are set out below.

Financial impacts
The financial impacts of the Bill are split between its two distinctive parts and are set out in more detail below.

Part 1 (FM paragraphs 100-147)
The Scottish Government’s planned programme of civil courts reform is expected to give rise to additional costs for the Scottish Court Service (SCS), including in relation to the new council (FM paragraph 126). The new council would ‘significantly assist’ in modernising the civil justice system and the associated costs are expected to be within the first 2-3 years with costs thereafter decreasing. The new council would be responsible for the rules revisions associated with these reforms.

The additional costs of the council (£87,000- £149,000 pa) will be met by the SCS. The total costs of civil courts reform for the SCS, including for the council, are expected to be ‘significantly higher’. As your Committee is aware, Scottish Ministers intend to increase (via subordinate legislation) civil court fees later in 2012, covering the three year period up to 2014-15. The Scottish Government expects the overall increase in fees, if approved by the Parliament, to enable the SCS to meet the additional costs associated with the council as well as other aspects of civil courts reform.

The Committee did raise with the Bill team (col. 1481) the submission from Consumer Focus which considers that the funding of the SCJC is ‘critical to its future success’ and that to undertake the range of functions identified then ‘significant additional resources’ must be committed, particularly in view of the ‘substantial workload’ the SCJC will have in preparing civil court reform rules.

Consumer Focus offers ‘observations’ (paragraphs 10-15 of its submission) on the issue of funding and the information within the FM itself. It sets out its views (paragraphs 16-19) with regards the expectation that the Scottish Government will meet the running costs of the SCJC through an increase in court fees and is concerned that ‘pushing the additional costs of running the SCJC on to court users by increasing court fees may deter some users from accessing the courts, and therefore act as a potential barrier to access to justice’.
The Bill team did state that the scope of the costs of the new Council will be a matter for the Parliament to determine through its scrutiny of the Bill which will give effect to the Gill reforms (col. 1485). There is therefore an opportunity for further scrutiny and assurance on this point through examination of the Bill and its FM. The FM states (paragraph 129) that ‘it is not possible to estimate the costs the new council will incur in taking forward the rule changes for civil courts before legislation in that regard is passed by the Scottish Parliament’.

The Bill team also stated (col. 1485) that much of what happens (with regards costs of the new Council) depends not just on what is in the legislation but “on how quickly it is implemented and how it is phased in”. It went on to say that its expectation is that “the cost will not substantially exceed to any appreciable degree the ranges that are given in the Financial Memorandum”.

While the Committee welcomes this assurance, your Committee may wish to consider whether to secure further assurance from the Minister on costs when it considers the court fees SSI.

In addition, this will be a matter which the Finance Committee can pursue further when considering the FM attached to the Court Reform Bill and whether the estimates set out in the FM to this Bill before us are sustained and consistent with the Court Reform Bill FM.

In response to further questions about an increase in court fees limiting people’s access to justice (col.1487) the Bill team responded that such fees are typically a small part of the cost of any action and that “the relatively modest uplift in court fees will not be the deciding factor in whether people have access to the courts”.

We also discussed with the Bill team (col.1482) the point made in the Consumer Focus submission about the remuneration of Council members.

The Bill team in response stated that there has not been a tradition of remuneration of members of the existing councils. While the Bill does allow for such remuneration that will be a matter for the Lord President to consider if necessary following the establishment of the new Council.

The submission in the name of Lord Gill refers (Q2) to concerns expressed by himself and colleagues ‘about the lack of financial detail within the consultation paper for the Bill’. Lord Gill’s assessment is that—

‘the provision made in the proposed fee order, beyond that needed to maintain the real terms value of court fees, will be sufficient to meet the additional costs to the SCS of the Scottish Civil Justice Council (SCJC)’.

With regards the annual running costs and the costs of implementing court reforms, Lord Gill considers ‘the financial assumptions made in tables 1 and 3 are accurate’ and that ‘the financial assumptions made are the best assessment that can be made at this stage of what the eventual costs may be’.
A note of caution is expressed about comparisons in the FM with England and Wales (Q2). Similarly Lord Gill states (Q4) that it is ‘less clear as to whether the financial implications for the organisation in the long term are reliable’. This is due to the detail of the Court Reforms Bill being substantially unknown (this point was also made by the Bill team in oral evidence) and that until the Council is established ‘we cannot know how the Bill will be implemented through Court Rules’.

The SCS makes similar points in its submission. It states (Q1) that ‘funding for the SCJC must be consistent with the anticipated scope of responsibilities of the Council’.

In response to questions (cols. 1482-3) the Bill team stated that it “had set out a steady-state cost of the SCJC which is a modest increase above the current cost of the two existing rules council to reflect the policy function that the SCJC would take on”.

Part 2 (FM paragraphs 148-172)
The legal aid bill in 2010-11 was £161.4 million. The Scottish Legal Aid Board has estimated that savings of up to £3.9 million pa could be achieved by introducing financial contributions into criminal legal aid (FM paragraph 151). The Bill only deals with criminal legal assistance (no changes to civil legal assistance or children’s legal assistance).

It is claimed that 80% of those currently eligible for criminal legal assistance will continue to be eligible without being asked to pay a contribution (this is based on the Scottish Government asking SLAB to look at criminal legal aid cases in 2011). Those on passported benefits will not pay a contribution, nor will those who have disposable income below a certain threshold. Only those above a certain level of disposable income or capital will be asked to pay a contribution.

This was an issue we discussed with the Bill team (cols. 1483-4) and the Committee sought clarification on what criteria is used by SLAB when considering the outgoings of an individual when assessing entitlement to legal assistance. The Bill team has provided additional information (from SLAB) on this matter (see below)—

**‘Disposable income calculation**
The following items will be **taken into account** as weekly income—
- Pay or sick pay from work (including overtime, commission, bonuses, but after deducting income tax, national insurance, etc)
- Net profit/drawings from business if self-employed or in partnership.
- Private pension
- Non passported benefits
- Student grant or bursary
- Money from any other source including maintenance payments.

The following weekly payments will be **deducted from the total income**—
- Rent or board and lodgings
- Mortgage (including any endowment or life insurance policies linked to the mortgage)
- Council tax/water charges
• Child care payments (nursery or child-minder)
• Loan repayments
• Maintenance payments made (for children not in the applicant’s care)
• Contribution payments being made to other cases
• Regular payments made associated with a disability.

We will also consider other reasonable outgoings if the applicant can show that it would lead to undue hardship for them or their dependants if we did not include it in our assessment.

An allowance is also given for each dependant – this is to cover the costs of being responsible for caring for that person’s wellbeing. For example, their clothing and food. **As well as expenditure, this allowance is deducted** from the income as part of the calculation of disposable income.

The current allowance rates are based on Income Support levels and from 10 April 2012 are:

- Partner living with the applicant - £40.45
- Dependant person, being a member of the applicant’s household (each) - £64.99

The Scottish Government does not anticipate there being any additional costs on it, local authorities, SLAB (beyond staff costs), the COPFS, SCS nor criminal legal aid firms (FM paragraphs 166-171).

The response from the SLAB states it worked closely with the Scottish Government on the development of the proposals and provisions within the Bill and advised on the financial assumptions. SLAB considers (Part 2, Q2) that the savings figures ‘accurately reflect the maximum savings we believe could flow from the eligibility and contributions regime created by the Bill and illustrated in the Policy Memorandum’.

With respect to the whether SLAB can meet the financial costs associated with the Bill (Q6) it does consider that, with efficiency savings to further reduce its running costs, it should be able to absorb the additional costs associated with the introduction of contributions ‘assuming that current plans to deliver required savings are successful and no other unanticipated additional costs arise over the period’.

I do hope this information is useful to your Committee. Should you wish to discuss, please do get in touch (alternatively, your clerks can discuss with Finance Committee clerks).

Yours sincerely

Kenneth Gibson MSP, Convener
Present:

Kenneth Gibson (Convener)          John Mason (Deputy Convener)
Mark McDonald                        Michael McMahon
Elaine Murray                         Paul Wheelhouse

Apologies were received from Gavin Brown.

Scottish Civil Justice Council and Criminal Legal Assistance Bill: The Committee took evidence on the Financial Memorandum of the Scottish Civil Justice Council and Criminal Legal Assistance Bill from—

   Colin McKay, Deputy Director, Legal System Division;

   Ondine Tennant, Bill team officer, Legal System Division.

Scottish Civil Justice Council and Criminal Legal Assistance Bill: The Committee considered the evidence taken on the Financial Memorandum of the Scottish Civil Justice Council and Criminal Legal Assistance Bill and agreed to consider a draft letter to the Justice Committee by correspondence.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Financial Memorandum

The Convener: Item 5 is consideration of the financial memorandum to the Scottish Civil Justice Council and Criminal Legal Assistance Bill. I welcome the meeting Colin McKay and Ondine Tennant from the Scottish Government bill team. Do you have an opening statement for us?

Colin McKay (Scottish Government): No, but we are happy to take questions.

The Convener: Oh, God—straight into questions. I will fire away then.

I want to comment on the submissions to the consultation. Consumer Focus Scotland said that it “did not think the SCJC would be able to undertake the range of functions identified without significant additional resources being committed by the Scottish Court Service... In its early life, the SCJC is likely to have a substantial workload preparing the rules required to implement the reforms of the civil courts.”

It went on to say:

“We are disappointed that remuneration of Council members is not included in projected costs of the SCJC, despite such remuneration being permitted by the Bill”

as “this may be a key means of opening up the membership to people not otherwise in a position to apply for such a post.”

Will you comment on those points?

Colin McKay: Certainly. On the first point, obviously the more resources the civil justice council has, the more it can do. The estimated costs that we have put in the financial memorandum for the council to do its normal state functions and the projected costs for the implementation of the civil courts review, should Parliament pass that legislation, are pretty frugal. That reflects the fact that public finances are under tremendous strain. We have had to pare down the costs to what we think are the minimum that we can afford while allowing the council to have the impact that it needs to have.

There are a host of civil justice issues that I am sure a council could usefully devote time to, if it had more resources. However, given the difficulty in finding money for new functions, we feel that we have allowed the council enough resource to do the things that it needs to do. In his submission to the committee, Lord Gill has confirmed that he is content that, within those parameters, the financial details are reasonable. We worked closely with the Lord President’s private office to develop the costs of the CJC.

On your second point, about remuneration of council members, as I understand it there has not been a tradition of remuneration of members of the current Sheriff Court Rules Council and Court of Session Rules Council. We recognise that there may be people who genuinely cannot be expected to do the work for nothing, which is why the bill makes provision for that. The Lord President may be minded to provide remuneration for certain members of the council.

However, the reality is that most of the people on the council will be on it in connection with their professional or personal roles, for example solicitors or advocates. I am not sure that we would want to make a commitment at the moment that those people would get paid, or certainly not that they would be paid at the rates that they would normally expect to be paid for their time. The Lord President will have to strike a balance between the desirability of remuneration for some members of council and other pressures on the council’s budget.

Ondine Tennant (Scottish Government): We worked out how much the maximum remuneration might cost the council over a year, based on quite regular meetings, which would be once a month for council meetings and once a month for committee meetings. Assuming a maximum of 12 eligible members for remuneration, the bill carves out additional payment for certain members, such as the judiciary, on top of their current salaries. We calculated that as possibly up to £72,000 a year, depending on the level that remuneration was set at. We used the sum of £250 on the basis of the current levels of other remuneration—for instance, for the Judicial Appointments Board—but the figure could be reduced if the remuneration were for a financial loss rather than a set payment. That was just to emphasise that the figure could range to quite high levels.

The Convener: Some individuals could get remuneration, but not all.

Ondine Tennant: That is certainly possible under the bill.

The Convener: The Scottish Court Service has said that Scottish ministers’ proposals “should include consideration of the future costs associated with supporting the work of the SCJC beyond its initial period of operation.”

Do you have any comments on that?

Colin McKay: I think that the proposals do that. We have set out a steady-state cost of the SCJC, which is a modest increase above the current cost of the two existing rules councils to reflect the
policy function that the SCJC would take on. Separately, we have allowed for what we anticipate would be the cost of the major project of implementing the Gill reforms, should those be legislated for.

The Gill reforms will take several years to work through the system, and quite what the civil justice system will look like in six or seven years is difficult to estimate. Nevertheless, as far as we can, we have estimated what the body doing the kind of things that we think that it needs to do would cost either if the Parliament did not legislate for Gill—although the intention is clearly to do so—or once the Gill work was completed.

The Convener: Legal aid is an important issue given the likelihood that people will be asked to make a contribution. The Scottish Government considers that, in the current “challenging financial circumstances”, those who can afford to contribute towards the cost of their criminal legal aid should do so. It believes that introducing contributions could save up to £3.9 million a year. However, it seems to me from looking at your figures that about 83 per cent of people will not have to make contributions. Only those above a certain level of disposable income or capital will be asked to pay a contribution.

Although I have read through the documents and have seen some figures, it is not entirely clear to me who will and who will not be asked to make a contribution. Can you elaborate a wee bit on the level that we are talking about? What is the ballpark figure that people will have to make a contribution to their own legal aid costs?

Colin McKay: As you say, it is slightly difficult to express that. The figures that are set out in the financial memorandum relate to the figures that are used currently to assess contributions. As you will be aware, people who are in receipt of civil legal aid are already assessed for a financial contribution. Indeed, in some criminal cases, people already pay a contribution under the assistance by way of representation—ABWOR—scheme. By and large, those are people who are pleading guilty rather than not guilty. Therefore, the idea of a contribution towards legal aid costs in the criminal legal system is not totally new.

The figures that are used in the financial memorandum have had to be adjusted so that we can harmonise the different schemes. The threshold that is set out in paragraphs 158 and 159 of the financial memorandum is a disposable income of £68 a week—that is the level at which someone would start to pay a contribution. Unless there are particular circumstances, if someone’s weekly disposable income is over £222 they will be ineligible for legal aid. Those figures sound quite stark, and I know that it has created some anxiety among members of the legal profession that people who are pretty poor will be making a contribution. However, it is important to bear in mind that those are not figures for disposable income after various outlays have been taken into account, including childcare costs and mortgage or rental costs. Everybody’s outgoings are different, so it is difficult to give you an average gross figure for the money that people need to have coming in for them to be eligible to make a contribution. In most cases, it is likely to be substantially more than £68 a week, which will be the amount of money that they are genuinely able to dispose of and which could be used to contribute towards their costs.

The Convener: Yes, I saw those figures under paragraphs 158 and 159: I was just looking for a wee bit more information. You have mentioned mortgage costs and childcare costs, but I imagine that people will want to know whether they qualify for legal aid, which I suppose they will if the proposal goes through. However, could you put more meat on those bones with regard to what is included and what is not included in terms of disposable income?

Colin McKay: I doubt that I can give you much more information at this point, beyond what is in the financial memorandum. I should apologise for the fact that my colleague, Karen MacIvor, who was due to give evidence on the legal aid aspects of the bill is not here today, but she is unwell. We would be happy to give you details of what the board currently treats as outgoings that are taken off the calculations. That should give you a clearer picture of what that would mean.

Michael McMahon: Obviously, everyone would sign up to the goal of improving the civil justice system. Fortunately, I have never had direct experience of the courts but, speaking to family members or friends who have been witnesses or jurors or earn their living in the court system, I am aware that there is a concern that there is a lack of efficiency and that we need to get more value for money from our judicial system. I am also aware that, sometimes, we must spend to save—that there are some additional costs that must be met in order to arrive at something that, in the fullness of time, will achieve some savings. The financial memorandum suggests that there would be increases for the first two or three years but that there would be decreases thereafter as a result of efficiency savings. However, it is also concerning that the financial memorandum says:

“It is not possible to estimate the costs the new Council will incur in taking forward the rules changes for civil courts
reform before legislation in that regard is passed by the Scottish Parliament.”

How can you convince us that we are not buying a pig in a poke?

Colin McKay: When it says, “It is not possible”, you must remember that we have done the best we can to give fairly detailed estimates of how many staff will be needed to take forward the reforms as we understand them. The point that we are making is that the Parliament might choose to legislate in a different way from what we currently envisage. The Government has set out a response to the Gill review and we have set out how we intend to take those things forward but, clearly, we do not know what will end up as legislation, so we cannot be entirely clear about what the outcome of that will be.

That said, much of what happens depends not just on what is in the legislation but on how quickly it is implemented and how it is phased in. There is scope for the Scottish Court Service to manage and husband its resources in a way that will allow it to phase in the reforms over a period of time, should that be necessary.

Our expectation is that the cost will not substantially exceed to any appreciable degree the ranges that are given in the financial memorandum. We think that that is adequate to implement the reforms.

The pig-in-a-poke aspect concerns the fact that it is not us who will deal with the bill but Parliament—ultimately, it is Parliament that will approve the financial memorandum for the courts reform bill, which will include whatever costs are to be borne as a consequence of the legislation, and that will include any implications for the civil justice council.

I should say, also, that we intend to introduce the bill as a draft bill for consultation before it is introduced to Parliament, so there should be an extensive opportunity for all the stakeholders to consider the implications of the changes.

Michael McMahon: As I said, I understand that, sometimes, there have to be some initial costs—there is no question about that. However, we have to test whether those initial costs will be around the area that the financial memorandum suggests that they will be and that the on-going costs are not going to miss the target. The convener referred to Consumer Focus Scotland’s evidence. It has some major concerns because, if the council is to be properly funded to make the changes that will come about, the initial set-up costs may be greater than the financial memorandum suggests.

12:15

If the figure in the financial memorandum can be argued for, legitimised and sustained, that will make the memorandum more robust and will mean that we will have more confidence in it. However, Consumer Focus Scotland believes that, with the level of funding that has been set, the council will be nothing more than a rule-setting body, which means that it will not achieve the savings that have been set for it in the longer term.

Do you understand the concern that, if we do not get the costs right at the outset, the council will not achieve its aims regardless of how well the bill is drafted and we will not get the reformed and more efficient judicial system that we all want?

Colin McKay: Yes, I appreciate that. However, I am not aware that Consumer Focus Scotland identified any particular comparisons or any basis for its concerns other than the general sense that the figure was not as much as it might have hoped for the council to do the business. We examined the costs of the two current rules councils, which will be merged into the single body, considered the costs of the Civil Justice Council in England and Wales as the best comparator and came up with a set-up that is relatively lean but which will have additional capacity to implement changes in the rules.

On the point that you rightly make about investing to save, the larger part of the investment for courts reform will not be in the proposed Scottish civil justice council; it will be in, for example, information technology systems, judicial training and, potentially, changes to the court estate. Therefore, the set-up costs for the council are a small element of the overall court reform agenda.

To be honest, I think that if the Lord President decided that it would take three years for the civil justice council to do its rules revision but would rather that it carried it out in two years to get things going more quickly and, therefore, decided that we would need to put more money into the body, such variations in the cost of the council would be completely swallowed up by the variations in, for example, the cost of buying a new IT system for the Scottish Court Service.

We have enough flex in the Scottish Court Service’s overall budgetary provision and in the financial memorandum to ensure that the council has sufficient resources to carry out the Gill reforms. You will have seen that the extra cost of making those reforms is substantially more than the steady-state cost of the council, so we are talking about ramping up the funding fairly significantly over the next few years to implement the rules project.
That has been done by reference to the similar exercise that took place down south following the Woolf reforms, which are along broadly similar lines to the Gill reforms. In his evidence to the Justice Committee, Lord Gill pointed out that we cannot always directly compare Scotland and England because the way in which the English rules are constituted is different from the way in which the rules work in Scotland, so there is some degree of uncertainty. However, we are reasonably certain that the range that we have given provides enough money for the council to do a decent job of bringing the rules up to date.

In essence, the council’s job is to think about things and we just need to get the right people with the right brain power and the right analytical skills to do that thinking. The council will not require large costs for equipment, buildings or any of the other public sector spending items that can sometimes run away with themselves. It will have enough people to think about things to enable it to come up with the right solutions.

**John Mason:** The point has been made that, if there are extra costs, they will be added to court fees and will be paid by the users of the courts. There is already concern that, although people at the bottom get legal aid and people at the top have lots of money, many people in the middle cannot access the courts. Therefore, I fear that the number of people who cannot access the courts might increase. Has that been taken into consideration?

**Colin McKay:** Yes, it has. That is obviously a concern with access to justice. However, I point out that court fees are typically a small part of the cost of any action; lawyers’ fees are what cost people money and make court potentially expensive. Therefore, the relatively modest uplift in court fees will not be the deciding factor in whether people have access to the courts.

As you said, people who receive legal aid do not pay court fees. The Government has substantially extended eligibility for legal aid up the income ranges so that people with moderate incomes can still access it, particularly if they have a very expensive case. They may have to pay a contribution, but the idea that they would be subject to huge financial risk is removed. It is obviously difficult to sustain that approach, given the pressures on public finances, but we have done so and have committed to trying to maintain it.

We do not think that the fees increases on which the Scottish Court Service has consulted will impact on access to justice for the poorest or the people in the middle income ranges.

**The Convener:** I thank colleagues for their questions and the witnesses for their evidence.
About Consumer Focus Scotland
Consumer Focus Scotland is the independent consumer champion for Scotland. We are rooted in over 30 years of work promoting the interests of consumers, particularly those who experience disadvantage in society. Part of Consumer Focus, our structure reflects the devolved nature of the UK. Consumer Focus Scotland works on issues that affect consumers in Scotland, while at the same time feeding into and drawing on work done at a GB, UK and European level.

We work to secure a fair deal for consumers in different aspects of their lives by promoting fairer markets, greater value for money, improved customer service and more responsive public services. We represent consumers of all kinds: tenants, householders, patients, parents, energy users, solicitors’ clients, postal service users or shoppers. We aim to influence change and shape policy to reflect the needs of consumers. We do this in an informed way based on the evidence we gather through research and our unique knowledge of consumer issues.

Introduction
1. Consumer Focus Scotland, and its predecessor organisation, the Scottish Consumer Council, have campaigned for many years for improvements to the civil justice system to ensure it better meets the needs of its users.

2. We support the establishment of a Scottish Civil Justice Council (SCJC). We believe its creation will be a key means to avoid in future the type of piecemeal reforms that were criticised by the civil courts review, and which have led to a court system that does not deliver ‘the quality of justice to which the public is entitled.’

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

Question 1: Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
4. Consumer Focus Scotland responded to the Scottish Government’s consultation on proposals to establish a Scottish Civil Justice Council. This consultation paper did not provide an indication of the likely costs associated with establishing the SCJC.

5. Within our response to the consultation paper, however, we highlighted the issue of the SCJC’s resources as being critical to its future success. We made clear
we did not think the SCJC would be able to undertake the range of functions identified without significant additional resources being committed by the Scottish Court Service than currently provided to the Rules Councils. The current Rules Councils have only limited resources available at present to make rules of civil procedure, and to draft and revise rules and court forms. We believe that but for the high levels of commitment and hard work by the Chairmen and other members of the Councils, and the under-resourced secretariat, the current system would collapse under the weight of its increasing workload. In its early life, the SCJC is likely to have a substantial workload preparing the rules required to implement the reforms of the civil courts. It is likely that additional resources would be required to ensure the SCJC is able to prepare these rules in a timely fashion.

6. In both our response to the Scottish Government's consultation, and in our evidence to the Justice Committee on the current Bill, we have emphasised that the SCJC is not just to be a rules-drafting body, and will also have a policy function. It is to be responsible for keeping the civil justice system under review, and providing advice and recommendations to the Lord President (and Scottish Ministers) on the development of, and changes to, the civil justice system. While it is intended that its priority in the early stages will be on making rule changes, it is essential that sufficient resources are provided to enable it to undertake its policy functions effectively; having such a strategic oversight of the civil justice system will be an important means of ensuring the system is operating effectively and we believe it will also help to prevent more costly wholesale reforms being required again in the future. Without the commitment of sufficient additional resources, we find it difficult to see how the Council would realistically be able to serve as anything more than a rule-drafting body.

Question 2: Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
7. As there was no indication of financial impact provided in the Scottish Government's consultation, we cannot comment on whether our comments have been reflected in the Financial Memorandum. However, we would note that the proposals do provide for more resources than are currently allocated to the existing Rules Councils, and that this increase is to meet the estimated costs of the SCJC carrying out additional policy functions.

Question 3: Did you have sufficient time to respond to the consultation exercise.
8. Yes

Question 5: Do you consider that the estimated costs and savings set out in the Financial Memorandum, and the timescales over which they are projected, are reasonable and accurate?
9. We are not in a position to comment on much of the detail of these proposals, for example whether the resources identified for the SCJC to undertake civil courts reform implementation are sufficient, whether the grades of staff identified are appropriate, or whether the estimates for costs of recruiting and remunerating members of the SCJC are adequate. We would, however, make the following observations.
10. The Financial Memorandum identifies the anticipated costs of the SCJC when it moves beyond implementation of civil courts reform to its ‘steady position’ of rule-drafting and keeping the civil justice system under review. In this steady form, it is expected that the SCJC will require additional staff resources beyond that provided to the existing Rules Councils of between £63,000 and £100,000 per annum. We consider the current rules councils to be under-resourced, and we are unconvinced that these additional staffing costs will be sufficient for the SCJC to undertake its substantial workload of ongoing care and maintenance of rules, and its policy functions, particularly if staffing resources are required to support any sub-committees of the SCJC. We would note that the Civil Justice Council in England and Wales has staffing resources of £211,000 per annum.

11. We are disappointed that remuneration of Council members is not included in projected costs of the SCJC, despite such remuneration being permitted by the Bill. Enabling the Scottish Court Service to remunerate certain categories of members is desirable; this may be a key means of opening up the membership to people not otherwise in a position to apply for such a post. This could result in a potential widening of the range of people who apply to be members, and in particular could be an important means of encouraging diversity in appointments.

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

13. Likewise, while the Financial Memorandum identifies expected costs associated with carrying out consultation exercises, these costs are attributed to consultations on proposed rules changes. While this is welcome, the Financial Memorandum does not appear to account for any costs associated with the SCJC consulting or working with other groups and bodies when undertaking its policy functions. We would expect such activities to be an essential means by which the SCJC would keep the civil justice system under review and identify areas where developments or changes to the civil justice system are required. In our evidence to the Justice Committee we said we wanted the Bill to be strengthened to make it a general requirement (rather than discretionary power) for the SCJC to consult and work with other groups and bodies with an interest in the civil justice system, including users. We would suggest it is necessary for additional resources to be provided for this purpose.

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

15. The Financial Memorandum does not currently identify any costs associated with the SCJC taking on the functions of the Scottish Committee of the Administrative Justice and Tribunals Council. The Bill’s policy memorandum makes clear it is the Scottish Government’s intention that the SCJC should take over such functions when judicial leadership for tribunals is transferred to the Lord President.
While we recognise that such functions will not immediately be included within the SCJC’s remit, we might have expected some indication of the likely costs of this to be given. Our understanding is that such a transfer is anticipated within the timeframes covered by the Financial Memorandum.

**Question 8: Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?**

16. Our response to question 5 identifies a number of areas where we believe extra costs are either required, or will likely be incurred if the SCJC operates the way it is intended. These costs are mainly linked to the SCJC’s policy functions, and include resources to undertake research, and appropriate consultation with all interested parties, including users.

17. We are concerned that the Scottish Government expects the additional costs associated with running the SCJC, as well as other aspects of civil courts reform over the next three years, to be met by increasing court fees. This means such costs will be met by users of the civil courts – those individuals, or organisations, asserting or defending their legal rights. If the costs identified in the Financial Memorandum are underestimated then this would potentially lead to even higher court fees than are currently proposed by the Scottish Government. We are concerned that pushing the additional costs of running the SCJC on to court users by increasing court fees may deter some users from accessing the courts, and therefore act as a potential barrier to access to justice.

18. We accept that litigants who can afford to do so should be required to pay towards the cost of running the civil court system. However, we do not believe it is appropriate that in future the full costs of running the SCJC will be borne by civil court users, in line with the Scottish Government’s policy of moving towards a system full cost pricing through court fees. We believe that taxpayers should have some responsibility for contributing to the funding of the SCJC on an ongoing basis. We have two main reasons for this:

• Firstly, the civil courts and civil justice system in Scotland have been explicitly recognised as providing a public service. The system does not just benefit those who become involved in proceedings, but rather fulfils a broader public good. We therefore believe it appropriate for the taxpayer to make a contribution to the running costs of the organisation tasked with keeping the system under review and making recommendations on required reforms.

• Secondly, the remit of the SCJC goes beyond the civil courts to the wider civil justice system; this includes issues such as alternative dispute resolution and the availability of advice services and is intended in the future to include tribunals. We are unclear therefore why the costs of running the SCJC should be borne fully by civil court users.

19. We acknowledge the severe financial constraints within which all public sector organisations, including the Scottish Government and Scottish Court Service, are operating. Similarly, we recognise the substantial changes that require to be made to the civil court system to make it fit for the 21st century; we have campaigned for civil justice reform for many years. It will be incredibly challenging to implement the
necessary reforms in the context of reducing public budgets. However, we do not agree that the way to address this is to ultimately pass the costs of this on to civil court users, in line with the Scottish Court Service’s policy of full cost pricing. We believe it is entirely appropriate that some level of subsidy should continue to be paid from the public purse in order to achieve the ‘public goods’ which flow from the work of the civil justice system.

**Question 9: Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

20. As noted at question 5, we would expect there to be future costs should the Scottish Government proceed with its intention for the SCJC to take over the functions of the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) when judicial leadership for tribunals is transferred to the Lord President. We would expect it would be possible to estimate such costs by looking at the current level of funding given to SCAJTC by the UK Government. If the SCJC was also intended to assume other functions in relation to administrative justice, such as responsibility for drafting rules for tribunals, again we would expect it might be possible to estimate potential costs of this, by considering the current budget for such functions.
This response is submitted in my capacity as Head of the Judiciary in Scotland. I refer to the consultation responses provided by my predecessor, the Rt. Hon. Lord Hamilton, the Senators of the College of Justice and the Sheriff Court Rules Council. My comments relate solely to Part 1 of the Bill. It would not be appropriate for me to comment on Part 2 of the financial memorandum.

Consultation

1. Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

My predecessor the Rt. Hon. Lord Hamilton submitted a response in his capacity as Lord President. The Senators of the College of Justice and the Sheriff Court Rules Council responded for their respective interests. I shall refer to all three responses in this paper. In all three submissions there were comments on the financial assumptions.

All three responses observed that no detail was provided in the consultation paper as to how the Scottish Civil Justice Council was to be funded. This was of particular concern to my predecessor (c.f. paragraphs 3-10 of his response).

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

The financial assumptions set out in the Financial Memorandum can be categorised in two parts, namely the annual costs (tables 1 and 3) and the costs of implementation of the Court Reforms Bill (tables 4-9).

My colleagues and I were concerned about the lack of financial detail within the consultation paper for this Bill. To meet these concerns, and following discussions between the Scottish Court Service (SCS) and the Cabinet Secretary for Justice, fee increases in the Court of Session and Sheriff Court Rules Council were proposed. The Scottish Government are currently consulting on provisions to increase court fees by 1% above inflation which is to be directed towards the implementation costs of civil court reform and service improvement. This consultation (Scottish Government consultation paper: Review of Fees Charged by the Court of session, Accountant of Court, Sheriff & Justice of the Peace Court, High Court, Office of the Public Guardian) will close on 23 July 2012.
My assessment is that the provision made in the proposed fee order, beyond that needed to maintain the real terms value of court fees, will be sufficient to meet the additional costs to the SCS of the Scottish Civil Justice Council (SCJC).

**Annual costs**
In respect of the annual costs, the current costs of the Court of Session and Sheriff Court Rules Councils are accurately reflected in table 2. I am reasonably confident that the financial assumptions made in tables 1 and 3 are accurate.

**Costs of the implementation of the Court Reforms Bill**
So far as can be known at this stage, the assumptions made about the impact of the Court Reforms Bill for the Council appear to be reasonable (paragraphs 132-144). In my view, the financial assumptions made are the best assessment that can be made at this stage of what the eventual costs may be.

I would sound one note of caution regarding the comparisons in the Financial Memorandum with the rules revision work undertaken in England and Wales. The Civil Procedure Rules Project undertaken in England and Wales emerged from a team led by Lord Woolf who had produced a rough draft of possible Civil Procedure Rules. The rule drafting team were heavily and consistently staffed.

The Civil Procedure Rules in England and Wales are of a different nature from those in Scotland. They are underpinned by many practice directions and protocols which enable the rules to set out “guiding principles” which leave the substantive detail of their implementation to the practice directions and protocols. This has not been the practice in Scotland where the majority of the detail is within the Court Rules themselves. Finally, there are substantially more sets of court rules in the Court of Session and Sheriff Court which would require to be considered as a part of any rules project than there are in England and Wales. Some commentators have expressed views that because of the size of the Scottish jurisdiction a civil court rules revision project would be simple and straightforward compared to England and Wales. I do not share this view.

3. Did you have sufficient time to contribute to the consultation exercise?
   Yes

**Costs**

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
The financial implications for the implementation of the SCJC reflect the predicted costs. The ultimate costs will depend largely on decision that will be made by the SCJC itself. I understand that the financial assumptions now being made were based on the pre-existing Rules Council costs with some additional provision for the matters such as the appointment of members, consultation and training. I am of the view that implementation and annual costs are accurate.

It is less clear as to whether the financial implications for the organisation in the long term are reliable. The detail of the Court Reforms Bill is substantially unknown. Until the Council is established we cannot know how the Bill will be implemented through Court Rules.

5. Do you consider that the estimated costs and savings set out in the Financial Memorandum, and the timescale over which they are projected, are reasonable and accurate?
Yes

6. If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
Without the increases in fees proposed, to which I referred in answer to Question 2, I do not believe that it will be possible to fund the creation of the SCJC as envisaged by this Bill. I would share the concerns of my predecessor regarding the funding of the SCJC. The SCJC cannot come into operation in the absence of additional funding.

7. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
Yes

8. Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
I believe that the costs of setting up the SCJC, early work in implementing the reforms by preparing the necessary rules and rule revisions, and eventual likely ‘steady state’ operation have been as accurately assessed as is possible at this stage.

9. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation? If so, is it possible to quantify the costs?
I do not foresee additional costs beyond those shown, but much will depend on the content of the main legislation and on how the Council will implement it.
Background
This response is restricted to Part 1 of the Bill, with reference to the proposed establishment of the Scottish Civil Justice Council.

Under the terms of the Judiciary and Courts (Scotland) Act 2008, the SCS is responsible for supporting the work of Scotland’s courts and the judiciary of those courts. This includes responsibility for providing administrative support for the current Court of Session Rules Council and Sheriff Court Rules Council. It is proposed that the SCS will be responsible for providing administrative support and funding for the operation of the new Scottish Civil Justice Council (SCJC).

Consultation
1. **Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?**
   Yes. The SCS responded to the Scottish Government’s *Consultation on the Creation of a Scottish Civil Justice Council*. The SCS noted that provision for any additional costs associated with establishing the SCJC in place of the existing Rules Councils was not included with the SCS’s existing budget allocations and appropriate funding would need to be identified. Such additional funding could come either from Scottish Government or additional income, for example from court fees. The SCS also noted in dialogue with Scottish Government officials that funding for the SCJC must be consistent with the anticipated scope of responsibilities of the Council.

Scottish Ministers are consulting currently on proposed Fee Orders for setting court fee levels in the current and subsequent two financial years. This includes proposals for above inflation increases in fees. Inflationary increases to fees are required to meet the SCS’s baseline costs. The SCS Board has indicated that any income above inflation over the next 3 years will be directed towards the transitional costs associated with civil courts reform, including additional costs associated with the SCJC. If the proposed fee orders were not progressed or not approved by Parliament, there would be no financial provision available to meet the additional costs of establishing the SCJC.

2. **Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**
The financial assumptions made within the Financial Memorandum reflect accurately the current costs to the SCS of supporting the work of the Court of Session Rules Council and Sheriff Court Rules Council. They also anticipate some additional costs associated with the SCJC.
It is not known what the final proposed programme of activity for the SCJC will be either with reference to the initial review of rules or longer term activity. The Bill places on the SCJC new, wider responsibilities for keeping the civil justice system under review and for developing proposals for changes to the system. It cannot be certain what the immediate and longer-term priorities of the Council will be. However, we accept that the financial assumptions within the Financial Memorandum aim to provide an accurate assessment of the costs of the Council during its establishment and the period of the initial rules review.

3. Did you have sufficient time to contribute to the consultation exercise?  
Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
Yes. As noted above, we accept that the Financial Memorandum aims to provide an accurate assessment of costs during the initial establishment of the SCJC and review of rules.

The reforms to Scotland’s civil courts arising from the recommendations in the *Review of Scotland’s Civil Courts* will have much wider practical and financial implications for the operation and administration of Scotland’s courts. Some of these changes offer the potential for financial savings, others will impose additional costs. Changes to jurisdiction limits will have implications for the income available to the SCS from court fees. These wider financial implications will need to be considered as part of the preparations for legislation to implement Scottish Ministers’ proposals for civil courts reform. This should include consideration of the future costs associated with supporting the work of the SCJC beyond its initial period of operation.

5. Do you consider that the estimated costs and savings set out in the Financial Memorandum, and the timescale over which they are projected, are reasonable and accurate?  
Yes, with the qualifications set out above.

6. If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
As noted above, no provision for any additional costs associated with establishing the SCJC in place of the existing Rules Councils is available within the current SCS budget. The SCS is taking forward measures to respond to reductions in both its revenue and capital budgets arising from Scottish Ministers’ 2011 Spending Review. The SCS has indicated to Scottish Government officials that, without additional funding from court fees, above inflationary increases, the SCS could not meet the additional financial costs of the SCJC.
7. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
Yes, with the qualifications set out above.

8. Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
Yes, with the qualifications set out above.

9. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation? If so, is it possible to quantify the costs?
As noted above, future costs will depend on the programme of activity for the SCJC determined by the Lord President and the Council, once established. It is not possible to identify or quantify any additional costs at this time, although these are likely to be considered as part of future legislation to implement civil courts reform.
Part 1 – Scottish Civil Justice Council Consultation
1. Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
The Scottish Legal Aid Board did respond to the Scottish Government’s consultation on the creation of a Scottish Civil Justice Council. The Board did not comment on any financial assumptions made.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
N/A

3. Did you have sufficient time to contribute to the consultation exercise?
Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
We do not believe that this Part of the Bill has any financial implications for the Board.

Part 2 – Criminal Legal Assistance Consultation
1. Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
The Scottish Legal Aid Board did not submit a response to the Scottish Government’s consultation on criminal contributions. However, we worked closely with the Scottish Government both on the development of the proposals contained in the consultation and subsequently on the development of the provisions reflected in the Bill. As part of this process, the Board has advised the Scottish Government as to the basis for the financial assumptions made in the Bill. While the assumptions are the Scottish Government’s, they are informed by analysis undertaken by the Board.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
Yes. The Financial Memorandum sets out estimates of both costs and savings flowing from Part 2 of the Bill. We believe the costs to be an accurate reflection of our advice to the Scottish Government on the impact on the Board. The savings figures accurately reflect the maximum savings we believe could flow from the
eligibility and contributions regime created by the Bill and illustrated in the Policy Memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?
Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
The provisions of the Bill will lead to additional costs for the Board associated with a small increase in the number of staff required to assess and collect contributions. These costs are accurately reflected in the Financial Memorandum.

5. Do you consider that the estimated costs and savings set out in the Financial Memorandum, and the timescale over which they are projected, are reasonable and accurate?
The Bill itself does not set out precise arrangements for calculation of eligibility or contributions. However, the Policy Memorandum sets out an illustrative set of arrangements. The Board carried out modelling of these arrangements and provided to Scottish Government the figures set out in the Financial Memorandum. The Financial Memorandum accurately sets out the likely maximum level of savings that could flow from the eligibility and contributions regime created by the Bill and illustrated in the Policy Memorandum.

6. If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
The Board's grant-in-aid, which covers its administration costs, is under considerable pressure. The Board's Administrative budget was frozen at the 2007/08 level for four years, before being reduced, in 2011-2012 by £1.1m. The Scottish Government's spending plans for the period 2012-2013 to 2014-2015 set out further reductions in the Board's administration budget over the next three years, totalling £1.3m. This challenge is heightened by inflationary pressure, additional responsibilities (notably around changes to children’s legal aid) and by the need to utilise staff resource to deliver on our commitment to a wide range of developments associated with delivery of legal aid savings. However, the Board continues to make efficiency savings to further reduce its running costs. While recognising that it will undoubtedly add considerably to existing pressures, the Board should be able to absorb the additional costs associated with the introduction of contributions, assuming that current plans to deliver required savings are successful and no other unanticipated additional costs arise over the period.

7. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
As noted above, the figures in the Financial Memorandum were modelled by the Board. This modelling included calculation of the time lag between the measures being introduced and savings arising. We are confident that this modelling is accurate and the stated timescales for achieving savings are realistic.
As for margins of uncertainty, the Committee will note that the FM sets out the maximum savings that would be achieved by the scheme described in the Policy Memorandum. Should the parameters of that scheme change prior to implementation, clearly the level of savings achievable would also vary.

The FM sets out the basis on which the savings were modelled and makes clear that a declining trend in grants of criminal legal assistance would reduce the savings. Similarly, some limitations in the Board’s data are noted. While these have been taken into account in the modelling, the results should be viewed as a best estimate of the savings achievable. In particular, should current data on applicant outgoings be less complete than estimated, savings will be lower. Conversely, if current data is more complete than estimated, savings will be higher. Finally, as the table in the FM is designed to illustrate the maximum savings possible, they assume collection in full whereas in practice some degree of non-collection is inevitable. This would have a relatively minor impact on the overall figures, however, as it only applies to those contributions to be collected by the Board; for summary and ABWOR cases, non-collection by the solicitor of some or all of the contribution has no impact on the saving to the public purse.

The savings figures are therefore predicated both on the specific scheme set out in the Policy Memorandum, but also the Bill being passed as introduced. In particular, should the provisions relating to the collection of contributions as between solicitors and the Board be changed during the Bill’s passage, this could have a major impact on the savings achievable. This is for three main reasons: First, if the Board were to be responsible for collection in summary criminal cases, any extent of non-collection would impact on savings. Second, the considerably higher volume of summary cases would lead to substantial additional costs for the Board, far in excess of those identified in the Financial Memorandum associated with the assessment and collection of contributions in solemn and appeal cases. The Board would be unable to absorb these costs within its projected resources. Finally, if the Board were to collect contributions in summary criminal legal aid cases but solicitors continue to collect contributions in ABWOR cases (as at present), a perverse incentive would be introduced that might lead to fewer cases proceeding under ABWOR. This would have the twin effect of placing more demand on the Board to collect summary criminal legal aid contributions and also, very significantly, reducing the number of cases in which accused plead guilty, reversing the advances made in this regard in the four years since summary justice reform. This would lead to additional costs not only for legal aid but for the rest of the criminal justice system.

Wider Issues

8. Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
We believe that all costs are reasonably captured.

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?
No.
Subordinate Legislation Committee

38th Report, 2012 (Session 4)

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Published by the Scottish Parliament on 27 June 2012
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:
Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Michael McMahon
John Pentland
John Scott

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Rob Littlejohn

Support Manager
Daren Pratt
Subordinate Legislation Committee

38th Report, 2012 (Session 4)

Scottish Civil Justice Council and Criminal Legal Assistance Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 12 and 26 June 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Scottish Civil Justice Council and Criminal Legal Assistance Bill¹ (“the Bill”) at Stage 1. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill was introduced in the Parliament on 2 May 2012 by Kenny MacAskill MSP. It is a Government Bill which establishes the Scottish Civil Justice Council and makes provision about contributions in respect of criminal legal assistance.

3. The Scottish Government has provided a Delegated Powers Memorandum (DPM)² setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.

4. In the consideration of the memorandum at its meeting on 12 June, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers. This correspondence is reproduced in the Annex.

DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers provisions in the Bill.

---

¹ Scottish Civil Justice Council and Civil Legal Assistance Bill. Available at: http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd.pdf

² Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/DPM.pdf
6. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 6, 17 (inserting new section 8A(1A) of the Legal Aid (Scotland) Act 1986, 18(1) (inserting new section 9(2)(dda) of that Act, section 20 (inserting new section 25AD of that Act), section 22 (inserting new section 33ZA of that Act), section 23(4), section 23(5), section 23(9), and section 25.

7. The Committee’s comments and, where appropriate, recommendations on the other delegated powers are detailed below.

Section 18(2) – new section 9B of the 1986 Act (scheme of eligibility)

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Legal Aid Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>scheme (not by Scottish statutory instrument)</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>no parliamentary procedure</td>
</tr>
</tbody>
</table>

Power conferred on: the Scottish Ministers
Power exercisable by: directions
Parliamentary procedure: no parliamentary procedure

Background

8. The delegated power which is inserted by section 9(2)(dda) of the 1986 Act will enable the Scottish Ministers to disapply the existing eligibility criteria for assistance by way of representation (“ABWOR”) and replace them with the criteria in sections 9A and 11A of the 1986 Act. One of the criteria in section 9A(2)(a) is that the scheme of eligibility provides that the fees and outlays of the ABWOR cannot be met without undue hardship to the client or the dependants of the client. “Scheme of eligibility” means a scheme approved under section 9B(3).

9. Section 9B(1) makes provision for the preparation and publication of a scheme of eligibility by the Scottish Legal Aid Board (“the Board”). It is to set out the financial circumstances which the Board considers would constitute undue hardship for a client or the dependants of that client if they were required to meet the fees and outlays in respect of ABWOR. The scheme requires to be submitted to the Scottish Ministers for approval (section 9B(2)) and they may approve it with or without modification (section 9B(3)). Provision is also made for the Ministers to approve a modification to an approved scheme, or to withdraw approval at any time (section 9B(4)).

10. Separately, the Scottish Ministers may give the Board directions as to the preparation and publication of a scheme of eligibility, and the Board must comply with those directions (section 9B(5)).

Scheme of eligibility

11. The Committee asked the Scottish Government to explain why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given its stated position (in paragraph 17 of the DPM) that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny. As noted above, the Scottish Government response is set out in the Annex.
12. Section 9B involves the delegation of power to the Board to prepare and publish the scheme of eligibility, subject to approval of the scheme by the Scottish Ministers. That delegation is not by way of a power to make subordinate legislation. As a result, the scheme of eligibility will not be subject to any parliamentary procedure. It will not be laid before the Parliament and it is not subject to the usual publication requirements for Scottish statutory instruments, although the scheme is required to be published in some form.

13. The response to the Committee explained that the intention underlying the new section 9A(1) of the 1986 Act is that the solicitor acting will have discretion to carry out the assessment of undue hardship. In turn, it is intended that the scheme setting out the financial circumstances which consist of undue hardship will be within the Board’s discretion to define, from time to time. This will be subject to approval of (and possible later withdrawal by) the Scottish Ministers. This is intended to be analogous to the Board’s existing non-statutory guidance which is issued on undue hardship in relation to criminal legal aid cases. The scheme will require to be rather complex. It may set out other circumstances which may amount to undue financial hardship, apart from an applicant’s income level. The scheme is intended to take into account information on average case costs, and could summarise what is treated as income and capital, when calculating a particular applicant's resources.

14. The Committee noted, however, that the Scottish Government’s response did not offer a satisfactory explanation why making the scheme by Scottish statutory instrument would not be sufficiently flexible to enable the ABWOR scheme to operate. It also did not offer an explanation why it is not appropriate that the Parliament should be required to approve, or have power to annul, the scheme. The statement of the circumstances which amount to undue hardship has significant consequences for the operation of the ABWOR arrangements and the payments which will be made to applicants. One of the criteria for ABWOR to be available in terms of the inserted section 9A(1) and (2) is that the solicitor is to be satisfied that the fees and outlays of the assistance cannot be met without the undue hardship.

15. The Committee also noted that what a scheme will set out is defined in the inserted section 9B(1). It is to set out the financial circumstances in which the Board considers that paying the fees and outlays in respect of assistance by way of representation will result in undue hardship for a client or their dependants. That provision does not include discretionary elements within it. The scheme is proposed to define the relevant financial circumstances which amount to undue hardship.

16. The Committee also noted that it would appear to be technically possible to provide that the scheme could be made in the form of a Scottish statutory instrument, whether made by the Board with approval of the Scottish Ministers or made by the Ministers.

Conclusion

17. The Committee considers that the proposed power to make a scheme of eligibility is a power of significance which it appears could be expressed as a power to make subordinate legislation by means of making a Scottish statutory
instrument. The Committee considers that the Scottish Government has not justified in satisfactory terms within the DPM, or in response to the questions raised, why the power to make this scheme should not be subject to the approval of the Parliament. The Committee would accept that if there are good reasons why the scheme should not be subject to the affirmative procedure but rather the negative procedure – for example, that a modification could be required within the dates when the Parliament is in recess – then it is possible that the negative procedure could be applied as suitable for scrutiny of the scheme. However, taking into account the Government’s response on this power, the Committee’s view is that the scheme should at least be capable of annulment by the Parliament.

18. The Committee considers that the power in section 18(2) (inserting section 9B of the 1986 Act) enabling the Scottish Legal Aid Board to make a scheme of eligibility with the approval of the Scottish Ministers is a significant power which would be more appropriately expressed as a power to make subordinate legislation, by means of a Scottish statutory instrument. The Committee considers that, unless there is good reason to the contrary, a draft scheme should be laid subject to affirmative procedure.

19. The Committee accordingly asks the Scottish Government to consider this further in advance of Stage 2. It also requests that the Government indicates in response to this report whether it considers that any difficulties would arise with the suggestion that the scheme could be subject to the affirmative procedure.

Direction-making power in the inserted section 9B(5) of the 1986 Act
20. The Committee also asked the Scottish Government to explain why the direction-making power in the inserted section 9B(5) of the 1986 Act is necessary, given its extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility.

21. The Scottish Government’s response explains that the proposed direction-making power is not intended to amount to any further powers of the Scottish Ministers to modify the contents of the scheme. It is intended to enable directions on the procedural matters of possible consultation requirements when preparing the draft scheme, or the method of publication.

22. The Committee is satisfied that this power of direction should not be exercisable in the form of a Scottish statutory instrument. However, the Committee considers that this power in the inserted section 9B(5) is generally framed to permit any directions which the Board must comply with in the course of preparing and publishing the scheme.

23. The Scottish Government’s response to the Committee has clarified that the power is intended to cover any consultation or method of publication (and so procedural) requirements only. From the viewpoint of users’ understanding and accessibility of this provision, the Committee considers that the Scottish Government should consider in advance of Stage 2 of the Bill whether the power to direct in the inserted section 9B(5) could be more clearly or narrowly drawn, so that the power enables directions on consultation, method of publication or other procedural requirements.
24. The Committee therefore recommends that the Scottish Government should consider in advance of Stage 2 of the Bill whether the power of direction in section 9B(5) of the 1986 Act (inserted by section 18(2)) should be more clearly or narrowly drawn. The Scottish Government has indicated to the Committee that this power is intended to relate to consultation, method of publication or other procedural arrangements in preparing and publishing the scheme of eligibility, rather than generally allow any direction which the Board must comply with in carrying out such preparation and publication.

Section 24 – ancillary provision

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure</td>
</tr>
</tbody>
</table>

Background

25. Section 6 of the Bill specifies the composition of the Scottish Civil Justice Council, in terms of maximum number of members and categories of members. Section 6(3) enables the Scottish Ministers to vary by order the maximum number of members on the Council, and to vary the minimum number in a category of membership. This power has attached to it its own ancillary provision in section 6(5). This permits the making of such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

26. It is expressly provided, however, in section 6(6) that these powers may not be used to modify the description of a category of membership or to add a category of membership. Section 6(4) requires the Ministers to consult with the Lord President before making an order under section 6(3).

27. Section 24 contains general ancillary powers for the Bill. Section 24(1) allows the Scottish Ministers to make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Bill. Section 24(2) provides that such an order may make different provision for different purposes. Section 24(3) provides that this power may be used to modify this or any other enactment. Section 24(5) provides that, where the power is exercised so as to amend any part of the text of an Act, then the affirmative procedure applies. Otherwise, negative procedure applies.

28. The Committee accepted those scrutiny procedures applying to the powers.

29. The Committee asked the Scottish Government whether, given the existence of the specific power in section 6(3) to modify that section and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24. It also asked whether, if that is not the case, the Scottish Government intends to exclude the possibility of using an order under section 24 to modify section 6.
30. As noted above, the Scottish Government’s response is reproduced in the Annex.

Comments
31. On the face of it, section 24 may modify any provision of the Bill, including section 6. Section 6(3) confers a very specific power to modify aspects of section 6. Section 6(6) is then expressed as a specific limitation on that power: it does not include power to modify the description of a category of membership or to add a new category. The response by the Scottish Government acknowledges that an order under section 24 which purported to augment the power in section 6(3) by modifying categories of membership would circumvent the clear intent of section 6(6), and would be contrary to the Act. The Committee welcomes this view. However, it observes that the views and intentions of the present administration cannot be determinative of the matter when the unrestricted section 24 power will appear on the statute book until it is repealed, and so will be available to any future administration, including one which took a different approach to this matter.

32. For this reason, and from the viewpoint of the reader and in the interests of the accessibility of the provisions, the Committee considers that it would be preferable to put the matter beyond doubt by providing that an ancillary order under section 24 should not be capable of modifying or repealing the specific exclusion made by section 6(6) on the categories of membership.

33. The Committee considers that it should be made clearer within section 24 that the powers in that section to make ancillary provisions for the purposes of or in connection with the Bill do not include the power to modify or repeal the specific restriction which is contained in section 6(6), as to the description of the categories of membership of the Scottish Civil Justice Council.
Correspondence with the Scottish Government

On 12 June 2012, the Subordinate Legislation Committee wrote to the Scottish Government as follows:

Scottish Civil Justice Council and Criminal Legal Assistance Bill at Stage 1

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 12 June and seeks an explanation of the following matters:

   Section 18(2) – new section 9B of the 1986 Act (scheme of eligibility)
   Power conferred on: the Scottish Legal Aid Board
   Power exercisable by: scheme
   Parliamentary procedure: no parliamentary procedure

   Power conferred on: the Scottish Ministers
   Power exercisable by: directions
   Parliamentary procedure: no parliamentary procedure

2. Section 18(2), which inserts new section 9B into the Legal Aid (Scotland) Act 1986, enables the Scottish Ministers to disapply the existing eligibility criteria for assistance by way of representation.

3. A new scheme of eligibility, prepared and published by the Scottish Legal Aid Board, would have to meet certain criteria, including on the avoidance of undue hardship to clients or their dependants. Separately, the Scottish Ministers may give the Board directions as to the preparation and publication of a scheme of eligibility, and the Board must comply with those directions.

4. The Committee asks the Scottish Ministers to explain:
   - why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given their stated position that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny; and
   - why the direction-making power in section 9B(5) of the 1986 Act is necessary, given the Scottish Ministers’ extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility?

Section 24 – Ancillary provision
Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure

5. Section 24 allows the Scottish Ministers to make such ancillary provision as they consider necessary or expedient for the purposes of or in connection with this
Bill. However, there is an overlap between this provision and the bespoke ancillary powers provision in section 6(5), which may be used when making provision under section 6(3) on the number of members of the Scottish Civil Justice Council.

6. The Committee asks the Scottish Government:
   - whether, given the existence of the specific power in section 6(3) to modify that section, and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24; and
   - if that is not the case, whether it intends to exclude the possibility of using an order under section 24 to modify section 6.

On 19 June 2012, the Scottish Government responded as follows:

Section 18(2) – new section 9B of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”)

You have asked that the Scottish Government explain why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given our stated position is that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny; and why the direction-making power in section 9B(5) of the 1986 Act is necessary, given the Scottish Ministers’ extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility.

In answer to the first part of the question, the Scottish Legal Aid Board (“the Board”) currently applies the ‘undue hardship’ financial eligibility test in relation to summary and solemn criminal legal aid applications and in doing so has discretion about what constitutes ‘undue hardship’ in each and every application. The Board requires this discretion as application of the ‘undue hardship’ test is very dependant on an individual’s case and circumstances. The Scottish Ministers are prevented under section 3 of the 1986 Act from giving any directions to the Board in relation to individual cases.

The Board currently issues guidance to the profession on how it applies the undue hardship test to applications for criminal legal aid and the kind of factors it takes into consideration. This guidance is non-statutory. Its status as guidance allows the Board to be as specific as it can be, in order to assist and inform practitioners, without limiting its discretion to consider all the circumstances of a case. Being guidance the Board can also alter it as necessary to reflect changes in what it considers would be undue hardship, for example as a result of changing financial circumstances in Scotland generally.

At present solicitors assess financial eligibility for Assistance By Way of Representation (“ABWOR”) in certain criminal manners, most notably where a plea of guilty has been tendered. In carrying out the financial assessment, solicitors refer to regulations which prescribe what is counted as capital and
income and other figures that are fixed by the Scottish Government and set out in the Board’s Advice and Assistance Keycard ("the Keycard").

Section 18 of the Bill inserts a new section 9A into the 1986 Act which provides for a new financial eligibility test for certain criminal ABWOR proceedings to be based on undue hardship. The assessment of undue hardship will be carried out by the solicitor. The Bill proposes that a scheme of eligibility ("the scheme"), which would be analogous to the Board’s existing non-statutory guidance for criminal legal aid cases, would be prepared and published by the Board and would be used by solicitors where applying the undue hardship test. However, section 18 also provides for a new regulation making power which will allow Scottish Ministers to prescribe the proceedings in which the new provisions about criminal ABWOR are to apply. These regulations will be subject to the affirmative procedure thereby ensuring thorough Parliamentary scrutiny.

Scottish Government officials have been discussing with the Board what will be in the scheme of eligibility. The scheme will probably be similar in approach to the ABWOR Keycard currently available to practitioners and the non-statutory guidance for criminal legal aid cases. It is expected that the scheme will set out when discretion may be exercised to grant criminal ABWOR even where the applicant appears to have too much income. This could occur where there are other circumstances of the case which would mean that undue hardship would be caused if criminal ABWOR were not provided. This discretion will only be exercised by the Board upon an application made to them either by the solicitor or the applicant. The scheme will include information on average case costs, so that a practitioner can factor in the likely total cost of a case in assessing the undue hardship of the applicant paying for his/her own representation. It is likely that the scheme will also summarise what is provided for in regulations about what should be treated as capital and income when calculating an applicant’s financial resources.

In answer to the second part of the question, the powers of Scottish Ministers to approve, reject or modify a scheme (under section 9B(4)) are different to the power (in section 9B(5)) to make directions about the preparation or publication of a scheme. For example, Scottish Ministers might direct the Board to consult with the Law Society of Scotland when preparing the scheme, or to publish the scheme in a particular way to ensure the widest possible knowledge of it. The direction making power could be used to achieve both these things.

Section 24 – Ancillary provision

You have also asked whether, given the existence of the specific power in section 6(3) to modify that section, and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24; and if that is not the case, whether the Scottish Government intends to exclude the possibility of using an order under section 24 to modify section 6.

In response, it is considered that it would be possible for the order making power in section 24 to be used to modify any of the sections of the Act including section 6.
provided that any modifications are consistent with the power in section 24 – necessary or expedient for the purposes of or in connection with the Act.

However, the power in section 24 must be read in the light of other specific provisions and powers in the Bill. In particular, the general power’s applicability will be excluded in any instance where there is a specific power which already makes similar provision.

Section 6 provides a specific order making power for use in amending the numbers in any membership category in section 6(1). The Scottish Government considers that section 24 could therefore not be used to amend section 6(1) in the same way as section 6(3) provides. Similarly, the Scottish Government considers that the power in section 24 could not be used to amend out the specific limitation contained in section 6(3). An order under section 24 is to be used only “for the purposes of or in connection with the Act”. It is clear that the Act, in being explicit in section 6(6) as to the limitation on the use of the order making power in section 6(3), does not envisage the use of the power in section 6(3) to effect the modification or addition of a category of membership. Accordingly the Scottish Government is of the view that any order under section 24 which purported to augment the power in section 6(3) by modifying categories of membership would circumvent the clear intent of section 6(6) and would be contrary to the Act and not within the powers in section 24.

The Scottish Government does not consider that it is necessary to exclude the possibility of using section 24 in different circumstances relevant to section 6 as the position is covered adequately by the normal rules of statutory interpretation.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

10:00

The Convener: Item 2 is our first evidence session for stage 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Today, we will concentrate on part 1.

I welcome to the meeting Gemma Crompton, who is policy manager at Consumer Focus Scotland; Professor Tom Mullen, from the University of Glasgow school of law; Professor Alan Paterson, from the University of Strathclyde school of law; and Alan Rogerson, who is vice-chairman of the Forum of Scottish Claims Managers. I thank you for your useful written submissions. We will move straight to questions from members. Humza?

Humza Yousaf (Glasgow) (SNP): Thank you very much, convener.

The Convener: I am very impressed, Humza. He is very alert this morning.

Humza Yousaf: Well, you looked my way, convener.

The Convener: So, you thought that you should respond.

Humza Yousaf: I thought that you were giving me the nod to go ahead. It was either that or I was in trouble for something. I thought that I would take my chances.

The Convener: I was not rebuking you, by the way. It is too early for rebukes—I am saving them for later.

Humza Yousaf: I thank the panel for their extremely useful submissions, a common thread in which is the Scottish civil justice council’s composition and membership. The majority of the panel are angling for 50:50 representation between the legal profession and judiciary, and those who represent other interests. How can that balance be achieved? How, for example, would we be able to cover, and ensure that the views are taken into account of, all the various users and sectoral interest groups without leaving out and offending some? How could we do that without making the panel so big that it becomes cumbersome, cannot do its work and cannot reach a common position on anything? To strike such a balance is difficult with any board, so I wonder whether strengthening sub-committees and using them frequently might be a way forward.

The Convener: Before I let the witnesses answer, I remind you that you should self-
nominate—as it were—in responding. If you wish to respond, please indicate as much. Your microphone will come on automatically.

**Professor Alan Paterson (University of Strathclyde School of Law):** First of all, on behalf of the senior public law professors whom Professor Mullen and I are representing, I thank the committee for the invitation to give evidence this morning.

We endorse the suggestion on the use of subcommittees or committees. We note that, as well as having a policy and advisory role, the proposed council will replace the rules councils and will set rules itself, so we think that the best approach is to have the committees that deal with such matters comprise more lawyers and judges, but also to ensure that representation on the council is near parity between practising lawyers and judges and other stakeholder groups. We concede that that will be difficult to manage, but we feel that it should be done through the public appointments process. I am sure that we will discuss that process and our concerns about it shortly.

**Gemma Crompton (Consumer Focus Scotland):** As we say in our submission, Consumer Focus Scotland thinks that the user interest is critical in all of this. Because the courts and, indeed, the wider civil justice system provide a public service, we really think that the council should have a very strong representation from users.

In our submission, we suggest that the membership criteria be examined. Given that there are criteria for consumer representatives, we think that there is reason to consider whether the bill could set out additional criteria to ensure representation from a wider range of users.

**The Convener:** What criteria should be included?

**Gemma Crompton:** We have suggested, and think it important, that the council include someone who has knowledge and background experience of alternative forms of dispute resolution, because the council will have to regard to the need to promote means of dispute resolution other than the courts.

One could read the bill’s reference to “consumer representative members” as including members of the public, and there is a need to look more widely at membership from business users. Local authorities also have a key role in all this.

The wording in the bill is that the two consumer representative members of the council need to have

“an awareness of the interests of litigants in the civil courts”.

Perhaps that point could be expanded to ensure that the range of litigants in the civil courts is represented on the council.

**Humza Yousaf:** You think that those users and litigants should not be specified in the bill, but that there should be flexibility. Perhaps it would be up to the chair—we can discuss that later. You think a requirement for more laypersons should be included on the face of the bill, if I can put it that way. My worry is about how to represent businesses, family litigants and consumers without making the council far too extensive.

**Gemma Crompton:** The number of council members needs to be increased. At the moment, the council is required to have at least two consumer representative members. We would like that to be increased to ensure sufficient flexibility to include a variety of kinds of members.

I understand your point that if we are too specific some people could be excluded, which could be criticised by some interests. On membership of the Civil Justice Council in England and Wales, the wording is to do with the interests of litigants—including, I think, members of the public and business users. The wording in the bill could be expanded slightly.

However, as Alan Paterson said, there is the option of using sub-committees. People who feel that they are not being included in the council could have the opportunity to offer input in that way.

**Professor Tom Mullen (University of Glasgow School of Law):** On the council becoming so large that it is unwieldy, that is dealt with by Professor Paterson’s point that people can work through committees as well as through the full council. In particular, when the council is exercising the function of drafting rules of court it could have a rule-drafting committee that would include people who are not members of the full council. That committee—because of the technical expertise that would be required—might have a higher proportion of lawyers than a committee that was oriented more towards general civil justice policy, although there are policy issues when it comes to rules, too.

On the structure of the current section 6 in the bill, although it is appropriate to have certain types of people specified as members of the council—including consumer representatives—that specification could be backed up with a more general formula. As the composition of the council stands, there is in the bill a reference in section 6(1)(i) to six other people

“considered by the Lord President to be suitable”

... to be members, but there is no further specification; it is purely at the discretion of the

...
Lord President. That could be amended to say that the choice of people for the six additional positions should take into account the diverse range of court users. That would give the flexibility to represent the full range of users without tying things down too much. Having six wholly unspecified people is not the appropriate way to draft that section.

The Convener: Would you settle for 20 council members who could break off into sub-committees to deal with specific issues, with the committees being drawn from those 20 members?

Professor Mullen: The bill allows people to be members of a committee without being full members of the council.

The Convener: Okay.

Professor Mullen: I will follow up on the point about the balance between lay and legal members. At the moment, we have an effective guarantee of five judges and four other lawyers on the council. That seems to be too many—at least symbolically—given the important public interest in the operation of the civil justice system. I question whether we need to specify automatic membership for quite so many judges and lawyers. As Professor Paterson and I have already said, additional lawyers could be included on the committee that takes the lead in drafting rules. That would cater for concerns that the council did not include sufficient technical legal expertise.

Alan Rogerson (Forum of Scottish Claims Managers): To add to that, it is important to have a balance in general—not just when it comes to the representation of court users. If we are going to reform the civil justice system, we need people who have experience of what happens before the court system takes over as well. That is where Gemma Crompton’s point about alternative dispute resolution comes in, because that is also important.

I agree with Professor Mullen that the issue can be resolved through a simple amendment to the bill to define more clearly who should form the civil justice council. We should not look at the issue from the perspective that we cannot be more inclusive in case we alienate some court users. We should be as inclusive as possible, but within reason. There is a balance to be struck between the non-legal users and the legal users, if you like.

The Convener: What problems does the way in which the courts operate create for non-legal users? What are the issues that the council is set to cure? It would be useful to know that.

Alan Rogerson: The legal system can be criticised for the delays that exist within it. The Gill review recognised that it needs to be reformed; the best way to reform it is to ensure that groups that are affected are included in the reform so that they buy in to changes. We can thereby ensure that the court system is fit for purpose.

The Forum of Scottish Claims Managers agreed pre-action protocols with the Law Society of Scotland through negotiation, and those protocols form a sort of framework for dealing with personal injury claims. However, things are a little disjointed, because the pre-action protocols do not fit with how the legal system works—there is a gap between the two. With a civil justice council that looks at such things together, we will have a system that fits together.

The Convener: In what ways do they not fit together? What is the missing link?

Alan Rogerson: The missing link is that there is no sanction on parties for not complying with the protocols. I am talking not just about solicitors and claimant solicitors, but about insurers. The first port of call is the courts, but the courts will ask what the parties have done to resolve the matter before they get to litigation. We believe that there should be a focus on that.

Professor Paterson: The Gill review was the first review of the system of civil justice for many years. The idea behind the creation of a civil justice council is to have a body that will help with oversight of implementation of the Gill review, to monitor how it works, and to keep the fairness and efficacy of the civil justice system under continual review so that it will not be necessary to have another large-scale review in 10 years. The Government must speak for itself but, as I understand it, that is its intention.

The Convener: The civil justice system is a moving feast, as it were.

Gemma Crompton: The Gill review found that the courts are slow, inefficient and costly and that they are not delivering the quality of justice to which the public are entitled.

It is important to note that the focus of the bill is wider than just the courts. It takes a whole-system approach, and the policy memorandum explains that it is intended to encompass things such as advice, alternative dispute resolution, how the system works as a whole, and how the different elements complement each other. Given the general shift towards preventative spending, steps to ensure that things do not go to court if they can be resolved earlier in a different and more effective way are a real benefit, and such work will lead to marked improvements in the system.

John Finnie (Highlands and Islands) (SNP): My question is for Professor Mullen and/or Professor Paterson. It builds on the comments in your written submission about the status and composition of the proposed civil justice council. In the final paragraph, you state that the council
“is to be a statutory advisory body rather than the advisory non-departmental public body”

that was proposed. You go on to mention the difference between the two in respect of accountability mechanisms. What, if any, would be the shortfall in accountability mechanisms under the proposed model? Do you see any conflict between those accountability mechanisms and the accountability that each individual member of the council may or may not have to the body that would put them there?

10:15

Professor Paterson: On the first question, the Gill review recommended that the council be a non-departmental public body. We, too, recommend that it be an NDPB, because it is to be an arm’s-length publicly funded body with a policy and advisory remit. Therefore, it will be an NDPB in all but name; it is just not to be called an NDPB. Whatever it is called, we believe that it should have the accountability mechanism of a public body, and should have fair, open and transparent public appointment procedures that comply with the guidelines that are set down by the Public Appointments Commissioner for Scotland. Such procedures are standard for appointments to public bodies such as the Scottish Legal Aid Board, the Judicial Appointments Board for Scotland and the Scottish Legal Complaints Commission. We think that appointments to the proposed new body should be made in the same way.

The English equivalent is the Civil Justice Council, the judicial members of which—those from the High Court of Justice and below—go through exactly that process, which involves open invitations to apply, competence-based application forms, shortlisting, interviewing, a fair and open process and equal opportunities. All the normal standard public appointments procedures apply in relation to appointments to that body; we think that they should apply here.

John Finnie: Are there any other accountability mechanisms, apart from the one to do with appointments, that you feel are not picked up by the proposal?

Professor Paterson: Provision is made for an annual report to be made to Parliament, which is another of the standard accountability mechanisms. We approve of that. Consumer Focus Scotland proposes that, in addition, an annual report be made to the Lord President. We think that that, too, is a perfectly sensible idea.

The Convener: Professor Mullen, you were named. Do you wish to respond?

Professor Mullen: I add that, at the moment, section 7 says that the Lord President should publish a statement of appointment practice, but that is insufficiently specific. The only guidance that is given is that the Faculty of Advocates, the council of the Law Society and ministers should be consulted, on the basis that they will make appointments to the council. There is no statement of the principles. As Professor Paterson said, it is important that the standard principles for public appointments be followed, so there must be some mechanism for ensuring that that happens. At the very least, we hope that section 7 will be expanded to ensure that the basic accepted principles of public appointments will apply.

Gemma Crompton: We share that view. We think that appointments need to be made with reference to fair and open competition and best practice in public appointments and that, as Alan Paterson said, the appointment process should be extended to cover members of the judiciary, rather than just the advocate, solicitor, consumer representative and Lord President members.

Roderick Campbell (North East Fife) (SNP): I probably just require expansion of what has already been said, but I would like to press you a bit further on what role—if any—the Lord President should have in relation to what are described as the “LP members”. Should the appointment of those members be delegated to the political forum, subject to the comments that have been made about appointment? Is it right that the Lord President will have involvement in relation to LP members, who may or may not be judicial?

Professor Paterson: As far as our group is concerned, we were slightly surprised that the proposal was not that the Lord President and Government ministers—who both have an interest in policy in this area—would make the appointments jointly. It is not the same to say that the Lord President will make them in consultation with the Government, because “consultation” could mean, “We’ve heard what you say, but we’ll just appoint these people anyway.” I am not saying that that would be the position, but a requirement to consult is not enough; it is not the same as appointments being made jointly. We think joint appointment is a possibility. From our point of view, the crucial thing is the adoption of public appointment procedures. In some ways, who does the appointing will be less significant if the public appointment procedures are adopted, because they are what will get fairness and accountability into the system.

Gemma Crompton: The issue comes back to the point that all of us have made, which is that there is a need for transparency in relation to the LP members. It is a case of identifying from the get-go what knowledge and expertise are required on the council and using those members to ensure
that the council has that expertise, rather than just appointing them on a discretionary basis.

Roderick Campbell: Is there a need for a prescribed role for representatives of insurers, for example, and also possibly of trade unions?

Alan Rogerson: Yes. There should be a balance. My organisation does not represent only insurers; we also represent local authorities. I accept that if insurers are represented, it is only right that trade unions also be represented in order to ensure that any new rules are fit for everybody.

Professor Paterson: That takes us back to the first question that we were asked. There is a case for trade union appointments and for insurer appointments. The Civil Justice Council in England and Wales has an insurer, somebody from the trade unions, consumer representatives and academics. The question is whether we should stipulate that there will be representatives from each of those groups, in which case the question that will be asked is, “Where do you stop?”

We would be better to try to understand the breadth and diversity that we are looking for and expect that there will be people from each of those sectors, and academia—there is normally an academic member in the council down south. However, that does not necessarily have to be stipulated. We have mentioned Consumer Focus Scotland and Citizens Advice Scotland—I declare an interest, in that I have a link with Citizens Advice Scotland—but that is not to say that those bodies must have places; it is to say that, if there is one recognised consumer body in the field, it must have a strong argument for being represented, whether or not that is set out in the bill.

Roderick Campbell: Can any of the witnesses give the committee the benefit of their knowledge and understanding of the working of the alternative dispute resolution sub-committee of the English Civil Justice Council, given that there is to be a major push towards alternative dispute resolution?

Professor Mullen: I cannot comment in detail, but I certainly support the idea that alternative dispute resolution should be within the remit of the Scottish civil justice council. The use that could and should be made of alternative dispute resolution is the type of policy development that we hope the civil justice council will consider.

Professor Paterson: That comes back to a point that I made earlier. The English council works through committees, and not all the committee members are members of the council. That is the sensible approach. In the Scottish council, the membership of the committees can be adjusted to take account of issues whereas, for the overall council, the balance between practising lawyers and judges on the one hand and other stakeholders such as consumers and users, on the other, should be nearer to parity. That would not necessarily be the case on each sub-committee.

The Convener: There would be specialisms.

Professor Paterson: Yes.

Graeme Pearson (South Scotland) (Lab): I understand the clamour to be represented at the table in the council—we have heard evidence this morning about the number of people who want to be there. As someone who has limited experience of civil justice, my question is basic. In the light of the Gill review, and looking at the remit that has been set out for the council and the principles by which it will operate, based on your experience, will the council be capable of improving civil justice as is necessary?

The policy memorandum gives an indication that the work is expected to be unpaid, although section 10 mentions expenses and remuneration. It seems to me that the people who will be involved will be fairly busy folk who have more than full-time jobs already. Do you believe that, when we bring those people together in the council, it will be fit for purpose and will deliver for Scottish civil justice?

Professor Paterson: There were two points to be made on that, I think. We have been arguing for more parity between practising lawyers and judges and other stakeholders because—as we read the bill—there is nothing to prevent all 20 members of the council from being practising lawyers or judges. That is not what we think is intended, but there is nothing to prevent it. That should not be the position and, if it were, the council would certainly not be fit for purpose, which is why we are arguing for more user and consumer advice representatives and other stakeholders to be involved. We think that the overall policy advisory role requires that.

There is provision that some of the judges and civil servants will not receive additional remuneration. I do not see why that should rule out a daily rate for our stakeholders, such as is received by members of the Scottish Legal Aid Board, the Scottish Legal Complaints Commission and the Judicial Appointments Board, all of which are public bodies that do similar things.

Professor Mullen: The ability of the council to operate effectively will not depend exclusively on remuneration. Many stakeholders have strong incentives to put their views into the system, and will do that regardless of remuneration or expenses. The key is to ensure that participation is genuinely open to a wide range of stakeholders.

Gemma Crompton: We echo those comments and we support members’ remuneration where
appropriate, because we think that it will open up membership. It is important to note that it is not just about the members of the council; it is about the secretariat. It is essential that the council be given sufficient resources for staffing and money to undertake its functions, in order to ensure that it is able to deliver what is intended.

Alan Rogerson: The composition of the council is key. If the right people are in place on the council, the council will be able to make real change. The more change it can make, the more it will be seen as an important body. It is right to get the composition correct first. We do not have a strong position on remuneration because, as my colleagues have said, if we have the right people, everything else will follow.

Graeme Pearson: To some extent, the remuneration element is a red herring. It is really about having the time, energy and wherewithal to make changes. The experience noted by the Gill review was that the system was not well placed to invite change—it was not a great system for moving forward in any kind of modernisation programme. Will the council have the energy and the ability to deliver, given the nature of the people who may be on it?

The Convener: That is a bit unkind, given that we do not know who the people will be.

Graeme Pearson: Once the group has been brought together, will it have the energy and the power to change the system?

The Convener: Are you one of the people with the energy and the character for this, Professor Mullen? That is quite a question, is it not?

Graeme Pearson: Professor Mullen will get the point that I am making.

Professor Mullen: Yes, I do.

Graeme Pearson: There is no point in just having a commission, giving it a great title and all the rest of it, if nothing changes.

Professor Mullen: Indeed. You have to look at the council’s actual powers. It should be possible to get together a group of people who have the energy and ability to consider well and give good advice on policy, but the remit will stop at giving advice on policy. The part of the remit in which you can really expect the council to deliver is the rule drafting. The council will recommend rules to the court, which, in the normal course of events, the court will adopt and enact. You can expect the making of rules of court to work.

Only a minister can deliver on the more general policy function, and that is why I find some of the current drafting rather odd. Section 2 says that the council’s functions include providing advice to the Lord President generally, but also providing advice on any matter "requested by the Lord President."

The council has a general duty to advise the Lord President and it has a duty to respond to specific requests from the Lord President. For example, the Lord President may ask the council to investigate a particular topic, such as whether there are further possibilities for introducing mediation into the system. When we come to the relationship with Government, we see instead that the council has a power, but not a duty, to make recommendations to ministers. There is no mention of the minister or ministers requesting the council to look at things. That is slightly odd because, as I have said before, in the last analysis civil justice policy is for ministers. The bill as drafted does not seem to recognise that. There ought to be a duty and not simply a power to provide advice to ministers.

It would also be appropriate to include a provision that ministers could invite the council to look at a particular matter, and the council would then have a duty to do so. That would make the policy advice function more effective. Whether that is translated into better civil justice is down to the Parliament in terms of legislation and the ministers in terms of the implementation of legislation.

The Convener: Sorry, would that be section 3?

Professor Mullen: It would involve amending sections 2 and 3 to include in the duties a duty to advise ministers as well as the Lord President, and a duty to respond to a specific invitation from the minister to look at a particular matter.

The Convener: It would mean changing the word “may” to something more powerful, such as “shall” or “must”.

Professor Mullen: Yes.

10:30

Professor Paterson: Just to add to that, we think that the need to ensure that the civil justice system is “fair, accessible and efficient” should be a function rather than a principle, as it is in the English council.

The Convener: Alison McInnes has a supplementary. Is it on payment?

Alison McInnes (North East Scotland) (LD): No. I wanted to pick up on something that Ms Crompton said about the secretariat.

The Convener: That is fine.

Alison McInnes: Ms Crompton mentioned the need to resource the council properly. Perhaps it would be appropriate to explore that a bit further. The financial memorandum that accompanies the
bill suggests that the council would need 5.5 to 11 members of staff. Would that be sufficient to deal with what is, in effect, a large remit that has been given to the organisation?

**Gemma Crompton:** It is quite difficult to answer that. Obviously, it is an increase on the resources that the current rules councils have. There is a general recognition that certainly in the short term, a significant amount of resources will be required for the drafting and implementation of the rules. As the council gets its policy functions, it might need different kinds of staff. I am not sure that we are best placed to answer whether the numbers that are in the financial memorandum are appropriate, but we make the general point that the council needs to be sufficiently resourced.

We have noticed that the financial memorandum does not mention any resources being designated to things such as research for the council. In the explanatory notes, that is one of the powers that the Government envisages for the council. That is not expressly mentioned as one of its powers—we would like it to be added.

**Professor Mullen:** It would be useful to include in the bill a statement that the council is empowered to carry out research. Of course, whether it can do so practically will depend entirely on the funding that the Scottish Government makes available to it. In addition, there should be a specific power for the council to propose topics for research. That means that if research budgets are effectively kept within the Scottish Government and not transferred to arm’s-length bodies, at least there is a guaranteed input to Government decision making on what gets researched.

**Jenny Marra (North East Scotland) (Lab):** I would like to skip back a wee bit to Graeme Pearson’s point. I think that he was thinking along the same lines as me, but I wanted to expand on his question about personnel fulfilling the function. Earlier, Professor Paterson talked about the Gill review and how we did not want to come back in 10 years and have to do such a review again. Is the bill sufficient to address that? Are there any omissions in the bill or do you have any suggestions for things that would make it better?

**Professor Paterson:** I am in danger of repeating myself. It really depends on who is appointed to the council. If the council follows the route that we have suggested, which gets nearer to parity between the practising lawyers and judges on the one hand, and the other stakeholders on the other hand, and if it is properly resourced and works through sub-committees in which we can bring in a better mix of specialisms, it will have a better chance of keeping an eye on what is needed by the civil justice system and the users, consumers and advice organisations and so on. If the council is predominantly composed of practising lawyers and judges and so on, we do not think that it will be fit for purpose in 10 years.

**Jenny Marra:** So it is just the personnel who are key.

**Professor Paterson:** Proper resources, personnel and focus are key.

**Professor Mullen:** If I can risk stating the obvious and make the link between the appointment process and getting the right people, following the standard public appointment process means creating clear job specifications in advance for the members of the council and having open advertisement of positions. That allows anyone with the right expertise to know that the positions are available and to put themselves forward.

**Gemma Crompton:** We share the same idea about the council being 50:50 lawyer and non-lawyer. In addition, it is essential to consider the way in which the council undertakes its functions. We would like the council to have to adhere to the principle of proactive engagement with a full range of stakeholders so that it proactively engages with everyone who has an interest in the system, including users.

We established the civil justice advisory group, chaired by Lord Coulsfield, and a couple of years ago we held a seminar that brought together a range of interests from members of the judiciary through to court users to consider some of the recommendations of the civil courts review. That was recognised to be a useful thing to do. One of the group’s recommendations was that such work should continue. It is not just about who is on the council, but about how the council does its work.

**The Convener:** Colin Keir is next, to be followed by Roderick Campbell.

**Colin Keir (Edinburgh Western) (SNP):** I think that Mr Rogerson wanted to speak.

**The Convener:** I am so sorry. Do not take it personally.

**Alan Rogerson:** I will not, do not worry.

To return to Mr Pearson’s point about the clamour of stakeholders to give evidence, that gives a flavour for the appetite that stakeholders have for the civil justice council. If we ensure that the right people are on the council, and as long as the council has the correct remit to do the job, we will get what we need to ensure that there is no Gill review in another 10 years.

**The Convener:** I think that we have got that message, and the message that there are too many lawyers. I think that I have heard that before. Perhaps there are too many lawyers on this committee.

**Humza Yousaf:** Hear, hear.
Colin Keir: I seek clarification on Consumer Focus’s written submission. Paragraph 22 says that CFS believes “the Court of Session should be able to reject or modify the rules proposed by the SCJC only when the proposed rules fail to meet certain identified principles”, and it carries on to give some examples.

I am a little bit unsure whether you are looking for a prescriptive approach in which the examples would be written down, and that would form the basis of any review, or whether you want to leave it open to the Court of Session to deal with.

Gemma Crompton: The point is about transparency, and it goes back to my point about the way in which the council will undertake its functions. We hope that it will be open and inclusive and engage a wide range of users, and that any rules or proposals that it comes up with will be well informed by those interests.

I do not think that we necessarily want the criteria to be included in the bill. We want there to be a clear rationale for when the Court of Session modifies or rejects the rules that are made by the council, so that that is done for specified reasons and those reasons are given to the council.

Colin Keir: I was just trying to work out whether we were being asked to lay down the only set of reasons that the Court of Session would be able to use, or whether someone is looking at something and saying that, in their view, it can be taken forward. I do not think that your submission is terribly clear.

Gemma Crompton: I do not think that we want that laid down in the bill, but it would be useful to have it intimated somewhere. The suggestions that we have come up with would apply, for example, if the rules were disproportionate or incompatible with other rules, or not competent. There should be criteria so that, if the Court of Session rejects the rules, it is for those reasons and they are communicated to the council.

The Convener: Incompetent rules—that is dynamite. The courts will be shaking at the thought that they might have incompetent rules.

Colin Keir: I was merely thinking that a lot of these things are subjective.

Roderick Campbell: Will the Lord President have too much control in the proposed structure? Consumer Focus questioned whether the Lord President should be a member of the Scottish civil justice council at all. Has the bill got the balance right in relation to the Lord President’s functions?

Gemma Crompton: We do not dispute that the Lord President will have a key role in relation to the council. However, given that the civil justice system is a public service, there is a clear public interest and the council must be seen to be transparent and accountable. When we consider the range of roles that the Lord President will have in relation to the council, we think that there needs to be separation between the role and functions of the Lord President and the role and functions of the council.

It is clear from the policy memorandum that the Government intends the council to be accountable to the Lord President. We are concerned that the Lord President will 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. There is a need to review the roles and responsibilities of the Lord President and the council, to ensure that there is clearer separation between the two.

The Convener: Something that niggles at me in that regard is that under subsection (2) of section 9, “Disqualification and removal from office”, “The Lord President may, by notice in writing, remove any member appointed under section 7(1) if satisfied that the member—

(a) is unfit to be a member by reason of inability, neglect of duty or misbehaviour, or

(b) is otherwise unsuitable to continue as a member”.

There is a caveat that requires the Lord President to consult a consumer representative member or one of the LP members, but the Lord President will have quite a lot of power. Will there be any comeback for someone who is sacked in that way? Is the provision okay?

Professor Paterson: I have not been able to check this, but I think that the provision is fairly standard in relation to members of other public appointments boards. What is different in this context is that the Lord President will chair the board, which gets us into the question about separation of functions.

On the wider question, this and other issues were discussed at a Chatham house event, at which many stakeholders were present. There was a feeling that the system in England, whereby the Master of the Rolls—who is practically the most senior civil judge—chairs the Civil Justice Council, has worked well.

We do not see why the deputy chair should not be a layperson or non-practising lawyer or judge, and we do not quite understand why the bill is so specific about that. If a layperson must chair the Judicial Appointments Board for Scotland, must chair the Scottish Legal Complaints Commission and may chair the SLAB, why cannot a layperson even be a depute chair of the Scottish civil justice council? We did not understand that argument.
The Convener: I think that you said that in your written submission. However, are you content with section 9(2)?

Professor Paterson: I can see the problem that you are raising. I think that part of the issue is that the provision is standard for public bodies. However, the Scottish civil justice council will be a public body in which the Lord President is more involved.

The Convener: That is the point that I was making.

Professor Mullen: You asked whether a person who thought that they had been removed unfairly would have any comeback. There would be the possibility of seeking judicial review of a decision.

The Convener: People do not want to go down the route of judicial review, because it takes a long time and is very expensive. Should the bill provide for another route?

Professor Mullen: The difficulty would be that if we did not want to rely on judicial review we would have to create a statutory right of appeal, and a decision would have to be made about whether appeals would go to a newly invented tribunal or to the courts. That would raise further questions.

The Convener: Instead of leaving the matter in the hands of one person—the Lord President, who could disqualify someone or remove them from office “by notice in writing”—perhaps we could insert something after the provision on consulting, so that the decision was not in the hands of just one man or woman.

Professor Mullen: Section 9(3) states: “The Lord President must consult the Scottish Ministers before removing” consumer representatives or an LP member. That could be amended to say that the provision applied to any member.

10:45

The Convener: That is what I would hope might happen, otherwise it would be hard going for somebody who might suffer an injustice. I am not saying that the Lord President would be guilty of anything in that regard. We must watch what we say, given that the Lord President is coming in front of us.

It seems to me that, as the bill stands, there is no backstop for somebody who might be removed under the section 9(2) provision.

Gemma Crompton: We said in our written submission that a policy should be drafted that would at least identify when the power under section 9(2) would be applied and what rationale would be used.

The Convener: Thank you. I think that I have explored that.

Humza Yousaf has a question.

Humza Yousaf: No, convener. My question was in the same vein as yours.

The Convener: I pre-empted you.

Humza Yousaf: It is the last time that I share my notes with you.

The Convener: The child, the foolish child to say that to me when I am in the chair. I could slip you down the list any time, Humza, and it may just happen.

Humza Yousaf: I hope that you forget post-recess.

The Convener: On that point, is there anything that we have not covered? Matters have been pretty well aired and I think that we have got the general thrust of the witnesses’ arguments.

Oh! It seems that we have not. Two professors are indicating that we have not been astute enough to ask better questions.

Professor Mullen: I am reluctant to detain the committee any longer, but I want to raise briefly the question of administrative justice. The bill’s policy memorandum suggests that the Scottish civil justice council will ultimately take over responsibility for administrative justice, but it also says that that will not happen until judicial leadership for tribunals is transferred to the Lord President. Because there is some uncertainty about the timescale involved, there is a danger of a gap developing.

As the committee knows, the United Kingdom Government intends to abolish the current oversight body, which is the Administrative Justice and Tribunals Council and its Scottish committee. If that happens before judicial leadership is transferred, there will be a gap or period in which there will be no oversight of administrative justice. That area is very important, given not only the number of tribunal decisions that are taken annually but the other aspects of administrative justice, such as the ombudsman, complaints procedures and so forth.

Further, given that the Administrative Justice and Tribunals Council is on the way out, it is less likely to be taken seriously, which means that there could be a period in which not much is done on policy development. The suggestion is that the Scottish civil justice council will not be thinking about administrative justice issues within its first few years, which would be a mistake because there is in fact quite an important connection between what we might call the traditional civil justice forum of the courts and administrative justice. One of the weaknesses of policy making
has been for administrative justice policy—for example, the area of tribunals—to develop along a totally separate track from policy relating to the courts.

I would favour the Government simply saying that as soon as the Scottish civil justice council exists, it will take over the administrative justice portfolio, assuming that by that time the Administrative Justice and Tribunals Council has been disappeared. If the UK Government changes its mind and does not abolish the Administrative Justice and Tribunals Council, we might need to reconsider matters. However, there needs to be a clear commitment that as soon as the AJTC goes, its function is picked up by the Scottish civil justice council.

The Convener: Which would be—I am being a bit thick here—a bit of a change, because much of the tribunal process and legislation is reserved.

Professor Mullen: Some of it is reserved, but some of it is devolved: for example, anything to do with children’s hearings or mental health.

The Convener: Or education hearings.

Professor Mullen: Yes. All that is devolved at the moment. The boundary between what is reserved and what is devolved is becoming more fluid, because the UK Government has indicated that it would be happy for reserved tribunals to be, in effect, administered in Scotland in the future by Scottish bodies.

The Convener: That would include employment tribunals and so on.

Professor Mullen: Even if the basic legislation remained UK legislation, the UK Government would be happy for such matters to be administered in Scotland. The tribunal administration for everything that happened in Scotland would be unified, in the way that the court administration has now been unified.

The Convener: Thank you for clarifying that. Does Professor Paterson want to add to that or talk about something else?

Professor Paterson: I have a slightly different point. I will go back to earlier remarks and give clarification on a point that is common ground among all the witnesses—I think that because we discussed it earlier—but which has not come out in the evidence.

Legislators struggle with the meaning of the word “lawyer”. Many good people in the insurance and advice sectors and in the consumer movement have law degrees or even have legal qualifications but do not practise. Such individuals cannot be council members because they are not practising lawyers or judges. The definition of a lawyer is unclear.

The Convener: That point is helpful—I understand it. Is that everything?

Gemma Crompton: I have a couple of points.

The Convener: I should never say that we have reached the end, because everybody always has something else to say, but that is fine. I do not doubt that Mr Rogerson has something to say, too—do not disappoint me.

Gemma Crompton: To pick up Tom Mullen’s point, we share the concern about the potential gap between the abolition of the Administrative Justice and Tribunals Council and the civil justice council picking up the administrative justice functions, particularly as the civil justice council is intended to pick up those functions after the tribunals have undergone a reform process. We are worried about a potential gap while the tribunal system is reviewed and reformed.

Alan Paterson made a point about who will chair the civil justice council. We want the provisions on that to be reviewed. It is not necessary for the chair and the deputy to be members of the judiciary—we would like that to be opened up.

I touched on the need for the council to be open and accessible to a wide range of interests that go beyond the council’s membership. Ideally, we would like the fact that the council should improve the system to the benefit of its users to be included in the principles that underpin the council, along with the fact that it should engage fully with a wide range of interests in not just the court system but the wider civil justice system.

Alan Rogerson: I think that I have got my point across in the main.

The Convener: But you could not resist speaking.

Alan Rogerson: Being inclusive of users is the best way forward. We are looking at the whole civil justice system and not just the court system—that should be the council’s focus.

The Convener: I think that we will call it the not-too-many-lawyers council.

I thank the witnesses for their helpful evidence.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

10:02

The Convener: Item 2 is our second evidence session on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Today, we will concentrate on part 1 of the bill.

I welcome to the meeting the Lord President and Lord Justice General, the right hon Lord Gill, who is accompanied by his legal secretary, Kathryn MacGregor. I invite Lord Gill to make a short opening statement.

Lord Gill (Lord President and Lord Justice General): I am very grateful to the committee for the opportunity to address part 1 of the bill.

We are just beginning a remarkable process of legislative reform in Scotland that will profoundly affect civil justice for—I believe—the benefit of the whole system. The Scottish civil courts review was the first major exercise of its kind for more than a century, and the bill marks the first stage of the implementation of the review’s recommendations in legislation.

I have seen many law reform projects run into the sand during my career, but my colleagues and I, who carried out the civil courts review, are gratified by the Scottish Government’s positive response to our recommendations and the prompt and committed way in which it has proceeded to implementation.

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.

I am pleased that this part of the programme has been devised in such a positive spirit, and I hope that the Scottish Government will continue to legislate in the same spirit at later stages of the programme of implementation. I will be happy to answer any questions from the committee in relation to part 1 of the bill.

David McLetchie (Lothian) (Con): Good morning, Lord Gill. It is inevitable that when a new body is being set up many of the representations to the committee are about who will be on that body and who will be chair. This is no exception. For example, the Law Society of Scotland suggested that the representation of the solicitor branch of the profession is being considerably reduced compared with its input to the current rules councils, which are being absorbed into the new council.

Other bodies, such as Scottish Women’s Aid, suggest that there is insufficient representation, from a user standpoint, of people involved in family law issues—obviously abuse may be a part of that. We have had insurers saying that they are major users of the court system and suggesting that their input would be valuable in determining rules and procedures. Will you comment on some of the apparent omissions that have been brought to our attention? What is your general view of the proposals for the composition of the new body?

Lord Gill: I would not see those as being omissions as the use of that term suggests that such interest groups would be excluded and, as far as I am concerned, that is not the case. In primary legislation of this kind, it would not be appropriate to be too specific or to itemise 20 representatives of various interest groups for a council of no more than 20 members. That would deprive us of the flexibility that is needed in setting up such a council.

As far as I can see, the list of people who have to be on the council is entirely appropriate. However, there is plenty of flexibility in paragraph (d) of section 6(1), under which there is to be a member appointed by the Scottish ministers. Furthermore, to comply with the requirements of paragraph (h) of section 6(1), there are to be two persons known as consumer representative members. There is also a catch-all at the end of section 6(1), under which up to six members can be appointed by the Lord President. As I envisage it, in the process of setting up the council there will be an opportunity to consider exactly which spread of interest groups would be most appropriate.

I envisage a process of publicly advertised appointments to the council. My experience has been that when you advertise and invite applications you tend to find that some remarkably suitable candidates emerge from quite unexpected quarters. At this stage, I do not think that we can say that any of the interest groups that Mr McLetchie has mentioned will not be appropriately represented on the council.
David McLetchie: Do you have any idea of the sort of people who might comprise the six-pack that you will appoint when the body is set up? Will they represent user groups other than members of the legal profession? Will the balance between representatives and members of the legal profession be as is provided in the bill, with other user groups being represented in the six?

Lord Gill: I do not quite see it in that way. At this stage, it would be wrong for me to reach any hard and fast conclusions about who should be any of the six people who could be appointed under paragraph (i) of section 6(1), but obviously one would look to canvas the widest possible range of relevant interests. At the end of the day, a great deal of the council's work will be quite technical because it will involve the drafting of rules. In the early stages of civil court reforms, the drafting of rules will be a substantial project and, for that, we will need strong legal representation on the council.

I entirely accept that it is desirable that a wide range of interest groups and users of the system be represented, and I am confident that they will be.

Graeme Pearson: My question follows on from some of the points that David McLetchie has made. There has been a lot of conversation in the committee about members appointed by the Lord President and what that means. Although you have indicated that you do not want to identify particular groups at this stage, outwith the technical element of the council, what kind of skills will you be looking for in the people who might join you as selected LP members?

Lord Gill: One would certainly consider users of the system and the various interest groups. As you can see, consumer representation is written into the bill in section 6(1)(h). The answer to Mr Pearson's question about the LP six is that we will look for people who have experience in business and commerce, such as economists and people like that. I am not trying to tie my own hands at this stage but we will look for the widest possible range of relevant skills.

The council will obviously have to draw up budgets and some sort of corporate plan, so we will look for people who also have experience of that work.

I emphasise that I would not exclude anyone at this stage.

Graeme Pearson: That is a nice position to be in, I am sure.

Some concerns have been raised about the ability of lay members to influence the council, especially given the fact that it will be heavily populated by people who have a good technical understanding of the system. Some have commented that a lay person should be the chair or at least the vice chair. What is your response to such a proposal? How do you see the lay influence playing out in the council?

Lord Gill: 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.

10:15

Graeme Pearson: You would expect, and one would hope, that it will be important that the people who use the courts—the lay element that we discussed—should see a change in the culture, because there has been some disquiet at the previous lack of reform. They want to see that change implemented and brought in through the council. Do you see that as an important part of the chair's responsibilities?

Lord Gill: Absolutely. If you read my introduction to the report on the civil courts review, you cannot be in any doubt about where my sympathies lie and what I would like to see from the civil justice system. So far, I have been dealing only with questions of technical draftsmanship of rules, but another important part of the civil justice council's work will be the formulation of policy: the sort of system we want to have, how we want it to work and whose interests we want to protect. Those are all matters of policy where lay input is vital.

The Convener: You have touched on policy. How does that match the fact that Government ministers and Parliament agree policy matters? How will that approach work with your relationship with Government?

Lord Gill: It is not entirely a straightforward matter for Government, because the rule-making powers in, say, the Court of Session are statutorily conferred by the Court of Session Act 1988 on the court itself. Rules are not imposed externally on the civil courts; the civil courts devise their own rules in the light of their appreciation of current needs. That will continue to be the case with the
civil justice council because it will not be imposing rules on the courts; it will be making recommendations. However, it is obvious to me that the process by which those recommendations will be reached will involve input from the judges anyway, so I do not see any risk of conflict in that matter.

**John Finnie (Highlands and Islands) (SNP):**
Good morning, Lord Gill. On the question of the appointment process, there is a requirement in the bill that you “must prepare and publish a statement of appointment practice”.

The committee has received a lot of evidence about the appointment process and, in particular, the desire that we all have for it to be open and transparent. Might that be achieved by having the appointment practice that you adopt follow the principles of the Office of the Commissioner for Public Appointments in Scotland? Supplementary to that, do you agree that a written procedure for removal of people from office would cover the aspect of open and transparent governance?

**Lord Gill:** 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.

**John Finnie:** Can you clarify whether that would also apply to removal from office?

**Lord Gill:** The question of removal is rather different. The appointment itself will set out what is expected of members by way of their commitment to the work, attendance at meetings, and so on. It is obviously essential to appoint people who can be depended on to commit themselves fully to the council’s work, and that will be part of the selection process.

My experience of the public bodies on which I have had the privilege of sitting is that the question of a member’s removal arises seldom, if ever, because—again in my experience—people who do public service do so in a committed way. As a result, I do not think that one needs to be too prescriptive about rules for removal, although the matter can be discussed in due course.

**Jenny Marra:** I want to return to the issue of policy, which you touched on. The thing that jumped out at me from the bill is that civil justice policy should be part of the remit of Government ministers and be subject to the scrutiny of a democratically elected Parliament. Will you expand on your definition of policy? What scope will the new body have with regard to a policy remit?

**Lord Gill:** You are absolutely right to suggest that justice policy is entirely a matter for the Parliament. Of course, the recommendations in the civil courts review report make it very clear that the major proposals will require primary legislation, which is what we are discussing this morning.

When I was speaking about the rules councils, I was referring to policy in a rather different sense. At present, when Parliament decides the courts’ structure and the remedies that the courts can grant, it is for the rules councils to decide how to make that work in practice under the rules of court relating to time limits, the documents that must be lodged and so on. These are all detailed matters of practice, and it was policy in that respect that I was talking about.

**Jenny Marra:** So you were talking about policy in relation to the rules.

**Lord Gill:** Yes.

**Jenny Marra:** In that case, do you agree that the bill is a bit ambiguous in that respect and might need to be tightened up?

**Lord Gill:** I do not think so. In part 1, for example, section 3 makes the council’s powers very clear and section 2 contains broad general statements about the council’s functions. As you will see, the council will not only “keep the civil justice system under review” and “review the practice and procedure” but “prepare and submit ... draft ... procedure rules” and give “advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system”.

I envisage that, under that power, the council might in future recommend that the jurisdiction of a certain court be enlarged or reduced or that certain types of cases be transferred to the sheriff court or to the Court of Session. That sort of thing is envisaged under section 2(1)(d). I am quite happy with that provision, because it not only gives a great deal of flexibility but ensures that the council is not buried in rules, as it were, and can stand back from the system and see how it can be improved.

At the end of the day, of course, the council can only make recommendations; it is for Parliament to decide whether they should be implemented.
The Convener: Does your question follow on from that, Roderick?

Roderick Campbell: Well—

The Convener: I do not know what that gesture means. Does it mean “sort of”?

Roderick Campbell: Yes, convener. It is about the operation of the rules.

You have already touched on this, Lord Gill, but in one or two submissions people have suggested that the Court of Session’s powers be curtailed with regard to taking a view on any draft rules that might be presented. Can you put a bit more flesh on how the draft rules produced by the new council—and their presentation, under section 4, to the court for approval, rejection or amendment—might operate in practice?

Lord Gill: I do not foresee the slightest difficulty in that. The council will have a strong representation of judges, the bar, the solicitor profession and the various interest groups that we talked about earlier. Before a recommendation goes from the council to the Court of Session—

The Convener: Forgive me. I wonder whether it would be useful for Roderick Campbell to say that he is still in the Faculty of Advocates.

Roderick Campbell: Sorry. For the record, I should have declared my interest as a member of the Faculty of Advocates.

The Convener: It is belt and braces, just to make him—

David McLetchie: More deferential.

The Convener: You are very naughty. We have missed you. Mr McLetchie, behave.

Roderick Campbell: Sorry, Lord Gill.

Lord Gill: What I was trying to say is that, by the time a recommendation emerges from the council, it will have gone through extensive discussion by people on the council who have considerable knowledge and experience of the matter. There will have been strong judicial input, and 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. However, the language of recommendation has to be used for the technical reason that, under the Court of Session Act 1988, it is the court that makes the rules.

The Convener: Thank you for that. I apologise for the interruption. We have just come back and heads are not together yet. Mine is not, anyway.

Humza Yousaf has been very patient—

Humza Yousaf (Glasgow) (SNP): It is most unlike me.

The Convener: —which is unusual, but there you go.

Humza Yousaf: Yes, I know. Thank you, convener.

Good morning. I want to move on to the specific issue of alternative dispute resolution, or ADR. In the written submissions that we have received, the proposals have largely got a positive write-up and a positive welcome, but one or two organisations have raised concerns about the idea that ADR should be promoted “where appropriate”, and about what that caveat might mean. In particular, Scottish Women’s Aid made the point that family law cases involving domestic abuse might well be swept into the caveat. Can you give any reassurance on that?

Lord Gill: The question of ADR was specifically considered in the review. For a number of reasons that I need not go into in detail today, we came to the view that it would be wrong to make ADR compulsory in the civil justice system and that everyone should have the right of recourse to the courts. However, we also recognised that, in many cases, ADR is the ideal method of resolving a dispute. As you know, there are some cases that would never be appropriate for ADR, but in my experience there are some cases that are never quite appropriate for the courts. As long as the option of ADR exists, and as long as facilities are made available for it, I think that one has to leave the choice to the profession, to advisers and to the litigants. I cannot see that there is any obstacle in the way of ADR in any of the proposals.

Humza Yousaf: I imagine that we will pursue—

The Convener: Humza, I think that it would be helpful for the record if you said what ADR is.

Humza Yousaf: It is alternative dispute resolution. Sorry—I thought that I said that.

The Convener: Thank you. Other people might not have known what it is.

Humza Yousaf: I understand exactly what you are saying, Lord Gill, but I wonder whether those who have been involved in domestic abuse cases would say that the courts and the legal profession have not dealt with such cases as well as they could or should have done. It might be that they welcome the reforms for precisely the reason that they might enforce a culture change, if nothing else. Perhaps you could expand on exactly how the “where appropriate” caveat will be determined. Will it be through solicitors or advocates, or will it be done through litigants themselves? If it is the latter, we can see exactly where the concerns arise.
10:30

Lord Gill: Unless there is a rigid rule that every dispute that comes before the court must be subject to ADR in the first instance—that is a possible way to approach it—the only way is through the encouragement of ADR by the court and the provision of facilities for ADR should the parties wish to resort to it. We were keen in our report to ensure that there should be facilities for ADR in the courts. I cannot see that there is anything in the proposals that would in any way inhibit that. It could be that, in due course, the civil justice council will recommend rules that provide for the consideration of ADR at an early stage in the resolution of a dispute.

Humza Yousaf: Much of what you say is perfectly logical, but I wonder whether the culture change has to come from lawyers and solicitors. Some of the evidence that we got, particularly from Scottish Women’s Aid, was that lawyers were suggesting—mainly to women—that if a person chose not to take part in a dispute resolution mechanism, they would be seen as being unreasonable, obstructive and perhaps even hostile by the courts. Do your reforms deal with that?

Lord Gill: I am not aware that that is a problem.

Humza Yousaf: Scottish Women’s Aid has said that it is a problem.

Lord Gill: All I can say is that my hope is that when the recommendations of the review are fully implemented there will be a huge culture change and people will look at the legal and civil justice systems in an entirely new light. The reforms are radical and should alter the climate in which disputes are resolved.

Jenny Marra: I understand that the civil justice council will be funded by increased court fees from civil cases. Is that correct?

Lord Gill: That is the intention.

Jenny Marra: With the new £150,000 threshold for civil cases going to the Court of Session, many more cases—thousands, it has been estimated—will be heard in the sheriff courts each year. If that is the case, will the Scottish civil justice council be properly funded if sheriff courts around Scotland close?

Lord Gill: You are right to say that there is no doubt that there will be a substantial transfer of business from the Court of Session to sheriff courts—that is the intention of the proposals. However, I do not think that it follows that the court fee income, which will fund the council, will necessarily be less. We are providing a specialist national personal injuries court and there will have to be a review of the fee charging for that.

When Sheriff Principal Taylor’s report on litigation funding is published—I expect it to be published soon—that will necessitate a complete review of the whole question of court fees. At this stage, I am not prepared to assume that the income from court fees will be any less as a result of the jurisdiction changes.

Jenny Marra: Will there be a charge for all civil cases, whether they are heard in the Court of Session or in the sheriff court, which will go towards the funding?

Lord Gill: Yes, that is the expectation.

The Convener: I do not know whether you can comment on this, but it is interesting that the Scottish Legal Aid Board’s written submission does not mention the charge, although in many cases it will carry the cost of the increase in fees in legal aid-funded cases.

Lord Gill: I am not fully conversant with how the system works in relation to legal aid, because there have been so many changes to it over the years.

The Convener: I just remark on it because the Scottish Legal Aid Board will be coming before us. If there is not an award of expenses for the legal aid-funded party, the board will meet the cost. The board has not put anything in its submission about additional costs for legal aid. I put that on the record so that the board can respond to it.

Colin Keir (Edinburgh Western) (SNP): Good morning. My question is based on a comment in Citizens Advice Scotland’s written submission about the role of the Lord President. Citizens Advice Scotland reckons that there should be “a clear separation of roles” between the Lord President and the council to ensure impartiality. I do not know whether you have seen the written submission, but it says in effect that there could be a conflict of interest one way or the other. Could you comment on that?

Lord Gill: I can see where the origins of that objection are. However, section 2(1)(d) states that one of the functions of the council is “to provide advice and make recommendations to the Lord President”.

Section 2(1)(e) states that the council’s other function is “to provide such advice on any matter relating to the civil justice system as may be requested by the Lord President.”

I therefore think that the fear that is expressed in that objection is completely overstated.

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.

I currently chair the civil and criminal courts rules councils, which at the moment have the function of providing advice to the Lord President, and that does not cause the slightest problem in practice.

**The Convener:** Humza Yousaf has a supplementary question.

**Humza Yousaf:** I suggest that not every Lord President would be as willing to listen to advice as Lord Gill or some other potential candidates out there might be. To expand on Colin Keir’s point, does there need to be something further in the bill to dampen the potential for conflicts of interest or to provide more checks and balances for the Lord President’s role?

**Lord Gill:** No. 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.

**Alison McInnes (North East Scotland) (LD):** Let us take a moment to explore administrative justice. The policy memorandum proposes that the new council will take over at least some of the responsibilities that the Scottish Committee of the Administrative Justice and Tribunals Council carries out, but the bill does not contain any provisions on that role. Does that proposal need to be explained in the bill?

**Lord Gill:** This is not the correct moment in history to draft legislation on the administrative justice side of the justice system in view of the uncertain future of tribunals in Scotland and in view of resources. I favour our taking one step at a time. The new council’s remit should be restricted to what the bill proposes for the time being. I think that, ultimately, it will be extended to include administrative justice and tribunals, but it would be premature for us to legislate about that at this stage.

**Alison McInnes:** I recognise what you say about such legislation being premature but, if it were to come to pass, would the council be able to balance all those responsibilities properly? You spoke earlier about the heavy workload that it will have in the initial years, such as writing the new rules.

**Lord Gill:** That is why we should keep the council to a fairly restricted remit at present. There is considerable cause for concern that if the council were given far too big a remit, it would be overstretched financially and administratively at an early stage and its resources would be spread too thinly. I am keen for the council to get off to a good start on a clear and defined remit, but I do not exclude the possibility of its being extended in due course. In fact, as I said, I would support the idea.

**The Convener:** There are no further questions from members. I thank Lord Gill very much for attending.

I will suspend the meeting for eight minutes precisely before we move on to the next panel of witnesses.

10:43

*Meeting suspended.*

10:54

*On resuming—*

**The Convener:** I resume the meeting by saying that I cannot count. I was thinking that eight minutes would take us to 11 o’clock, but that is far too long a break for anyone.

I welcome to the meeting our second panel of witnesses, all of whom, I believe, were present for the previous evidence. Lauren Wood is social policy co-ordinator with Citizens Advice Scotland, Ronnie Conway is from the civil justice committee of the Law Society of Scotland, Richard Henderson is the chair of the Scottish Committee of the Administrative Justice and Tribunals Council, and Louise Johnson is national worker on legal issues with Scottish Women’s Aid. I thank you all for your written submissions.

Before we move to questions, I should say to witnesses that if a question is directed specifically at you, your microphone will come on automatically. However, if another witness wishes to come in on a question, they should indicate as much to me and I will call them. No one needs to press anything; everything in here is technologically perfect—I hope that everyone heard that. The light will come on and the microphone will be activated.

I seek questions from members.

**Roderick Campbell:** First of all, I wonder whether the Law Society will comment on my
assessment of the costs of collection with regard to summary legal aid. My understanding is that summary legal aid comes to about £35 million, but the Government estimates that under the new proposals about 80 per cent—

The Convener: Wait, wait, wait.

Roderick Campbell: Am I not being precise, convener?

The Convener: Ronnie Conway is looking a bit discombobulated because the Law Society will come back next week to deal with part 2 of the bill. We are discussing part 1 this morning.

Roderick Campbell: I am sorry, convener. I am having a good morning.

The Convener: Your moment will come next week. We will move on.

Jenny Marra: The two current rules councils deal with a large number of very technical procedures, so how will the proposed structure and membership of the new council be able to handle these changes? I guess that what I am asking about is technical expertise.

Ronnie Conway (Law Society of Scotland): First of all, I thank you for the invitation to address the committee this morning.

Jenny Marra has raised a concern that the Law Society itself has expressed. Under the bill, the Sheriff Court Rules Council and the Court of Session Rules Council will be abolished and replaced by the civil justice council. I understand that concern has been expressed about the number of lawyers that might be on the council, but I think that we should, before we look at what we are getting, think about what we are replacing.

As a Sheriff Court Rules Council member for three sessions—or nine years in total—I should explain the kind of work that a rules council carries out. When primary legislation is passed, either here or at Westminster, it has to be integrated into the existing civil court rules. We get a pile of papers from the draftsperson, and various proposals, then there is a meeting, at which the proposals are nit-picked and quibbled over. The detail is mind numbing; I have to say that it was—even for a lawyer—one of the most boring jobs of my career.

Let me give the committee a taste of the work. The first document that I am holding up is the sheriff court rules, which run to 900 pages, and the other document is the rules of the Court of Session, which run to 2,500 pages. I am in full agreement with Lord Gill’s proposal that the rules be harmonised and be written in English that everyone can understand.

The Convener: Are you saying that not even lawyers can understand the rules? That is breaking news from the Law Society.

Ronnie Conway: I cannot possibly agree with that proposition, but I must admit that, from time to time, the rules are impenetrable, even to lawyers.

My point is that the Lord President has set himself a mammoth task. As well as reforming the system, the civil justice council will have to do all the things that the rules councils do at present. As the Law Society suggests in its submission, that will be a job for technicians for the next five years at least; we think that the committee’s proposed make-up is light on such technicians.

At the risk of offending the Lord President, I say that it appears that there will be too many judges on the council and that we could lose a member of the Faculty of Advocates as well—I am sorry, Mr Campbell.

The Convener: He looks wounded.

11:00

Ronnie Conway: I said that because, although it is all very well to talk about justice being accessible, efficient and fair, with these reforms the key is in the minute particulars. The persons who know about them are those who are doing it day in and day out, and who have learned from the grind of representation and casework. In its written submission, the Law Society has asked for six council members instead of two. Having considered matters—and recognising the disquiet or unease that it might turn into a council of lawyers talking to themselves about themselves—we suggest today that there should be four council members from the Law Society. Those should be drawn from the 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.

I will make specific proposals. First, we should have a member from the claimant side of the profession for personal injury work. Secondly, we should have a member from the defender side of the profession for personal injury work, which makes up a huge proportion of the work of the courts at present. That would also meet the requirement or suggestion that insurers should be represented somehow on the council. Thirdly, there should be a family law representative and a commercial practice representative. Without those placements, I wonder how the detail of the rules will be properly written.

The Convener: Are there not members of the Faculty of Advocates who specialise, as solicitors do?
Ronnie Conway: Some members of the Faculty of Advocates specialise, but there is no suggestion in the bill or in anything that I heard from Lord Gill today that persons other than generalists will be appointed.

Lauren Wood (Citizens Advice Scotland): Thank you for asking CAS to come and give evidence. I will pick up some of the points that Ronnie Conway has made.

There will be a lot of change in all aspects of the civil justice system, particularly over the next five years. The rules will have to be drafted and change will also have to be monitored in terms of implementation of the making justice work programme. Monitoring will concern not just the technicalities, but how implementation has impacted on the professionals who sit in courts as part of the making justice work programme; how alternative dispute resolution and administrative justice have changed as part of the making justice work programme; and how users are accessing the system differently after five years of implementation.

It is perhaps slightly unrealistic to see the council as a body that will have to cope with all those things at the same time. The way to make the fullest use of the council will be to use committees and sub-committees to deal with various aspects of the changes to the landscape; for example, the rules, how users and judges are accessing the new system, and how alternative dispute resolution sits within it. The council could be used more as a facilitator whose role would be to listen to those committees and sub-committees.

The Convener: Is not that possible under section 13(1)?

Lauren Wood: I think that it is possible. In our written submission, CAS welcomes the fact that the bill provides for committees and sub-committees, but discussions about who is going to sit on the council are difficult because there are so many competing interests. At 20 members, the council will have probably the maximum number of members that it should have. If there were any more members, too many different interests would be represented.

One way of making the council function as effectively as possible might therefore be to use section 13(1) and committees and sub-committees to achieve the technical detail that is required for drafting rules, and to achieve the policy and research functions that are an encompassing part of the changing civil justice landscape.

The Convener: I think that that is quite possible under the terms of the bill. We do not have to have 20 people. Section 12(1) says:

“setting up committees and sub-committees. Is your point not dealt with in the bill?

Lauren Wood: I suppose that the point that I am trying to make is that, in arguing for extra members, one thing to remember would be the opportunity to have committees and sub-committees. The extra members might not need to be appointed for the whole length of the time of the council. If we think of the council as a body that will last for the next 20, 30 or 40 years, perhaps extra members who can deal with the initial technical details will not have to be appointed as legislative members but could go on sub-committees.

Louise Johnson (Scottish Women’s Aid): Good morning, convener and committee members. We appreciate the opportunity to speak to you.

On the point about the technical aspects of the civil justice council, it will not exist just to produce rules. Its functions will include working, under section 2,

“to keep the civil justice system under review”

and

“to provide advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system”.

Another of the powers under the bill is to

“provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system”.

Lord Gill has just said—I hope that I am quoting him correctly—that the council will

“lay the foundation ... of other projects and will be the vehicle for all legislative reforms”

to be implemented under the Gill review and the making justice work programme. The council is not going to be just about rules.

There is also a concern that the rules are far too technical; courts and their processes should be accessible, but without being over-simplified. There is certainly merit in having—as my colleague Lauren Wood said—individual sub-committees to deal with those issues, but the overall membership of the council must be able to reflect court users. There is no point in having rules, processes or references to legislation or changes that do not take into account the needs and rights of court users, or on which they have not been consulted. To see the proposed council as being a vehicle for looking only at technical aspects narrows it down; its functions will be much broader than that. In the circumstances, Scottish
Women’s Aid will certainly push for a broader membership.

**Richard Henderson (Scottish Committee of the Administrative Justice and Tribunals Council):** I find myself in a somewhat difficult position in that my council has come before the committee because of what is not in the bill rather than because of what is in it, and the consequences of what is not in the bill becoming part of it mean that we will have to look at the whole structure and nature of administrative justice to see how it can be absorbed into a structure that will deal primarily with civil justice. If the civil justice element of the council is reduced—if I may put it that way—to rule making, it will be much more difficult to broaden the council’s structure appropriately to bring in administrative justice.

**The Convener:** I think, however, that you accept Lord Gill’s point that constitutional issues that are in the air might impact on your area.

**Richard Henderson:** Absolutely. There are many balls in the air at the moment, some of which might land fairly soon—as long as they do not hit me.

**Jenny Marra:** We have had an interesting discussion about the council’s members. I want to play devil’s advocate for a moment. You talked about technical expertise—I appreciate completely that we are talking about complicated stuff. You also held up the book of rules. If the council is comprised completely of lawyers, the rules are less like to be comprehensible to the lay person.

**Ronnie Conway:** I think that you heard what the Lord President said: there is no prospect that the council will be completely comprised of lawyers.

**Jenny Marra:** What about the extra members that you have proposed?

**Ronnie Conway:** I am looking to shove people out of the balloon, so to speak. I do not quibble with the number of lawyers that is proposed in the bill. What I am saying is that the make-up should be different to reflect specialties.

**Jenny Marra:** Given the concerns among people who are not necessarily practising law in that area—you cited the example of insurers and family law practitioners, and people who have legal experience or qualifications in that area, who are perhaps working in different fields now—would it be possible for such people to be part of that council, rather than practitioners themselves?

**Ronnie Conway:** It comes back to what is going to happen over the next five years. If this meeting were to take place five years from now, the answers might be rather different.

Louise Johnson spoke about policy. As the Lord President indicated, policy comes from the Government, first of all. We are not starting with a blank sheet of paper; we have the Gill review, which is—whatever one thinks of the minutiae of it—a tour de force and a tribute to the Lord President’s power of analysis. The review sets out what he wants to have done over the next five years. We are talking about mechanisms that will ensure that that is done for the benefit of the people of Scotland, and a huge element of that relates to the rules.

Before I came here, I wondered whether the Lord President would suggest that we could outsource rules to a rules committee, which is what happens in England, where there is a Civil Justice Council and the Civil Procedure Rule Committee. However, I think that the Gill review says that for reasons of economy everything has to be lumped together.

As I have said, the council will be implementing harmonisation, simplification and so on—it will deal with all the new stuff. However, it will also have to integrate the Gill reforms into rules that are workable. Lawyers have a vested interest in that area, which is that they have a system of rules that is workable for clients and for the people of Scotland. That is such a central point that it would not be appropriate to outsource rules, for example to a sub-committee, and for those rules then to be handed up to a civil justice council that does not have the necessary technical know-how. It is a question of nuts and bolts.

**The Convener:** Forgive me if I summarise this wrongly, but I think that your line is, “Too many judges and too many advocates.”

**Ronnie Conway:** Yes.

**The Convener:** There are practising solicitors who instruct counsel, and those solicitors understand the rules of the Court of Session as well as the sheriff court rules. However, there are lawyers who, because of the areas in which they practise, do not know the Court of Session rules. Such lawyers are similar in many ways but are also different.

What is the problem with having a balance of practising advocates, who would be much more au fait with the Court of Session rules, practising solicitors, who are more au fait with the sheriff court rules, and—I am looking at section 6 on the composition of the council—one judge of the Court of Session and a sheriff principal or sheriff?

Day to day, rules are like the carpenter’s tools; you know what to apply at certain times and you know whether you have applied the wrong thing. If you practise for years, you get to know the rules because it would get you in the soup if you did not. What would be the problem with such a balance? I
was, in my time, a solicitor who instructed the Faculty of Advocates. I will say for the faculty, in its defence, that there are specialists; one goes to certain advocates for certain things—commercial law, family law, delictual actions, reparation or whatever. That seems to me to be a reasonable balance of the technicians, as it were—the people who have to know when to apply the tools that are the rules.

Ronnie Conway: To use your analogy, convener, a carpenter will probably know how to make one kind of thing, I suggested that we are talking about a number of different kinds of things. The main areas—as I indicated—are personal injury, family law and commercial practice. There is no doubt that there are advocates who are specialists, but as far as dealing with day-to-day business—the grind of casework—is concerned, I suggest that solicitors have unparalleled experience and expertise. On the constitution of the current rules councils, there are five solicitors on the Sheriff Court Rules Council and five solicitors on the Court of Session Rules Council, so the proposed change is certainly in favour of the Faculty of Advocates.

11:15

The Convener: I did not think that I would be defending the faculty so robustly, but I am afraid that I have to challenge you. I cannot see how having two practicing advocates and two practicing solicitors on the council is not a balance in the circumstances, when there will also be a Court of Session judge and a sheriff principal or a sheriff, who are all very familiar with their own and the other territories. To suggest that the faculty does not have specialists and does not have specialist knowledge of Court of Session rules, and conversely, that solicitors have specialist knowledge of sheriff court procedure is really quite wrong. In my time, I have certainly found some advocates to be unaware of certain things in sheriff court procedure and, vice versa, I have found some lawyers, especially those from out of town—outside of Edinburgh—to be unaware of Court of Session rules, which they and the faculty have to keep their eye on. I think that there is a reasonable balance, to be frank.

Ronnie Conway: It is a question of how the council is described and who is invited. I suggest that the solicitor profession is underrepresented and that a better balance would be to have four solicitors representing the particular specialties. For example, I made the point about the personal injury bar. No faculty member considers himself or herself to represent the pursuers or the defenders, whereas organisations exist that would represent claimants and defenders. That would be an easy way of getting those interests directly into the council.

The Convener: I do not want this dispute to dominate the meeting, but I disagree quite fundamentally with some of what you have just said.

Roderick Campbell: I am still a bit troubled. You talked about specialist solicitors, but what is there to stop there being a sub-council specialising in, for example, personal injury practice and rules, with a big complement of practicing solicitors of the type that you described—pursuers and defenders? Why could they not contribute on a sub-council basis?

Ronnie Conway: As I said, I expected to hear the Lord President say today that but, there has been no suggestion that sub-councils will be formed in those ways. That would be one way of addressing the problem, but there would still be the difficulty that things would go to the rule-making body, on which there would be generalists who would not really know what they would be signing off. That is really what I am saying.

Graeme Pearson: I will not presuppose the answer to this question; I am speculating on this conversation. Lord Gill, in his review, identified 206 recommendations for improving the administration of civil justice—despite the tomes of rules that you have in front of you. Will the council perhaps have an actual function of changing the experience of the customer—the client group—rather than engaging in the technicalities of the people who are involved as technicians in the system? Will it have not quite the same focus on your rule book, and be more about trying to draw the outcome to counsel’s attention, so that they understand whether or not the system works? Is not that really the function that the council will have, rather than re-writing your rule book?

Ronnie Conway: I am repeating what is said in the bill, Mr Pearson—it is one of the things that the council will be tasked with. The idea that the rules are somehow just technical matters and do not impinge on the customer experience is not correct. It is easy to make rhetorical statements about the need for justice to be fair, accessible, free for all and so on, but it is only once we get down to the minutiae—the minute particulars—that that promise is kept or broken. In my submission, the rules are of critical importance.

Graeme Pearson is right—you heard Lord Gill say that he hoped that there would be a culture change—but I would like to raise two cheers for the civil justice system that we have at present. Not everything that Lord Gill said in his review was critical of that system. There have been two recent reviews by Elaine Samuel, who is a well-known Government researcher. The first was a review of
personal injury procedure in the Court of Session and the result was the best report card that any justice system could ever get. The result was the same with the review of the Glasgow commercial court system. The challenge as far as personal injury is concerned is not to replace what is there, but to replicate it in a different forum—in the sheriff court.

There will be a massive downshift of work from the Court of Session to the sheriff courts. In some respects, that is counterintuitive, because the sheriff courts are where the problems are, at the moment. The sheriff courts do not have the resources, the work is logjammed and there is a culture of delay, adjournment and so on. The idea is for that to get downshifted again to summary sheriffs, which is a massive undertaking. For what it is worth, I think that Lord Gill is entitled to expect much assistance from the people here and from the legal profession to make that work. That is the change in culture and the improvement for the customer that the civil justice council would—one would hope—achieve.

Louise Johnson: It is interesting, following the comment about a change of culture, that one of our concerns is the focus of the work of the council on commercial, personal injury and consumer issues: there has been no mention of family. Given that a major case has just been decided in the United Kingdom Supreme Court—the B v G case, as it is referred to colloquially; I can give the committee its full citation—in which Lord Reed criticised the culture in the Scottish civil justice system and the way in which it approaches family and child welfare, and given that the Sheriff Court Rules Council is looking at child welfare hearings and has been tasked with continuing that work, there will be a strong emphasis on looking not just at the rules, but at the procedures of family law.

The Gill review covered issues such as bar reporters, case management by the judiciary, hearings and agreeing evidence—matters that, technically, are not strictly rules but are procedural, but which affect court users. Whatever the spread in the council, it will be necessary to have, as my colleague Ronnie Conway said, solicitors who are cognisant of the day-to-day running of the sheriff courts—especially if there is a move to bring business down from the Court of Session to the summary sheriffs.

We completely opposed the suggestion that summary sheriffs deal with child welfare hearings, because we saw that as a deprioritising of cases involving children. Regardless of that, a lot more business involving children and families will fall within the ambit of sheriff and sheriff summary courts, so it will be necessary to have professionals who are cognisant of the changes and how to effect them; to have a judiciary, whether Court of Session judges or sheriffs, who can get to grips with those changes; and to have organisations—I make it clear that I am not referring only to Scottish Women’s Aid—that represent court users on family issues. One of our major concerns about the proposals was that they seemed to be heavily loaded towards dealing with consumer and personal injury issues. Family matters, which form a major part of the business of the courts and are incredibly important for the welfare of children, should be prioritised. Any changes must include user involvement.

Lauren Wood: To go back to the point that Mr Pearson made, we said in our submission that we see the body taking “strategic oversight” of the civil justice system as a whole for end-users and practitioners and for the system as it functions and interacts. For us, the experience of end-users is of ultimate importance, but that depends on the experience of the practitioners within the system—whether judges or lawyers—and on the interaction of different tiers of the legal system.

The Gill review and the making justice work programme see alternative dispute resolution as playing a bigger role as part of the civil justice system. We believe that that should be considered from the outset of the civil justice council. In looking at the civil justice system, we should look at not only the Court of Session and the sheriff courts, but administrative justice and alternative dispute resolution, how they fit together and how the experience of practitioners impacts on end-users. The rules are certainly very important for that, but the culture shift is equally very important.

We also see the council as having not just oversight of how things change as the Gill review and the making justice work programme are implemented, but a vital role in a sustainable civil justice system. For such a system, it is important to look at the council as being a thing of longevity. We certainly see it as having not just a rules function but as something that will look at the whole system as it relates to every person who is likely to participate in it and that will look at the system for the long haul.

Richard Henderson: Once again, I am hesitant about entering into the debate, because what I will talk about is simply a possibility. If we begin to talk about administrative justice and tribunals being brought within the purview of a civil justice council, we must ask ourselves what we will bring in. Administrative justice and tribunals are dealt with separately. In this context especially, civil justice is seen as civil courts and civil court reform, down as far as rule making. Administrative justice and tribunals deal with an area of policy making that is quite separate and distinct from civil justice policy making. Administrative justice exists in the context
of the citizen and the state and their disputes, which is where tribunals come in.

The current committee and council are, for example, looking at the principles that should underlie administrative justice. Yesterday, the Scottish committee published a report on decisions for which there is no appeal. In areas such as housing and community care, decisions are taken by Government or Government agencies and no appeal is open to the citizen. That is a pretty sensitive area of policy work, and you need to ask yourself how appropriate it would be for that type of policy work to go to a civil justice council that would start out looking at civil court rules. Is it appropriate or likely that you would get the end result that you might be looking for in a body that is composed principally of lawyers?

**Roderick Campbell:** For the record, I want to follow on from a point that Lauren Wood made. Louise Johnson referred to a Supreme Court case. Perhaps it is important to stress that one of Lord Reed’s comments was that it is rather easier to change the rules of the court than to change a prevailing culture. Do you agree with that?

**Louise Johnson:** Not necessarily. Rules can be changed, but that does not mean that people will follow them. Last Friday, the Murray stable of advocates and the Scottish Child Law Centre held a seminar on those issues. We came to the conclusion that what was needed was not a change in rules, but a change in training and attitude. Rules exist to be followed, but they can be followed only if we have the culture of following them. We can create all the rules that we like but, if people do not want to follow them, there is no point in creating them. The change in attitude is the most important change.

There is no point in reinventing the wheel. We have a wheel, and we need to work with what we have. The issue with B v G and the proposed Scottish civil justice council is that we need to ensure not only that the processes are fit for purpose, but that people get the best out of their interaction with the civil courts.

It is not only a case of changing the rules. We can have all the rules that we like, but if the correct culture does not exist, they are no use. The culture must change. We cannot reform the system without a change in mindset. Lord Gill suggested some such changes in, for example, his proposals on judicial case management. They are not necessarily about rules alone, but a matter of thinking about how the process works.

Does that make sense? You do not look as though you are convinced.

**Roderick Campbell:** It sounds to me as though you agree with Lord Reed.

**Louise Johnson:** It is not simply a case of producing rules because, if we have rules and people do not want to follow them, they are entirely inconsequential. The way forward is to create an overall mindset that wants to follow the process. However, it is not a question of mindset on its own; we must have the processes to follow in order to bring about the change.

The problem is that the way in which some cases are dealt with means that the rules are not right. Therefore, people have the mindset of not following the rules for whatever reason or those rules do not work for court users. For instance, I have heard a lot of comment that form F9, which is used for taking children’s views, is not very useful for children. We have a rule and we might have a mindset about changing how to use it but, unless people understand why they have to change in the first place, it will not happen.

**The Convener:** I assume that you would make a distinction between not following the rules and rules not being appropriate. Any solicitor or advocate who did not follow the court rules would soon find that the judge or sheriff was telling them something. However, I think that I follow your argument and that you are saying that the rules do not always act in the interest of fair process and justice rather than that they are not obtempered by the lawyer or the advocate.

**Louise Johnson:** Yes. It is not that they are not obtempered, but that they are not applied in the intended spirit. That is the problem, as is the fact that they are perhaps too complex or too difficult in their construction to do what they are trying to achieve. Therefore, we need to ensure not only that the processes are simplified, but that we want the processes to be simplified in the first place.

**The Convener:** As distinct from saying that people should not follow the court rules; that would be inappropriate.

**Louise Johnson:** Yes.

**The Convener:** I got there before you, Mr Conway. I am beginning to slip back into a previous profession. I must not do that.

**Lauren Wood:** There has to be a culture change, even if there is a change to the rules.

In our submission, we mentioned the Citizens Advice Edinburgh in-court mediation service, which works in Edinburgh sheriff court. I admit that I noticed a mistake when I read over the submission again this morning, so I will submit an amendment. The sheriffs do not send on more than 90 per cent of the civil business in the court to the mediation service, because that would be overwhelming; they send on 90 per cent of the
small claims business. More than 80 per cent of the cases that they submit to the service are resolved through mediation very quickly—often within an hour.

The mediation project has been going for 10 years—perhaps just slightly less than that—and, if we track the number of referrals over those 10 years, they demonstrate a significant culture change. The sheriffs in Edinburgh sheriff court are now open to mediation and to making referrals to the service. Thus, they are open to alternative dispute resolution as an effective means of resolving disputes. However, it takes a long time for a change in culture to filter down through the system and to be implemented.

Culture change and rules have to go hand in hand, but there also have to be opportunities for that culture change to happen. For the civil justice council to look at the civil justice system as a spectrum that includes many tiers is the best way in which to encourage that change to happen alongside the rules.

David McLetchie: I suppose that the public would look at all this and ask whether the change will make civil justice more accessible to people, whether we will get speedier resolution of cases and whether we will have a reduction in the costs of resolving cases and disputes. Why is the creation of the civil justice council more likely than the sustaining of the existing system of rules councils to achieve those positive outcomes?

Lauren Wood: The initial perceptions of people who enter the civil justice system as users—people who seek justice—are often different from the justice that they end up following. A person who has a claim against somebody who has not built their fence properly does not necessarily expect at the start of the process that they will end up standing in front of a sheriff in a sheriff court and following all the rules that go along with that.

In terms of streams of accessible justice, to look at the civil justice system as a broad spectrum is the best way in which to ensure that people can access justice more effectively. It is important to have opportunities for mediation and other forms of dispute resolution where they are called for. Such options are not the best thing for every case, but they are certainly the best thing for some cases. Some cases should never make it as far as the sheriff court. The sheriff court process puts people off pursuing their civil claim if they are not supported by lawyers and professionals in the field. 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.

One problem with the in-court mediation project at Edinburgh sheriff court is that cases have to be referred to it by a sheriff, and the case then has to be closed in front of a sheriff. Although 80 per cent of the cases are resolved in mediation, a lot of court time is still spent on referring cases to mediation and then closing them. We could take things a step further and let people access alternative dispute resolution at the earliest stage in their dispute, without having to go before a sheriff first. That would remove another barrier to people being able to access justice quickly and efficiently. The approach will not be appropriate in every case, but it is certainly appropriate in many cases that might otherwise end up before the sheriff court.

The Convener: How would that be achieved under the bill?

Lauren Wood: We see the policy role of the civil justice council as something that will deal with that. It will deal with practitioners’ preconceived ideas about what alternative dispute resolution is and what it can be. We see a possible research function for the council, which could commission research on how people access justice and how people’s perceptions of access to justice change during the implementation period of the making justice work programme.

We envisage that the council’s policy function will be very different from being just about rules, and we see that as an important aspect of maintaining access to justice for end-users of the system.

The Convener: That is interesting. However, you are not saying that ADR should be mandatory. Lord Gill said that he would not want it to be mandatory for there to be ADR before someone goes to litigation, and you would not want that either.

Lauren Wood: No, but that is part of the culture change that must be considered. An important function of the council will be to monitor the change in culture whereby solicitors understand what alternative dispute resolution is.

I graduated from university quite recently—in the past five years. I studied law, but during that time alternative dispute resolution was not mentioned once. Perhaps culture change could start there, by letting law students know that such a mechanism exists and that the courts are not the only way forward.

The Convener: I am quite shocked at that, because around eight years ago I went to an event in Baltimore as convener of the Justice 1 Committee and saw that ADR mediations were taking place in major commercial actions, not just in family law and so on. At the end of the day, something must be agreed, someone will win or
there will be a compromise, so the process saves everyone a lot of money.

Lauren Wood: When I left university, I was particularly interested in mediation and I pursued the subject to expand my knowledge, but it was not mentioned at all during my university career.

The Convener: Well, Mr Conway, we will not go down that track just now with the Law Society of Scotland—I guess that that is for another day. Do you wish to come in at this point?

Ronnie Conway: To answer Mr McLetchie’s question, there will be a single overarching organisation with responsibility for what are currently disparate strands. It will be obliged to publish an annual plan and to be accountable to users in a way that one must concede that the current councils are not, and—to pick up on what Lord Gill said—it will be the vehicle for implementing the Gill reforms.

Do I think that the Scottish civil justice council will result in cheaper, better access to justice? It should do.

Richard Henderson: As we are talking about cultural change I do not feel the same trepidation about coming in, but we are talking about a long-term process and getting it right before we start. If we start by saying that we will have a civil justice council but we have not defined what it is going to do, and if we say that we will look at the rules and implement the Gill reforms, we have two competing policy objectives. One is narrow—to implement the Gill reforms—and the other is to achieve a culture change in the way in which justice is delivered in this country. If we are going down that road, we might be able to put in administrative justice.

In September 2010, the Ministry of Justice under Kenneth Clarke said that it was going to merge the tribunal and the uniform branch courts of judiciary in England and Wales. We are still waiting for the consultation document on that, because it is a vastly more complex operation than may have been understood, and certainly more complex than the Ministry of Justice understood it to be at that time.

If you set up a civil justice council and then you want to tack on administrative justice, you are tackling one culture on to another while trying to change the culture overall. We submit that that would not work.

Lauren Wood: We said in our submission that the civil justice council should be considered in relation to the outcome of the making justice work programme, rather than just in the context of this point in time. The programme’s outcome will represent a very different civil justice landscape than is currently the case, and will include things such as alternative dispute resolution.

The best way to embed the culture for which we are aiming from the start would be to consider the council’s make-up. There should be people who represent interests such as alternative dispute resolution so that that is embedded in the council’s culture and functions from the outset, and not just bolted on as and when it comes up as an issue in the civil justice landscape.

Louise Johnson: On the theme of culture change, one change that the council must achieve is to ensure that court users are central to the process, because people going to court and being represented is what it is all about. We must ensure that, when all the recommendations of the Gill review are processed, court users are at the centre of the system and that the Scottish civil justice council takes that into account.

11:45

I was pleased that Humza Yousaf mentioned domestic abuse. Part of the culture change is to recognise that it is not a dispute, so it cannot be dealt with by dispute resolution. Domestic abuse is not about two parties warring; it is about power and control. In relation to the culture change and involvement of court users, we must be aware that ADR mediation is not appropriate in domestic abuse cases, because it is not safe. When there is any channelling, triage or a process that would lead people towards mediation as a first opportunity to resolve the problem, it should be made very clear that the person does not have to go down that road. The opportunity for mediation is there but it is vital that if the person does not want to take it, they do not have to and there will be no adverse implications or adverse suggestions as a result of the fact that they did not want to use it.

As Humza Yousaf said, we have come across situations in which it has been suggested or implied to women that if they do not try mediation, they will be regarded as being obstructive and so on. We want people to feel that they can access the civil justice system at the level that they want and 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. That will have to be taken into account in the change of culture and mindset in the justice system.

The Convener: Is it not fair to say—heaven forbid that I paraphrase Lord Gill—that Lord Gill did not want ADR to be mandatory because that is just not appropriate?

Louise Johnson: He said that it should not be mandatory, but it depends on how you frame the system and the processes that people have to go
through in the first place. If ADR is an option and, even though it is not mandatory, there is a presumption that it would be considered before you do anything, that is fine as long as no adverse inference is drawn from the lack of mediation or the reluctance to undertake it. There must also be a realisation that in some cases it is not appropriate.

We are concerned about the end-product. It is vital that you enter the civil justice system at whatever stage is appropriate for you and that it is not considered that you should have done something else before you get to that stage.

The Convener: Does Mr Conway want to comment?

Ronnie Conway: Yes.

The Convener: I have become good at interpreting hand signals.

Ronnie Conway: I will comment briefly on ADR. I mirror what the Lord President and Louise Johnson have said. First, ADR covers a range of possible scenarios, including arbitration and mediation.

A practical issue that I should have mentioned in responding to Mr McLetchie’s question is that pre-action protocols currently exist for certain types of claims. They are very successful, but they do not bite because there is no mandatory sanction on either lawyers or insurers to comply with them. It is anticipated that the civil justice council would integrate those protocols into the rules so that there would be sanctions for failing to abide by and comply with the protocols.

As far as mediation is concerned, I confine myself to saying that it is not the silver magic bullet that some of its proponents claim it is.

The Convener: Would Humza Yousaf like to come in now?

Humza Yousaf: Yes, but not on that issue. I was interested to hear what was said and it is something that we will follow up—I certainly will—to see how it progresses.

The discussion that has taken place between the panel members has been incredibly informative. It probably reasserts the maxim that the less the politicians talk, the more sense things seem to make.

The discussion that has flowed, especially the first half of it, reaffirmed for me that the flexibility in the bill in respect of membership of the council is probably a good thing. However, my concern is that if the composition of the council is to be as suggested in section 6, there must be more checks and balances with regard to the Lord President’s power of appointment. Although the Lord President will have to consult advocates, the Law Society and Scottish ministers, do you feel that there need to be more democratic—if I can put it that way—checks and balances?

Of course, that leads to a wider question, which was raised by one of my colleagues in the previous session, about the Lord President’s role and general powers with regard to disqualified appointments, the chairing of meetings and even setting the quorum for a meeting. Does that concern you?

In summary, I am interested to hear your views, first, on the council’s composition and, secondly, on the Lord President’s powers.

Ronnie Conway: You have already heard what the Lord President has said. I might well answer your question differently at a different time. As well as highlighting the challenges of what the Lord President has to achieve over the next five years—which I will not repeat—I should mention the kicker: there is no money. We are asking him to undertake what I think is a colossal and extremely ambitious job. As I have said, I might not give the same answer at another time, because I appreciate the points that Mr Yousaf has made, but for what it is worth I think today that we should let him get on with the job and we will put our shoulders to the wheel.

The Convener: I do not think that you responded to a question that has not really been delved into: whether there is too much power in the hands of one person—in this case, the Lord President.

Ronnie Conway: I do not think that this Lord President has too much power in his hands at this point in time.

Lauren Wood: I was pleased to hear the Lord President’s comments about the public appointments process, which I think mitigate a lot of our concerns about the appointment of members and how democratic the process might be.

As for the Lord President’s powers, we harbour concerns that there is not much of a separation of power between the Lord President and the council, particularly if the council itself is to be standing in 40 years’ time. The council is to act as an advisory body but that advice will always be slightly compromised if the issues that it is advised to look into are suggested by the Lord President. With this Lord President, that is not so much of an issue, because Lord Gill is the person best placed for the council’s oversight of the next five years of the making justice work programme. However, at the very outset of the process, we should not be skewed by the thought that Lord Gill will be Lord President for ever; there is always a chance that, in years to come, the separation of powers will
become an issue. The issue certainly needs to be looked at again.

Humza Yousaf: I wonder whether you share another concern that I have in this respect. During the break, I and a colleague were discussing an issue that I should have pursued slightly further with the current Lord President, who is wise and about whom I agree there is not so much concern. As you have said, we need to take into consideration that a future Lord President might not be as wise or as benevolent as the current one.

I do not wish to quote the Lord President unfairly but there was a suggestion that an issue would arise if his or another Lord President’s opinion diverged from the council’s. That suggests to me that one opinion—in this case, the Lord President’s—would be asserted over that of the council. Do you share that concern or did I mishear what the Lord President was saying?

Lauren Wood: It is a concern, particularly given the Lord President’s range of powers in relation to the body. Again, I do not think that it is fair to make a judgment on the basis of the person who is Lord President at this time and who, as I have said, is best placed to lead this programme. There is a concern about whose opinion will prevail if the independent advisory body is advising the chair one thing and the chair is the person who is making the decision.

One possible way to get round that would be by presenting reports and recommendations not only to the Parliament but to Scottish Government ministers and requiring them to take account of the recommendations that are made. That goes back to our interpretation of the council’s policy function. If the council were to look at the policy relating to end-users, in order to take the independent advisory function a step further, it should present its advice to the people who are making the policy.

Humza Yousaf: That is interesting.

Richard Henderson: The Tribunals, Courts and Enforcement Act 2007 followed the Leggatt report. That report said that the primary interests in tribunals and administrative justice should be the user. If the bill aims to implement the Gill reform, the most efficient way will undoubtedly be for the Lord President to chair and deliver that reform. If, on the other hand, you are looking for the culture change in a broader policy context as far as civil justice and its development are concerned, placing the user at the centre—as is the case in administrative justice and tribunals—becomes, in our view, essential.

That means that there must be something that is separate and distinct from the Lord President. I am absolutely sure—I am not just saying this—that he would do the job properly. It is simply the niceties—the appearance—that we are talking about. However, to put the user at the centre means that there is a structure that is separate and distinct from the courts, rather than being led by the courts.

Louise Johnson: I echo the concerns and comments that have been made by my three colleagues on the panel.

In terms of representation, the Lord President was clear in saying that it would be appropriate to consider what interest groups it would be appropriate to include in the public advertisement of the process and therefore to sit on the council—that is absolutely right. However, that is the view of the current Lord President. Without safeguards being written in—especially relating to the council’s membership—we cannot ensure that we would always have such an enlightened view and that, as Richard Henderson said, court users would be regarded as central to the process. For that reason, and to give a better spread of representation, it would be preferable that the “up to 6 other persons considered by the Lord President”—known as LP members—should certainly be court users, lay members and representatives.

Although the current Lord President is open and inclusive on the matter, we echo the concern that we must ensure that future Lord Presidents, including how they run and focus the council and how it will report, will be equally democratic. That underlines how important it is that the council should report and be accountable to ministers and Parliament.

Alison McInnes: I want to push a little further the issue of administrative justice and tribunals. Lord Gill and Mr Henderson have alluded to it perhaps being premature to discuss the council’s role with regard to administrative justice and tribunals, but there is a real danger that if we do not talk about that a vacuum might be created.

Do we therefore need a mechanism in the bill that could be triggered in the future? Perhaps more fundamental than that, are the two cultures incompatible? I would be interested to hear from other panel members as well as from Mr Henderson whether that is the case or whether there are benefits to be had from both the organisations being under one umbrella.

12:00

Richard Henderson: The cultures are different, but that does not mean that they are incompatible. The cliché is that tribunals are inquisitorial and courts are adversarial, but it is better to see things as a spectrum. Employment tribunals are in the middle of the spectrum and they are, in effect—Shona Simon probably would not forgive me for...
saying this—courts by any other name. They are adversarial, with a highly legalised procedure. However, a tribunal such as the private rented housing panel focuses much more on the resolution of user problems and will, as it were, get its hands dirty in trying to solve the problem.

There is therefore a spectrum in that regard, as in all things, but I believe that the culture of a tribunal is to seek to solve a problem and that that of a court is to resolve a dispute on the basis on which the dispute is brought to it. One body therefore seeks to resolve something, while the other seeks to take the pleadings as they are presented and make a decision on that basis. If your pleadings in a court are wrong, justice may be on your side but you will not win. However, one hopes that if justice is on your side in a tribunal, you will win.

There is a cultural difference at that level between courts and tribunals. There is also a cultural difference in the sense of the formality or informality of the proceedings. Again, though, that is not a permanent situation or a question of incompatibility.

If we get beyond courts and tribunals into the administrative justice area and talk about policy, the nature of the policy is markedly different from that which one would talk about in a civil justice council context. The focus of administrative justice is on the citizen and the state; therefore, of necessity, a body that looks at that relationship is looking at the position of the powerless against the powerful and at issues that have a political overtone. A recent example of that from the south was the Home Office decision to withdraw London Metropolitan University’s accreditation, which affected not only the university’s ability to undertake its function but the position of individual students. Their position is a consequence of an administrative decision that was taken on a different set of circumstances.

Another situation in England and Wales, although it is perhaps slightly further removed, is the current difficulty regarding the examination diet. From one point of view, if it was the case that the criteria for making examination awards were altered in the course of the year, that is perhaps slightly disturbing. That takes us into the question of the principles that underlie the operation of the administrative justice component in the examination board’s decision and how the board came to think that it could do that sort of thing. I am prejudging most awfully on the basis of what I understand to be the position, but it becomes a significant political issue.

The classic separation of powers is that between the Executive, the legislature and the courts. That separation allows courts to deal with what happens in the courts and we should not expect the courts to come out of that and begin to operate in the Executive area. Administrative justice requires us to begin to look in detail at the interplay involved in how Government works. There is therefore a real cultural difference at that level between civil justice and administrative justice. Does that make any sense to you?

Alison McInnes: Absolutely. Thank you.

The Convener: I think that we should keep them separate, because administrative justice seems so different from the court process and court rules.

Richard Henderson: Again, I think 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.

The Convener: I think that it is the political implications that follow from the differences that make the proposal incompatible with the depoliticisation of courts, in a sense.

Jenny Marra: I have a very quick question, which I address to all of you.

The senior public law professors of Scotland have recommended that the deputy chair of the council be a layperson. Do you agree with that proposal?

Lauren Wood: That is something that we state in our submission. We think it would be a positive way of maintaining the user interest if there were at least the opportunity for the deputy chair to be a layperson.

Ronnie Conway: I have no particular views on the matter. I keep going back to the same chorus, as it were. I am content that the current Lord President resolve these matters. If this committee were somehow to take comfort from the deputy chair being a layperson, I would, on behalf of the Law Society, have no objection to that.

Louise Johnson: I agree with my colleague that the deputy chair should be a layperson. That would take forward the spirit of inclusion and consideration of court users’ interests and would effect the culture change that has been so great a focus of the discussions today. Allowing a layperson to have an opportunity to chair such a high-level committee will help to ensure that the discussions have parity and that court users are represented in discussions not only of rules but of policy, procedure and, perhaps, legislation.

Richard Henderson: Apart from that, if you are trying to signal that the user is coming to the front and that matters are not in the hands only of the
professionals, it would be immensely valuable to have a layperson as the deputy chair.

**The Convener:** This should be the last question. I should not have said that—nobody put their hands up now, please.

**Graeme Pearson:** I have what is, I hope, a practical question. Given what you have said about your confidence in Lord Gill and your concerns about the ability of a future Lord President to match his wisdom, do you think that, in order to achieve reform and progress in civil justice, we should confine ourselves to what is in the bill and put a mark on the calendar to revisit circumstances two or three years down the road to see how the measures have worked and decide at that time whether we want to insert some balancing measure to take account of the fact that Lord Gill has achieved his reform and whether we want to address what might be termed the broader, more philosophical issues?

**Ronnie Conway:** For what it is worth, I think that that point is well made, Mr Pearson. It is unlikely that the role of Lord Gill or any Lord President is going to provoke any kind of constitutional crisis but, if it does, I am sure that the people in this building will be the first to know about it. Further, one would hope that this committee would take an active interest in the progress of the making justice work reforms.

**The Convener:** I saw nods of agreement among panel members, so we need only have brief answers.

**Louise Johnson:** We need to start as we intend to go on. The reforms to the structure, the membership, the powers and the functions should be implemented now. We should have benchmarking in five or however many years’ time to see how things have gone, because we might then need to extend user membership, to use committees more or to consider how the council’s powers and functions operate. To indicate the intention of the Parliament, of ministers and of everyone who is involved in the process to ensure that the process is accessible, democratic and accountable for court users, all the suggestions that have been made should be implemented now.

**Richard Henderson:** The suggestion of a staged approach from James Wolffe in the second submission from the Faculty of Advocates is excellent. The process is so complex that it must be undertaken in a measured and considered way over time, rather than in one big bang.

**Lauren Wood:** Such an approach is a good suggestion to mitigate a lot of the difficulties that we have discussed in relation to the priorities that we each bring to the table. It has been clear throughout the discussion that the rules-making function seems to be of primary importance at the moment, whereas it seems that the policy function will be considered later. I would worry if the policy function was forgotten and buried under the rules function until the council was reviewed.

**The Convener:** I thank you all for your helpful evidence.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

10:01

The Convener: Item 2 is an evidence session on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

I welcome Elspeth Molony, senior policy and consultancy manager, Capability Scotland; James Wolfe QC, Faculty of Advocates; Mark Harrower, vice president, Edinburgh Bar Association; and Oliver Adair, legal aid convener, and Ian Moir, legal aid vice-convener, Law Society of Scotland. I thank all the witnesses for their written submissions. We are looking primarily at part 2 of the bill, but anyone who wants to say something about part 1 later on should not feel constrained.

Alison McInnes (North East Scotland) (LD): Good morning. Does the panel agree with me that access to justice, fairness and proportionality should underpin the new arrangements? We have received a number of representations that the proposed arrangements do not live up to those criteria. For example, those acquitted will have to carry the costs. The appeals arrangements are also rather strange. Will the panel explore those issues?

The Convener: I ask panel members to self-nominate. I will call you and your microphone will come on automatically. Who would like to start?

Ian Moir (Law Society of Scotland): Good morning, and thank you for the opportunity to attend today to explain some of our concerns, which are along the lines of those already expressed by the committee.

The consultation document stressed at page 6 that there was a commitment

“to maintaining and improving access to justice ... In addition, lawyers should be paid fairly for the delivery of a good quality service.”

However, there are a number of concerns about all aspects of what the bill seeks to do that lead us to conclude that, in its current form, it will not achieve its aims. The main reasons for that are the levels at which contributions will start, how high they will go and the fact that solicitors will be asked to collect summary contributions—all of which we see as creating substantial problems for access to justice.

Elspeth Molony (Capability Scotland): We absolutely agree that access to justice should underpin the bill. In 2009, we carried out an extensive programme of research on behalf of the justice disability steering group, which is a group
of justice organisations that includes the Law Society of Scotland, the Scottish Legal Aid Board and the Scottish Government justice directorate. We found that 40 per cent of disabled people said that they did not have equal access to justice in comparison with non-disabled people. We are operating with a starting point at which disabled people already feel disadvantaged, and we urge that the bill must ensure that that situation is not made worse.

The Convener: Is it going to make the situation worse?

Elspeth Molony: We believe so.

The Convener: Can you expand on that?

Elspeth Molony: Absolutely. The Scottish Government’s latest poverty statistics show that disabled people are disproportionately likely to be living in poverty. Twenty five per cent of disabled Scots subsist on less than £10,000 a year and households that include a disabled person are 20 per cent more likely to be living on a net annual household income of zero to £6,000 per year. As a result, many disabled people who previously qualified for criminal legal aid are likely to be asked to make a financial contribution to the cost.

Moreover, poverty among disabled people is likely to worsen as a result of welfare reform. Over the next five years, there will be a 20 per cent cut in disability benefits as disability living allowance is replaced by personal independence payments, and eligibility for that benefit will be reassessed for all disabled people. The cuts are likely to mean that 360,000 disabled people will not receive any financial contribution towards the additional costs of living with disability.

Alison McInnes: Is it not the case that disability living allowance will not be discounted and will actually be taken into account in income calculations? Do you think that that is fair?

Elspeth Molony: No. We think that disability living allowance—or the PIP that will replace it—should be disregarded completely in income calculations.

However, you should also note that the disregarding of disability benefits is not actually the end of the story for disabled people; the fact is that, as the Department for Work and Pensions itself admits, such benefits do not cover the total costs of living with disability. Indeed, research carried out by the DWP in 2005 found that the extra costs incurred by disabled people range from £7.24 to £1,513 per week. There is general consensus that disability benefits do not cover a person’s entire costs. As a result, disregarding disability living allowance is only a first step; the second step is to calculate a person’s disability-related expenditure and subtract that from the disposable income calculation to ensure that disabled people are not put at a disadvantage.

The Convener: Solicitors always moan about having to do things; indeed, everyone has the perception that that is all they do. Why should they not collect the instalment payments?

Mark Harrower (Edinburgh Bar Association): May I answer that, convener?

The Convener: Yes, indeed.

Mark Harrower: First of all, I thank the committee for giving me the chance to give evidence. Today I am speaking not only for the Edinburgh Bar Association, which is Scotland’s second largest faculty of solicitors, but on behalf of the largest: the GBA. Both faculties have come together in their opposition to the bill’s present proposals.

The Convener: And the GBA is the Glasgow Bar Association.

Mark Harrower: Yes, it is.

At the moment, the relationship between solicitors and accused persons is close and important; indeed, it has been very important in the implementation of the improvements to early case resolution that were brought in by the summary justice reforms of 2008. Those improvements have led to a steep increase in the number of cases that have been resolved early, which has resulted in a lot of savings.

We have a close relationship with our clients because they have to accept the advice that we give them at an early stage. As a result of SJR changes, the Crown now provides a summary of evidence at the start of a case; we go over that summary with accused persons and give them advice. Very often, they accept that advice and the cases can be resolved early. If we are asked to collect contributions far in excess of any that are in place at the moment, that will place 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.

As solicitors, we have no mechanism for collecting such contributions. At the moment, the level of contributions that we are expected to collect—which, way back in 2004, SLAB accepted most solicitors do not collect—is pretty small; I think that it amounts to less than 1 per cent of most firms’ annual turnover.

At the moment, contributions from clients relate only to advice and assistance cases and
assistance by way of representation—ABWOR—cases, which are cases that result in an early plea of guilty or certain cases that involve breaches of court orders by people who have already been convicted. The disposable income arrangements start at £105 per week: if somebody has a disposable income of more than £105 but not more than £112, the maximum contribution is £7. Under the bill’s proposals, in a sheriff court summary case—which is the most common type of case—an ABWOR contribution for someone who pled guilty would be £134. However, if they pled not guilty, their contribution would be more than that: it would be £145.60.

I point out as a side issue that there is an anomaly in the proposal. It seems that, if somebody were to plead guilty in the sheriff court, they would pay less of a contribution than if they pled not guilty. There seems to be a financial disincentive to people to exercise their right to plead not guilty.

At present, contributions go from £7 up to a maximum of £135 for advice and assistance and ABWOR cases. There are no contributions in cases in which people plead not guilty. Under the proposals, if somebody has a disposable income of around £160, their contribution will be more than the current fixed fee, which is £485.

We will have no mechanism for collecting that contribution other than asking people to pay us. Last week, The Herald reported that £6.5 million-worth of fines are still owed to the courts. The Scottish Court Service has powers to take enforcement action, such as making benefit deductions, freezing bank accounts, stopping wages and seizing cars. We cannot do any of that.

In its response to the consultation on the draft bill, the Scottish Legal Aid Board told the Government that it did not need any additional powers to recover contributions because it had been successful in doing so in relation to civil cases—SLAB collects contributions in all civil legal aid cases. It says that it will collect contributions in all solemn criminal cases, but refuses to do so in summary criminal cases and says that we should do that. SLAB knows that we will not be able to do that in many cases. It will simply be a cut for us.

Why should we not collect such contributions? We do a difficult job and try our best to make the system in Scotland work, but asking us to collect contributions will create another conflict between us and clients, which will lead to further delays and cuts for us and simply will not work.

The Convener: It struck me that you are saying that the introduction of the system would interfere with justice.

Mark Harrower: It would. Let us consider a couple of specific examples, starting with an intermediate diet—four weeks before trial—involving a person who is accused of a sexual offence and pleads not guilty. It could be quite a serious sexual offence, notwithstanding the fact that it is a summary case. Somewhere, the consultation documents say that the cases affected would not be serious cases. However, summary criminal cases in the sheriff courts are more serious now than they have ever been.

When I started in this job 20 years ago, an accused person could get up to three months’ imprisonment for breach of the peace on summary complaint in the sheriff court. If they were on bail at the time, they could get up to an additional three months’ imprisonment. That is a total of six months. Now, if someone is accused of breach of the peace—exactly the same charge—they can get up to 12 months’ imprisonment on summary complaint and, if they are on bail, they can get an additional six months. That is a maximum of 18 months’ imprisonment. However, it is not only bail that aggravates such cases. There are racial aggravations, homophobic aggravations and antisocial behaviour orders. Such cases are far more complicated and far more serious than they used to be.

I am doing a case at the moment on summary complaint that, 10 years ago, would have been an assault with intent to rape and would never have been seen on summary complaint. If you ask solicitors up and down Scotland—and sheriffs, who frequently comment on the matter—they will tell you that summary cases have never been as serious as they are now.

People come to the sheriff court for serious cases, including sexual offences cases. If we got to the intermediate diet in such a case and the accused person had to pay a contribution of, say, £200 but had not paid a penny piece four weeks before a trial in which there would be vulnerable or child witnesses, the solicitor would tell the sheriff that the contribution had not yet been paid and he was not yet ready to go ahead.

What would happen in such a case? The policy documents are silent on that. In fact, they say that they do not know what would happen. I will quote from the Scottish Parliament information centre briefing on the bill.

10:15

The Convener: Can you give the page number, please?

Mark Harrower: It is page 24. Under the heading “Practical implications”, the last paragraph on that page says:

“It is unclear what options a solicitor might have when dealing with a client who does not make payments as
required ... it may be possible for solicitors to withdraw their services in less serious cases”.

I do not know what is meant by “less serious cases”, and neither does SPICe, because the briefing goes on to say:

“It is not clear where the dividing line between less and more serious cases might lie.”

From experience, we now frequently deal with summary complaints that involve embezzlements of £20,000-plus, Department of Social Security frauds of £40,000-plus, assaults to severe injury, serious sexual offences, as I have already mentioned, and cases that involve forensic, scientific and closed-circuit television evidence. Those cases are complicated and serious. If an intermediate diet is reached and someone has not paid half the fixed fee as their contribution, the solicitor will have no option but to say, “We’re not ready here. This hasn’t been paid.”

What will happen to the legal aid certificate? Currently, in civil cases SLAB will suspend a certificate for 30 days, and if the arrears are not brought up to date, the certificate will be terminated and the case will effectively come to an end. However, civil procedure is completely different from criminal procedure. In the criminal courts, the case must go on. The accused is not a willing participant in it. He is not a pursuer who has stepped into court to sue to get some remedy; rather, he has been brought into it by the state. If an accused is on remand, the time limit is 40 days. Not all people who are in custody will be exempt from contributions, as they may have savings of more than £750, which will be the limit if the changes come in. If the case is a domestic abuse case, there must be eight weeks between the first plea and the trial, whereas there are timelines of 26 weeks for the recovery of contributions in the policy documents. Only a fraction of the contribution will be paid by eight weeks. What is a solicitor to do at the intermediate diet in a domestic abuse case if hardly any of the contribution is paid after, say, six weeks? Will we have to say that we are not ready, as we will not be sure whether we will be paid?

**The Convener:** Can you also touch on what will happen when there is a co-accused? I have raised that issue previously. Surely that would complicate things.

**Mark Harrower:** It would. When there are co-accused persons, every accused person must be ready for their trial. Summary cases commonly involve four or five accused, and there will be a delay if not every accused person is ready. The court will have to grant an adjournment. If an accused person repeatedly refuses to pay their contribution, their solicitor will have to withdraw from acting. The process will make it very difficult for solicitors to balance their professional responsibilities to the court to make cases work and keep them going and to represent the client if they are not paid for their work.

**The Convener:** I will move on. I know that others who have been in practice want to speak.

**Alison McInnes:** I would like to hear about the general principles of the bill from the Faculty of Advocates before we go into its details.

**The Convener:** I am sorry, Mr Wolfe. I did not know that you were indicating that you wished to speak about the general principles of the bill. I apologise.

**James Wolfe QC (Faculty of Advocates):** Not at all, convener. Thank you very much for inviting me to give evidence.

On the general principles of the bill, I entirely endorse the view that the three principles of access to justice, fairness and proportionality must be tested by which any proposal of this sort are measured, but I add to them the question of the impact on the administration of justice. I endorse the remarks that Mr Harrower has just made about the potential impact on the smooth running of the courts and add to them the point, which is made equally well in the Edinburgh Bar Association’s written submission, that one might expect the proposals, if they are brought in, to result in an increase in accused persons representing themselves. For the reasons that are set out in the Edinburgh Bar Association’s written submission, that is likely to have a significant impact on the smooth administration of justice, and it may result in unfairness for particular individuals.

As you know, the faculty’s big point, as it were, on this is a fundamental one about fairness. It seems unfair to us that someone who is brought into court on a criminal charge but is not ultimately convicted for whatever reason may, nevertheless, be left to bear the cost or part of the cost of his or her defence. That is not only unfair, but is liable to lead to what may be called perverse incentives of the sort that we describe in our written submission.

The other point is that any system of contributions that starts from the premise that the people who are able to meet part of the cost of their defence should do so should be designed in such a way that it bears only upon people who really can afford to meet the cost of their representation. In that respect, I respectfully align myself with the observations made by the Law Society of Scotland and the Edinburgh Bar Association in their written submissions.

**The Convener:** Thank you very much.

**Roderick Campbell (North East Fife) (SNP):** Good morning. I refer to my registered interest as a member of the Faculty of Advocates.
I wonder whether Mr Harrower or anybody else on the panel is able to help with my question. I want to touch briefly on ABWOR and contributions. I understand that the maximum contribution is £135 and that there have been approximately 43,000 grants of ABWOR in the past year, with £20 million spent on that. I presume that that £20 million excludes contributions. Do we have any more information on how much was raised in contributions? What precisely are the levels of non-contribution? Mark Harrower talked about some contributions being only £5 or £6. It would be helpful to flesh out the issue.

Mark Harrower: At the moment, my firm does not collect contributions because we do not have the time or the mechanisms in place to do so. Also, it is not worth creating conflict between ourselves and the client given the current level of contributions.

I am not sure how much should be raised through contributions—SLAB would be best placed to tell you that. SLAB knows—and has known since 2004, when it commented on Sheriff Principal Mclnnes’s proposals for the review of the whole summary criminal justice system—that most solicitors do not collect contributions. In fact, in 2004 SLAB proposed that contributions should be removed completely. I think that SLAB realised that contributions and their collection could raise another area of difficulty between solicitors and the accused, whose relationship is important and is central to the early resolution of cases.

The proposals suggest that the level of contributions should be increased to just about the whole fixed fee. The most common fixed fee charged by solicitors is £485, which is for cases in the sheriff court in which there is a guilty plea from the outset on a summary complaint; for cases in which a not guilty plea has been tendered at the outset but which do not go to trial and in which there is a guilty plea later in the procedure; and cases that go to trial but do not go over 30 minutes at trial. As soon as someone has a disposable income of around £160, they will pay the whole fixed fee—in other words, solicitors will have to collect the whole fixed fee before the conclusion of the case to be sure of getting paid.

As for how much contributions inject into firms at the moment, I really cannot say. They do not inject anything into ours.

Roderick Campbell: According to the Government’s figures, taking income and capital together, the average contribution for ABWOR will come to only £330 from the 18 to 20 per cent of people who will contribute. Do you take issue with the Government’s figures in the financial memorandum?

Oliver Adair (Law Society of Scotland): Perhaps I can assist with that. We assume that the figure of 18 to 20 per cent has been given to the Government by the Scottish Legal Aid Board. Part of the difficulty is that we have never seen any data to support those percentage figures, so I do not think that you can take them at face value as totally accurate.

David McLetchie (Lothian) (Con): Could we put some numbers on the cases that we are considering? How many cases fall into the criminal legal aid category, in which responsibility for contribution collection is in effect going back to the solicitors along with ABWOR?

Oliver Adair: According to the SLAB annual report of 2010-11, 153,962 cases.

David McLetchie: How does that compare with the totality of cases?

Oliver Adair: That is the total figure for criminal legal assistance; 27 per cent of those cases, or 42,000 cases, were ABWOR.

David McLetchie: What about the ones that are assessed and collected by SLAB?

Mark Harrower: SLAB does not collect any criminal legal assistance contributions at the moment. It collects civil contributions and it proposes to collect solemn criminal contributions. We think that that is because the last thing that SLAB wants is for a High Court judge to order it to turn up at the High Court when a case grinds to a halt because of an unpaid contribution of £200. SLAB is quite happy for collection to fall to us in the summary criminal field.

Mr Campbell made a point about default rates. On page 7 of our written submission, we repeat what was said in the SPICe briefing. It is accepted that there will be non-payment of contributions and a loss. SLAB says that a contribution will have to be paid in 18 per cent of cases, and the Law Society estimates that in up to 30 per cent of that 18 per cent of cases the contribution will not be paid. SLAB thinks that the figure will be rather less than that, and the Edinburgh Bar Association thinks that it will be more than that. Last week’s article in The Herald said that "Fiscal direct penalties are £2m in arrears for 2011/12," which means that 42.1 per cent of the total value of fiscal direct penalties is outstanding.

We think that a figure of 30 per cent for non-payment in the 18 per cent of cases in which there will be a contribution is low, but SLAB says that it is too high. In any event, in a significant proportion of cases, people are just not going to pay and we will be expected to take that hit.

David McLetchie: The Government’s consultation says that requiring solicitors to collect
contributions for ABWOR while SLAB collects contributions for criminal legal aid could create a “perverse incentive” for solicitors to encourage clients to plead not guilty so that they can be relieved of the burden that is associated with collection. Is there any evidence to support that?

Mark Harrower: The evidence is contrary to that. The proposed contributions for summary criminal sheriff court cases will be higher if someone pleads not guilty. I have some figures with me.

At the moment, if someone who has a disposable income of £182 a week pleads guilty in a sheriff court summary case, their contribution is £77 out of the £485 fee. If the proposed measures come in in their present form, that contribution will be £440 of the £485. If the person pleads not guilty initially and later resolves their case by way of a guilty plea—that does not mean that they plead guilty to the whole thing; people resolve their cases later on for many reasons—their contribution will be £681.20.

If a person’s disposable income is about £161 per week, their contribution will be £440 if they plead guilty but £473 if they plead not guilty. The incentive is to plead guilty, and we think that that is wrong.

David McLetchie: So we can dismiss that point, on the basis of your evidence anyway.

The SLAB evidence on incentives says:

“If the onus of collection were to shift to the Board for summary criminal legal aid but remain with the solicitor for ABWOR, the latter could become a less attractive form of criminal legal assistance from the solicitor’s point of view. Given the shift towards guilty pleas seen when ABWOR payments were increased in 2008, there is a risk that any difference in collection responsibilities could lead to a reversal of those advances.”

The implication is that the collection mechanism has an impact on whether people plead guilty or not guilty.

10:30

Mark Harrower: It will have an impact, but it will be to reverse the improvements made by the SJR in 2008. If we also have to worry about getting contributions in before the case is dealt with and the accused is off into the sunset, waving goodbye to us, we will be more likely to have to seek a continuation without plea before putting in an early guilty plea in order to ensure that the contribution has at least begun to be paid.

Paragraph 79 on page 19 of the policy memorandum states:

“Consideration has been given as to whether or not the Board would require new powers of recovery in order to maximise the potential savings. However, given that the Board already collects contributions in civil cases using its existing powers with considerable success … The Government has concluded that special powers of recovery are not justified.”

We do not have any powers of recovery. Even the courts, which have powers of recovery, cannot do it, so how can we possibly do it if we do not have powers of recovery?

Ian Moir: According to its website in the past week, SLAB has brought online a new, enhanced system to improve collection procedures. We simply cannot afford to introduce such procedures. It is illogical and does not make sense to say that because, under the previous ABWOR scheme, we have done a little bit of work to collect very small amounts for SLAB—one of whose core functions is to assess and collect contributions—in most cases writing the amounts off, we should collect all the contributions.

There is a more fundamental difficulty with the bill in that, if the proposed figures are brought in, the maximum contribution under ABWOR for people on the minimum wage, for example, will be in excess of £800, or almost £850 for a summary legal aid case. I do not think that anyone would view that as an example of people who can afford to pay making a contribution to legal aid.

That is a problem because it is likely to lead to people pleading guilty without having a lawyer because they cannot afford to pay the contribution that they are being asked for. Without realising that it would be a consequence of that decision, they might find themselves in prison or disqualified from driving and ordered to resit the driving test. They might not understand that all sorts of things could happen as a consequence of their decision to deal with their case themselves because they cannot afford to pay the contribution.

Capability Scotland will be well aware that DLA and war pensions are currently not taken into account when assessing the figures but they will be included under the new scheme. It is all very well to say that there will be scope to take into account somebody’s outgoings over the past seven days, but disabled people or anyone else who finds themselves housebound or subject to a 28-day mental health order will not incur their normal outgoings. That might mean that a snapshot of their outgoings will result in their having to pay a large contribution. Somebody who is temporarily in that category and who has an income of £135 a week, for example, but could not vouch for their outgoings to the satisfaction of SLAB because they have not been taking taxis to the physiotherapist or whatever could find that their contribution will increase from nil under the current scheme to £252.50.

The proposed levels will not bring in a system in which people who can afford to pay make a contribution to legal aid. That principle is not
contentious for us, but the system that will be brought in under the bill will not meet the principle—that is the real concern.

Elspeth Molony: Even a disabled person who is in the best possible situation and not in a cell awaiting their solicitor finds it difficult to calculate disability-related expenditure. It is almost impossible to calculate it. We could consider, for example, a family that has to have the heating on more often, and which has high heating bills as a result, because a family member’s physical impairment requires their body temperature to be maintained, or a person who is unable to find work because of discrimination in the employment market, who is therefore at home more often and has high heating bills. We could consider a family that has far higher laundry bills because it contains a disabled child who is doubly incontinent. Last week, I spoke to a man with cerebral palsy who said that he has to buy more shoes than the average person as his shoes wear out more quickly because of how he walks.

It is incredibly difficult for such people to compare their expenditure on those items with the expenditure of an average household or non-disabled person. The gentleman whom I spoke to about the shoes said, “Look, it would just be impossible.” Even in the best possible situations, which are by no means the ones that we are talking about today, it would be difficult for a solicitor to establish a person’s outgoings in order to establish their disposable income and therefore their contribution. In a stressful, crisis situation, it would be nigh on impossible for a person to give an accurate description of their outgoings.

The Convener: I do not know whether this is the case in general, but certainly in civil legal aid, which I used to deal with, outgoings that are submitted to the Scottish Legal Aid Board are challengeable by the board. That would also be an issue, would it not—whether the board would grant payment? A lot of administrative stuff would have to go on there, would it not?

Mark Harrower: It is getting worse. Recently, the board introduced new guidelines under which it wants to see evidence that we have seen vouching for all the financial documentation that pertains to an accused person. We have to confirm that we have seen bank statements, wage slips and evidence of certain benefits, or to have a very good reason for not having seen that documentation, before the board will even consider paying us for the work that we have already done.

It has to be remembered that many cases in the criminal courts are dealt with in a short timeframe, because that is the aim of summary justice or summary criminal business. As defence lawyers, we understand that. Often, people appear from custody and are dealt with on the same day, then they can be off to jail or they can be fined. In such cases, we start to make the legal aid application only after the case is over and we have gone 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.

The Convener: So you would also need electricity bills and shoe bills or receipts.

Ian Moir: Yes, that is exactly the position. Every single outgoing that we want to be taken into account would have to be vouched for in writing. That will cause delays and churn in courts with continual intermediate diets and adjourned trials. There will not be an overall saving in the criminal justice budget if churn continues in the way that is anticipated. The thrust of summary justice reform has been to try to speed up the resolution of cases through the courts but, in our view, the proposal will have the opposite effect.

Another legitimate concern is raised by the Church of Scotland on page 2 of its written submission. It states that problems with access to justice might result from solicitors taking the view that it is impossible for them to continue doing legal aid work, particularly in rural areas, where solicitors often undertake such work in order to provide a service to the community and not because it is the most remunerative work that they do. That would cause substantial additional difficulties for the operation of rural courts and so on.

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.

It should be borne in mind that the cases that we are discussing are now much more serious because, as Mr Harrower rightly identified, summary justice reform took many of the more minor cases away from courts altogether and they are now dealt with, in theory, by the person paying a fiscal fine. We can see the difficulties with that and the huge level of non-payment. I do not think that the bill in its current form would do anything other than add to those difficulties and undermine the good work that has been done so far on summary justice reform.

The Convener: We may come back to the words “in its current form” later, unless Graeme Pearson is going to pick up on that.

Graeme Pearson (South Scotland) (Lab): I suppose that contributions to legal aid are a bit like income tax, in that no one volunteers to pay their way. Mr Harrower’s description of contributions of
£7 almost takes us back to Dickens’s day in terms of the value that it would offer to the system. I understand many of the issues that have been rehearsed this morning relating to how that might impact on the system.

I want to round off some of my ideas. Let us say that a client fails to pay their contribution in a case. Does there need to be some form of directory to indicate that that person is a bad debtor so that, if they return to the system, they are treated as not having paid in a previous case and are therefore not even considered for legal aid in the subsequent case? Alternatively, would a client be treated as a new client on every occasion?

**Oliver Adair:** One of the problems with the system that is proposed, in which solicitors collect for summary cases, is that there will be no record of whether a client has paid. If a client does not pay their solicitor and goes to a new solicitor, that new solicitor will never know that that person had been abusing the system by not paying a contribution.

**Graeme Pearson:** Would you want to create such a system? It sounds bordering on an apoc—aca—a difficult time—[Laughter.] I am not going to have a third go at that one. Do you envisage forming that kind of administrative support or would you just give up on it and treat it as—

**Oliver Adair:** It would be more logical for the board to collect contributions because it has the systems in place to do that. It has a 95 per cent success rate. Surely it should collect contributions and have them on record.

**The Convener:** That is an interesting point. Is your question on contributions and impacts, John?

**John Finnie (Highlands and Islands) (SNP):** It is on the impact on the system.

**The Convener:** How about yours, Jenny? You have been waiting for a long time.

**Jenny Marra (North East Scotland) (Lab):** It is not about contributions.

**The Convener:** I will take questions about contributions and impacts. Jenny has been waiting a long time.

**Roderick Campbell:** Mine is on contributions.

**The Convener:** Definitely?

**Roderick Campbell:** Yes.

**The Convener:** Okay. I just wanted to be sure that you were not slipping something in—not that you would do that.

**Roderick Campbell:** The policy memorandum says that if contributions are made, they can be treated by solicitors as payment of fees straight away, which would improve cash flow. What do you think of that as a possible sweetener? What other steps could the Government take to make life easier for practitioners in respect of contributions?

**Oliver Adair:** It is fair to say that it would be of assistance to a solicitor if they could put the money to fees, but of course that only works if the contribution is collected; otherwise, it is of no value.

**Roderick Campbell:** Is there anything else that the Government could do?

**Oliver Adair:** It could ask SLAB to collect.

**Mark Harrower:** That is the issue.

**Ian Moir:** I do not know whether the universal response from all persons who replied to the consultation was that those problems do not have to exist because SLAB should be asked to collect the contributions, but we have not heard a compelling argument why that should not be the case. All the potential difficulties of churn and delay in court cases, which will ultimately increase the overall justice budget, would be taken away by the relatively small amount of money that SLAB would need to add to its budget in order to collect in all areas of legal aid and not just in civil legal aid.

10:45

**James Wolffe:** Although the issue of who collects contributions is important, I invite the committee not to focus on it exclusively. The fundamental issue here—again, there is no issue with the basic principle that those who can afford to pay may properly be asked to make a contribution—is that there remains a question about the level of income at which contributions kick in and whether we are really dealing with people who can afford to make a contribution.

Another question is whether it is fair to have a system in which someone who is not convicted still has to bear what can be very considerable costs. In that regard, we have talked a lot about the potential impact on the administration of justice in the summary justice system, and that is the area in which the most significant problems might arise. The system of contributions will also apply in solemn cases—in other words, the most serious case that an accused person can face—and the individuals involved might have to face very significant bills for their proper defence. Moreover, the fact that people might face significant bills that they will have to pay even if they are not convicted also raises issues of perverse incentives and fairness.

**Roderick Campbell:** I want to come back to James Wolffe’s comments, although my question is not directly about contributions.
I presume that you will not be able to answer this question, but I will ask it all the same. Does the faculty have any estimate of the cost of reimbursing the legal expenses of privately funded clients who are acquitted?

James Wolfe: I am afraid that I cannot offer any such estimate. However, I should point out that, in response to our position on this matter, the policy memorandum says that, at the moment, someone who does not qualify for legal aid at all has to bear the legal costs. Our position is that the fundamental unfairness argument applies equally to those persons; in fact, the Government has identified an anomaly in the current arrangements in that someone who has to bear these costs might not be convicted and still be left out of pocket.

The Convener: Are you suggesting that in such cases expenses should be awarded at the discretion of the judge, which is what prevails in the civil courts?

James Wolfe: There should be a system in which someone who requires to contribute to their defence against a criminal charge and is ultimately not convicted can recover at least an appropriate proportion of the costs. That seems to be fundamentally fair. After all, 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?

The Convener: Are you therefore suggesting that we should not agree to means-tested contributions for criminal legal aid and appearances without looking at the introduction of awards of expenses in criminal proceedings?

James Wolfe: We are looking in particular at the recovery of contributions in the event of an acquittal or no conviction. All I am saying is 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.

Mark Harrower: We should remember that in a significant proportion of summary criminal cases there is no conviction. In 2009-10, for example, 7 per cent of summary criminal cases either were not called or were deserted—in other words, either they were dropped or a not guilty plea was accepted. Moreover, that figure does not include the cases that went to trial that year; I do not have figures for the number of people who were acquitted after trial. That is a significant number of people whom the courts have found not guilty of what they have done. If the aim is to move from the current system of modest contributions in some cases to a system in which many of the people who currently qualify for legal aid have to fully fund or pay a significant proportion of rather than merely contribute to their defence costs, it might seem somewhat unjust and we should look at whether they should get a refund if they are acquitted, as is the case in England.

The Convener: In England, they get a refund?

Mark Harrower: If they are acquitted, they get a refund.

The Convener: That is interesting.

Jenny Marra: If you do not mind, convener, I want to pick up on exactly that issue.

In effect, the proposal is such that someone will have to pay even if they are found to be innocent. As the process of being brought to court is non-voluntary, the situation cannot be compared to what happens in civil proceedings. People enter civil legal proceedings voluntarily, but that is not the case with a criminal prosecution.

I want to ask about other jurisdictions. In England, people who are acquitted get a refund. Do you know what happens in other jurisdictions?

Mark Harrower: I am afraid that I do not. The policy memorandum points to other jurisdictions for other reasons. I do not know what happens in other jurisdictions, apart from the one over the border.

Jenny Marra: Rightly, the debate has focused, and will continue to focus, on what in my opinion are the medieval income thresholds that the Scottish Government has proposed for the contributions. However, I would like to take the witnesses back to the first principles. As legal experts, what impact do you think that the criminal contributions proposal will have on our legal system? Do you think that it is correct?

Mark Harrower: I do not think that it is correct. We are talking about savings of £3.9 million per year. I believe—and the GBA and the EBA believe—that, if we are to collect contributions at the level that is proposed, the changes will cause huge problems for the running of summary criminal business. In coming here today, I walked past a massive hole in the ground that is costing hundreds of millions of pounds. Scotland’s legal system is one of the finest in the world and we are talking about making changes for savings of £3.9 million per year. We need to get our priorities right.

At the moment, people who can afford to pay for their defence do so. The EBA and the GBA accept
that a level of contribution is in place. It has been in place for years and has not changed much for years, and we do not really take issue with the present levels. The proposed levels represent a massive increase on what is in place at the moment, and I think that they will cause real problems for our system.

Ian Moir: There is no directly comparable legal system that involves exactly the same system for contribution and collection as is proposed in the bill.

Every system has its own features. For example, in Finland there is no contribution system unless the case is viewed as being so minor that a sentence of imprisonment of less than four months is expected. There are no contributions in any case involving a substantial period of custody. The same applies in Ontario and in England and Wales—if there is a question of custody, there will be no contribution—whereas modest contributions are collected at the moment in Scotland.

Under the bill, the contributions that are collected from people who are in Barlinnie or Low Moss prison will be much more substantial. It is simply unrealistic to think for one minute that, if we write to someone who has just been sentenced to 12 months’ imprisonment to ask them to empty their Post Office account to pay a contribution of £400 towards what they will view as us getting them the jail, they will do it. They will not do it.

James Wolfe: It is important to focus on the practical impact on the smooth operation of the system of an increase in self-representation and of solicitors having to withdraw from acting in the course of a case. I come back to the fundamental point that it is simply not fair for someone who is not convicted to have to bear the cost of their defence. I entirely accept the point that following that logic would involve introducing some system of recovery for persons who currently have to bear the cost of their defence. It would be an improvement to our system if such an arrangement were introduced.

Elspeth Molony: The convener mentioned earlier that disabled people would have to present bills such as heating bills and shoe bills. That is relevant when considering the impact on the system, because it is not even as straightforward as just presenting the bills. For example, the heating bill would have to be compared with the standard, average heating bill for a home of the same size, with the same number of occupants, in the same area.

The criminal justice system would somehow have to develop benchmark measurements so that solicitors could try to assess what the additional cost of living with disability was in that respect. The complications that are involved in that should not be underestimated.

John Finnie: The witnesses mentioned churn a couple of times. We heard about the possible implications for the accused and for the solicitor. In relation to the process, Mr Harrower mentioned a particular example—domestic abuse—in which there was a timeline of eight weeks. Mr Harrower, can you explain the wider implications of that timeline for the criminal justice process, not least as regards the alleged victim?

Mark Harrower: The domestic abuse court is a pilot project in Edinburgh. These are anxious cases, so the pilot court tries to fix a trial diet in cases that are disputed—when a not guilty plea goes in—within eight weeks of the initial appearance. It will be less if the person is held in custody.

A solicitor has to do a number of things once a not guilty plea goes in. He has to take his client's full instructions in order to see what avenues of defence are to be explored; he has to obtain a full copy of the disclosure case—full statements—from the Crown; he has to get any technical evidence from the Crown; and he has to try to be ready for that trial diet in eight weeks.

In most other cases, it is about 26 weeks from the initial plea of not guilty to the trial diet, which is longer than the Government wanted. However, as I mentioned earlier, the Scottish Court Service has told Audit Scotland that that length of time is needed because cases are more and more complex. In that timeframe, whether it is eight weeks, 26 weeks, or 40 days, solicitors try to get the case ready. One aspect of that is applying for legal aid—it will be either an ABWOR application or a legal aid application.

At the moment, solicitors have to obtain financial documentation from the client to get a legal aid application back up, vouched and verified. 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 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.

The proposals have not even come in yet, but SLAB has recently increased the number of checks that it wants solicitors to carry out. As I
said, we have to say that we have seen all the relevant financial documentation—SLAB introduced new guidelines on that at the start of August. There have already been cases in the sheriff courts that have been continued without plea at the first calling—which means that the guilty or not guilty plea is not being put in—so that the solicitor can be sure that he will get sight of the documentation before the guilty plea goes in, so that he can be sure that the ABWOR application will be granted, so that he can be sure that he will be paid. I am aware of that happening.

It is not just about getting paid. Sometimes the legal aid certificate will cover other work that we have to do, such as getting an expert report. Sometimes we have to get a doctor’s report or a psychiatric report about a client. Those are outlays—we do not profit from them—but we have to pay for them in advance, because the national health service will often not give us reports if it does not know that it is going to get paid. If the legal aid certificate or the ABWOR certificate is not granted at the end of the process, we will not get back that outlay.

There are many reasons why we need to ensure that legal aid is in place before a guilty plea goes in. If we also have to get a contribution in place, that will be yet another reason why things are not ready in time, whether there is a guilty plea or a not guilty plea at the start of the process. When the accused is represented by a lawyer, there will be more scope for a defence not being ready in time. As I said, that is already happening.

Mr Wolffe rightly said that there will be an increase in party accused. Solicitors think that that is inevitable. We think that, if the rates of contribution are increased, people will either be unable to afford to pay the contribution or come to the view—before they have even been to a lawyer—that there is no point in going to a lawyer because they will not be able to afford it. There will therefore be an increase in the number of party accused in courts.

At the moment, hardly any people represent themselves in the criminal courts. A few people represent themselves in the justice of the peace courts, which used to be the district courts, for relatively minor cases, such as not wearing a seat belt, minor assault or shoplifting. It is also common in speeding cases. Often, those people plead guilty at a late stage in the case because they do not fancy cross-examining police officers, as they do not know how to do it.

11:00

We think that, if the proposals go ahead, the following will happen. We will write to the client ahead of the intermediate diet, telling them to be there and to remember their £200 contribution. If there is a trial diet in, say, four weeks’ time, we will have to tell the sheriff that we are not ready for it. The sheriff will say that it is not the first time that the case has been adjourned and something will happen—I am not sure what, but either there will be a suspension of legal certificate or we will have to withdraw from acting and the accused person will be standing in the dock on his own, representing himself.

The problems that that will cause in the sheriff court cases will be more marked than those in the JP court cases, as the sheriff court cases are more complex and difficult. The Crown will be unwilling to disclose evidence to a party accused in the form in which we get it. It will not want to give them full statements, potentially with people’s personal details in them, and it will not want to give them CCTV footage on disk or expert drug reports or forensic science reports, which they would struggle to understand anyway.

Significantly, a party accused cannot enter into a joint minute of agreement with the Crown. At the moment, a lot of evidence in summary and solemn cases is agreed not to be contentious by the defence and the prosecution. A document can then be drawn up by either side—it is often the defence—which is a complicated thing to draft and which is signed by both parties. That removes the need for expert witnesses to come into court or for formal evidence. For example, people may have had their cars broken into and not have seen anything—we can agree all that. However, a party accused cannot enter into a joint minute of agreement, so we will have people coming into court needlessly because the accused person cannot do a lot of the things that we can do. In addition, the accused person will not have access to a lot of the information that we get.

John Finnie: Sticking with the domestic abuse courts, is there a concern that a manipulative accused—I appreciate that they are still an accused at that point—would find non-payment a way of further aggravating the situation?

Mark Harrower: I think so. If an accused person sees the writing on the wall and that he may well get a jail sentence, it may be in his interests to delay that for as long as he can—nobody wants the evil day to come. Yet another way of delaying the case would be for him to fail to make a contribution to his current solicitor, the next one and the one after that. We do not know whether such an accused person would be barred from going to another solicitor.

Ian Moir: There may also be an impact on somebody who is awaiting a trial, in the normal run of things, and who is behind a party accused who has not paid his contribution. Inevitably, the party accused’s trial will take far longer and will delay
the running of everyone’s trials for that day. People will find their trial adjourned because a sheriff is having to ensure that an unrepresented accused receives his convention rights and has the whole procedure explained to him before the trial starts. Objections to evidence will take far longer and the sheriff will have to ensure that he has given the accused person, who has no knowledge of the legal point that has arisen, time to research it or have it explained to them, whereas a solicitor may be able to deal with the matter quickly. That is another way in which the justice system will be slowed down if a system is introduced whereby people who cannot afford to pay a contribution are asked to do so.

**The Convener:** Is there not also the prospect, in a summary trial that has had to stop because legal aid has been withdrawn, of having to ensure that the same sheriff, who has heard part of the evidence, can be brought back? Is it not another unintended consequence that that sheriff has to come back to hear the continuing trial?

**Mark Harrower:** I think that we will know before we get to the trial diet whether or not the person is going to be represented. Sheriffs will try hard to avoid conducting a trial with the party accused standing before them because they know just what a difficult situation that is.

**The Convener:** I am not talking about party accused; I am talking about a trial that is continued over a period of days. Maybe this is an extreme case, but let us imagine that the legal aid certificate is withdrawn and the trial has to be adjourned to await the solicitor finding out what the position is. It would have to be ensured that the same sheriff came back the next time, and that sheriff would have diary commitments to other trials further down the road. I am looking at the ripples that could be caused by something like that.

**Mark Harrower:** There will be many ripples like that, I am sure. The fact is that very few cases that go to trial in Scotland last for more than a day. Some of the figures that SLAB has put forward for case costs reflect scenarios that are rare. I do not think that I have ever done a summary trial that has gone to a third day, although I might be doing one soon. It is a pretty serious case—

**The Convener:** You will eat your words yet.

**Mark Harrower:** Yes.

Most cases are dealt with on the same day, so the fees are relatively low and they will be fully covered by the contributions that people will have to make. It will not be a contribution; it will be funding.

**Ian Moir:** Convener, part of the difficulty in answering your question is that there has been no pilot of the scheme, so we are in uncharted waters. The plan is to introduce the scheme without a pilot. We can anticipate a number of problems, but nobody will know for sure how many problems there will be until the scheme is in place. By then, it will be too late.

**Alison McInnes:** Listening to the discussion, it occurs to me that a particular problem is thrown up in relation to domestic abuse cases. I would welcome the panel’s views on that. If the assessment of the ability to pay is based on the household income, it will surely add a particular insult to injury if the victim of domestic abuse has to pick up the tab for the defence of the accused. Would that be the case? If so, is that a particular problem?

**Oliver Adair:** In that situation, if the party has an interest that is contrary to that of the accused, their income will not be taken into account.

**Alison McInnes:** That is helpful.

**Jenny Marra:** Most of your evidence is in agreement that £68 is an unrealistic threshold. What would be a more realistic figure?

**Ian Moir:** We do not have the ability to do research on the exact figure for an appropriate level. However, the Joseph Rowntree Foundation report on minimum income standards, which was published in July, states that a single person needs to spend £192.59 a week to reach a minimum standard of living, and that is when they are anticipating what might be coming. Nobody anticipates that, next week, they might be charged with a criminal offence, so people do not put money aside to pay for a contribution to legal aid. To say that £68 a week is a realistic level is so far off that mark that a substantial increase in the figure is required.

To state an exact figure is not something that the society could do, but I have indicated how far off the mark we believe the current figure to be.

**The Convener:** As no one has asked about the Public Defence Solicitors Office, I will ask two questions about that, and then I will ask the panel whether there are any other aspects that we have not covered.

First, it seems to me that there might be a role for the Public Defence Solicitors Office to step in if contributions are unpaid. If it stepped into the shoes of the accused’s solicitor, that would remove the problem in summary cases. Do you see that as a possibility?

Secondly, proposed new section 25AC(4)(a)(iii) of the Legal Aid (Scotland) Act 1986, as inserted by section 20, seems to suggest that where solicitors are employed by SLAB—as they are in the case of the PDSO—SLAB will take on the function of collecting contributions. If it is to do that
in the case of the PDSO, why should it not do that for all solicitors? Is the proposal in the bill unfair?

Oliver Adair: On the first question, we have raised the matter with the board and it has assured us that the PDSO will be expected to collect contributions, as well as private practitioners. That will provide a safety net in that situation.

The Convener: Okay—that question has been dealt with. What about the second question? Mr Harrower, do you see a role for SLAB to step in, or are you unable to comment on that?

Mark Harrower: I am sure that certain people at SLAB would love that to happen, but I do not think that there are enough of them at present. If the system was expanded, there would be a cost. Also, the idea does not take into account the fact that, under the European convention, an accused person has a right to representation of his choosing. If everybody who is left standing in the dock is represented by the PDSO, what will happen if someone falls out with the PDSO? There would be nobody left to comment on that?

The Convener: Do people fall out with the PDSO?

Mark Harrower: I am sure that they do.

The Convener: Right. You would know, as you are at the chalk face, as it were, like the rest of the panel.

Time is running on, so do not feel obliged to raise anything else, but is there anything that we have not touched on that you wanted to raise? I think that we have given the subject a good airing, but there might be something that we have not asked about that we ought to have discussed.

Silence is wonderful. Thank you all for your contributions, which have been very useful.

11:10

Meeting suspended.

11:18

On resuming—

The Convener: I welcome our second panel of witnesses. Dr Colin Lancaster is director of policy development and Kingsley Thomas is manager of criminal legal assistance at the Scottish Legal Aid Board. Professor Alan Miller is chair of the Scottish Human Rights Commission.

I thank you all for your written submissions. The fact that you listened to our previous evidence session is helpful to us all. I invite questions from members.

John Finnie: I would like to get panel members’ views on paragraph 92 of the policy memorandum, with which Professor Miller will be familiar. It states:

“There is nothing in the provisions of the Bill which has a practical effect on the extent and quality of the preparations for the trial and the right of the accused to have effective legal assistance. There is nothing which puts the fairness of the trial at risk.”

Will you please comment on that?

Professor Alan Miller (Scottish Human Rights Commission): Thanks very much for the opportunity to speak with all of you and thanks for the question. That is precisely where I had my folder open and I had underlined that sentence, because I think that the committee is presented with a real challenge in deciding what to do with part 2 of the bill in two respects.

First—and this answers your question directly—the Government seems to be making assumptions that there will be no risk to the right to a fair trial from any of the measures in the bill. Like you, I have listened to the past hour’s evidence and clearly there are a number of significant risks to be considered, whether or not you agree with or accept them all. Do you want more assurances, rather than the assumptions that the Government is asking you to make, that there will be no risks attached to the bill in its present form? I think that you should seek more assurances, either through a proper human rights impact assessment to identify—as we have begun to do—what some of the risks are, through a pilot that would gather evidence, or through a sunset clause that would allow the risks to be re-evaluated. The first challenge that you have is around assumptions and assurances—which will you look for?

Secondly, I think that there undoubtedly are risks, so the question is whether, depending on the weight that you give them and how much quality you think there is to them, they are proportionate to the potential savings of around £3 million that the Government has assumed. 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 in going further down this road.

Roderick Campbell: Mr Thomas, do you have comments on the matter that I raised in the first evidence session about ABWOR and non-contributions? Does the board have any information about the level of non-collection of contributions for ABWOR that it can share with the committee?

Kingsley Thomas (Scottish Legal Aid Board): We are finalising our end-of-year information for
2011-12. For that particular year, the total contributions assessed for ABWOR cases was £154,000. Of the ABWOR cases that were granted and submitted to us, 6.2 per cent had a contribution payment—that is a relatively small figure, but the amounts are not insubstantial.

Roderick Campbell: Do you have any information about the levels of contributions that were not paid?

Kingsley Thomas: No, because we do not collect contribution payments. We heard from Mr Harrower that not many do, although we are aware that some firms do collect them. How it works in practice is that we pay the solicitor’s account net of any assessed contribution.

Roderick Campbell: I have a question about a matter that is not in the bill. If the board were to collect the contributions for summary legal aid in particular, or indeed for ABWOR, for consistency, what would the cost to the board be? What level of expenditure are we talking about?

Kingsley Thomas: We have done initial analysis of that and we reckon that the extra resources, staff and systems would cost about £600,000 each year.

Roderick Campbell: Do you have any general comments about what I think are the modest savings that are referred to in the financial memorandum?

Kingsley Thomas: Do you mean in terms of the £750 threshold for disposable capital?

Roderick Campbell: No. I was referring to the general estimates of £1 million for ABWOR, £2 million for summary criminal legal aid, and £830,000 for solemn criminal legal aid. They seem quite modest.

Dr Colin Lancaster (Scottish Legal Aid Board): The savings figures are calculated on the basis of the figures that are elsewhere in the policy memorandum on the rate of contributions, the number of people who would be likely to pay them and how those contributions would be calculated. One is a direct result of the other, so if the thresholds were set differently, or the rate of contribution—the percentage of disposable income that would be taken—was set higher or lower, the savings that flow from them would also change. The policy memorandum sets out a scheme of contributions that would deliver that level of savings. If a different level of savings was wanted, a different scheme of contributions could be constructed to deliver that.

Roderick Campbell: So against the current budget of £20 million for ABWOR and £35 million for summary criminal legal aid, the saving is actually quite modest.

Dr Lancaster: Nevertheless, such a saving balances the need to reduce overall expenditure on legal aid with the recognition that it would be problematic to ask clients to pay substantially more. We must strike a balance in order to achieve meaningful savings and should put these proposals in the context of the wider savings packages that have been introduced for legal aid over the past couple of years. Although we have a demand-led budget for legal aid—there is no cap on the legal aid fund—obviously Government has to make provision for legal aid; however, notwithstanding its commitment to paying more if demand requires it, the provision that it has felt able to make has gone down. To deliver savings, therefore, it has put in place a number of measures in civil and criminal legal aid, eligibility, scope and fees.

Although ministers here want to try to achieve savings while preserving access to justice, other jurisdictions have found different ways of achieving savings. In England and Wales, for example, large parts of social welfare law have been taken completely out of the scope of civil legal aid. That is not what ministers in Scotland have said that they want to do; instead, they want to preserve scope. However, in order to find savings, they have to look at each of the areas and have said that, as a general principle, those who can afford to contribute to the cost of the help that they receive should do so. The question is how much they should pay and how one determines who can afford to pay, which is what much of the discussion with the previous panel was about. The levels of income and the contribution rates that have been set produce a saving that, alongside the other savings measures that have been introduced, should result in legal aid coming down to a level that the Government views as sustainable in the longer term.

Roderick Campbell: In the previous evidence session, there was a lot of talk about having to produce various bills to show income levels and so on. In practice, what should be the mechanism for completing the application online as far as the financial information required is concerned?

Kingsley Thomas: The mechanism should not have to change. Legal aid applications for summary and solemn legal aid already have to provide the kind of financial verification information that we are looking for. We should not forget that a substantial majority of clients who apply for criminal legal aid are in receipt of benefits and our automatic link to the DWP to verify such benefits means that we do not actually need much information from clients in that respect. The current online system, in which legal aid applications are sent to us and bank statements or any other information to confirm income or outgoings can also be scanned in and sent, works
pretty well and will not change with the introduction of contributions.

**The Convener:** Is the £3.9 million saving calculated on the basis of 100 per cent recovery?

**Dr Lancaster:** The figure in the financial memorandum is the maximum saving achievable under this contributions regime if there is 100 per cent collection. As Mr Harrower mentioned earlier, we have looked at various sensitivities with regard to our collection of solemn contributions and have set out a range of what we might be able to collect.

As for collection by solicitors, the collection arrangements in the bill mean that the savings that are achievable do not depend on the extent to which the contributions are collected by the solicitor because the current system for ABWOR that Kingsley Thomas described would also be adopted for summary criminal cases. Under that system, the solicitor’s account would be submitted to the board and paid net of the contribution—in other words, there would be an assumption that the contribution was collected.

**The Convener:** So solicitors would carry the loss.

**Dr Lancaster:** If they did not collect the contribution, they would carry the loss. If they did collect it, they would get their payment—and, in some cases, get it earlier than they would from the board.

**The Convener:** So that is how you get 100 per cent collection. You are basically saying, “If solicitors do not collect—tough. They’ll take the loss.”

**Dr Lancaster:** The bill does not assume 100 per cent collection. It is simply that once the contribution is assessed the saving is achievable.

**The Convener:** Is the £3.9 million net of administrative costs? Even with the online application system, the board might still refuse legal aid to a certain client and the solicitor might have to come back with further information. Are there really no administrative costs in running the system?

**Dr Lancaster:** I think that the financial memorandum sets out a small amount for that.

**Kingsley Thomas:** Yes. It is £103,000, which is to cover a few extra staff in my criminal applications department and in our department that deals with the recovery of sums for solemn cases. However, we are used to the kind of thing that you are talking about, convener: we do it day in, day out with cases that are initially refused.

11:30

**The Convener:** I asked whether the figure is the net figure. You have explained about the 100 per cent collection, and I understand that losses will be carried by the solicitors, as you will take the contributions off their bill. You have also said that the administrative costs are peanuts—£100,000—so I should not bother. The figure is £3.9 million.

**Dr Lancaster:** I suppose that, if we take the two figures that are in the financial memorandum and net one against the other, the figure will be £3.8 million.

**The Convener:** The figure is £3.8 million. I have taken a little bit off it. Right.

**Jenny Marra:** Excluding the transfer of liability that SLAB might have to pick up as a result, to which the convener has just alluded, how much more onerous would it be for SLAB to collect criminal summary contributions? You are already collecting civil contributions and you will collect solemn contributions.

**Kingsley Thomas:** The financial memorandum quotes figures for the number of cases in which we expect that we will have a contribution to recover. We reckon that we will have a contribution to recover in just under 2,000 solemn procedure cases. That accounts for the small extra resource that we thought that we would need. If we were to recover in relation to summary and ABWOR cases, there would be an increase of just over 17,000 cases. We would go from collecting in 2,000 solemn cases to dealing with a total of 18,500 combined criminal cases. Therefore, there would be a significant increase for the board to deal with.

**Jenny Marra:** What does that equate to in day-to-day operations? Does it equate to three, five or 20 members of staff? What is the comparison with solicitors making all of those collections? The Scottish Legal Aid Board already has a system in place—I presume that it has the information technology to collect the contributions and staff who are trained up to deal with mechanisms to collect them. Practically, how much more onerous would the extra 17,000 contribution cases be for that organisation?

**Dr Lancaster:** While Kingsley Thomas is looking for the extra staff numbers, it is worth pointing out that we open perhaps a couple of thousand civil legal aid contribution cases each year. The average value of a civil legal aid contribution is around £2,300. We set up an instalment arrangement with the applicant to pay a fair sum of money over an extended period of time. We are talking about 2,000 cases at around £2,500 each. We would be looking at a far larger
number of cases, the vast majority of which would be very much smaller.

The earlier evidence seemed to imply that all the people would meet the full costs of their cases and that the maximum contribution of £1,000 would be extensive, but that would be the case for a very small minority of all applicants and a very small minority of all contribution cases. The contributions would far more typically be under £50, or between £50 and £100, or between £100 and £300. We are not talking about the size of contributions that we typically deal with and the instalment periods that we typically allow for civil legal aid. With civil legal aid, we are looking at somebody paying a third of their annual disposable income by way of contribution at the basic level. In many criminal cases, we are looking at people who will pay perhaps 10 per cent over a 13-week period.

**Jenny Marra:** I understand that there would be many cases and that many of the payments would be quite small, as you have just said, but how much of an impact would there be on the Scottish Legal Aid Board in collecting the contributions? I am talking about the costs, staff numbers and hours. Has any assessment been made of the impact?

**Kingsley Thomas:** Yes. As I said, the additional cost of us collecting summary and ABWOR contributions would be just under £600,000—it is £594,904. That is largely for the additional staff who would be required. If my arithmetic is right, we would be talking about an extra 16 collection staff, a team leader and a deputy team leader.

**Dr Lancaster:** I think that that would be more than a quadrupling of our current Treasury complement for debt collection.

**Jenny Marra:** It would be a quadrupling of what, sorry?

**Dr Lancaster:** It would be a quadrupling of the current arrangement. The team that collects the civil contributions is relatively small and we would need a far larger team to be able to collect the volume of contributions that would be involved in summary cases.

What I was trying to say earlier was that the cost of setting up all the collection arrangements centrally would be disproportionate to the value of many of the contributions that would be collected in such cases. The same is not true of civil legal aid, in which the contributions tend to be higher.

**Jenny Marra:** The convener made the point to the earlier panel of witnesses that somebody could be represented by a solicitor, not pay their contribution and then go to another solicitor, who would not know that they were a non-payer or non-contributor. However, if SLAB managed the system centrally, that issue, which will be a problem, would be overcome. Perhaps you are not concerned about it, but I would like to know your opinion.

**Dr Lancaster:** I do not know how significant a problem that is likely to be. We have no way of knowing that.

The previous witnesses seemed to imply that every client was a new client and the solicitor had no knowledge of them, whereas we know that many clients are repeat clients and solicitors are well aware of their circumstances, their behaviours and how to interact with them. On the basis of that extended, continuing relationship between solicitor and client, we think that the solicitor is in a good position to manage the relationship and the collection of the contribution.

**Jenny Marra:** Dr Lancaster, do you agree that the repeat client pattern may not continue as a result of the bill because the client is not likely to go back to the solicitor to whom they owe money and the relationship might break down as a result?

**Dr Lancaster:** Solicitors will make a commercial judgment about how to respond to a client who does not pay, just as they do at present and just as they will with private clients. The solicitor will consider their history with the client and work out whether it is worth severing 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, in which, of course, a contribution would be payable to the board.

**The Convener:** That is a special way of looking at the justice system. A solicitor decides to invest in a client because they will commit murder or rape at some point.

**Dr Lancaster:** No, I am not saying that. I am saying that many solicitors have long-standing, continuing relationships with their clients and, on the basis of those relationships, would form judgments on whether they were willing to forgo some of a contribution.

**Graeme Pearson:** Many of the substantial questions that I wanted to ask have been asked. I invited the earlier witnesses to give a view about what would happen if someone who had failed to pay their contribution even after the case concluded came back into the system on a fresh charge. If SLAB were to take responsibility for the contributions and it was not for solicitors to take the hit—if I can put it in the vernacular—would the board’s policy be that, if somebody had failed to pay in an earlier case, they would not be able to access assistance until the bill was paid or would each case be considered as separate?
Dr Lancaster: We would have to consider that carefully. I can see where you are going with that question. There might be risks to the operation of the system if we took a blanket approach that, if somebody had an outstanding debt, they could not access legal aid. That would not be a reasonable position for us to adopt. People’s circumstances change and there can be legitimate reasons for their being unable to make a payment at a particular point in time. We must consider whether a person commits to make a payment to us in relation to the case in front of us. However, we would continue to pursue the contribution.

Graeme Pearson: Indeed. I am grateful for that answer.

I return to your point about the solicitor being responsible for obtaining the payment. Do you accept that, in some areas, the proposal might be anticipated as being a new discount to the fees, that solicitors would be unlikely to be able to collect 100 per cent of the fees from the client group involved and, therefore, that the policy presupposes that a private company would merely take the hit in the interests of the longer-term business?

Dr Lancaster: There was no discussion earlier in the meeting about how solicitors currently get their fees from their private clients. We know that solicitors have private clients and many firms do quite a lot of criminal business, for private clients, particularly in relation to road traffic legislation work; obviously, they have measures in place for recovering their fees from those clients. There will also be a point at which solicitors might decide to write off some of those fees, and we imagine that the same thought processes will go on in relation to legal aid clients who owe those solicitors. The solicitors might come to the judgment that they will let a bit of the contribution go. Again, there will be a commercial reality around whether it is worth pushing it with a particular client if there is a risk of the client going to another firm. Solicitors will form a judgment about what they are willing to take, on a client-by-client basis.

Graeme Pearson: You used the word “reality”. Do you accept that, for many clients, £100 is a king’s ransom?

Dr Lancaster: Again, the earlier discussion did not distinguish adequately between income and disposable income. The bill proposes that ABWOR should move from a system of taking the income, deducting allowances for dependants and arriving at a figure that can be looked up on the advice and assistance keycard to see whether the client is eligible and what size of contribution they will have to make.

For summary criminal legal aid, we have a more bespoke assessment that considers income and outgoings. For civil legal aid, we make a very bespoke assessment that looks at income and outgoings to arrive at a figure for disposable income. The disposable income figure is often very much lower than the income figure.

As we say in our written submission, our modelling suggests that the £68 is, on average, equivalent to the current lower income limit in ABWOR of £105. That gap is made up of outgoings that are currently irrelevant for ABWOR purposes. If a solicitor has a client who has to pay rent, council tax, childcare costs, transport costs, and so on, those will all be deducted from their earnings. We wanted to find some examples for the committee of the difference between the gross income approach and the net disposable income approach and we can send some examples to the committee after the meeting if that would be helpful.

However, just to illustrate the point, we have an example of a cleaner who has been charged with drink-driving. He earns £321 per week, which is well above the Joseph Rowntree Foundation figure that Mr Moir quoted. The cleaner has no dependants but he has outgoings for rent, council tax, a car loan and car insurance, which reduce his disposable income substantially down to £90. He is therefore eligible for summary criminal legal aid. However, for ABWOR purposes, his income would have been assessed as £321, which is well above the current upper limit of £245.

That is an example of a client who would have been eligible for summary criminal legal aid, but who would not have been eligible for ABWOR. Under the new system, he would have to make a contribution of £56, which we worked out as being 3 per cent of his disposable income over the 20-week assessment period. For ABWOR, he would have to make a contribution of £44. That is the ABWOR for which he would have been ineligible by around £100.

That is the difference between disposable income and gross income. It is a very big difference, which would make a substantial difference to a number of people who currently have outgoings and inescapable commitments that mean that they do not have the flexibility that would enable them to meet the cost of a lawyer. That inflexibility is taken account of in the assessment.

The people for whom the proposed change would be less of a benefit are those who have a reasonable income but no outgoings. Again, as we say in our submission, such people might reasonably be regarded as having more flexibility to meet unanticipated costs than the person whose entire wage packet is spoken for.
Kingsley Thomas: The person to whom £100 was a king’s ransom would probably qualify anyway and would not have that contribution to pay. An example was given of the person on the minimum wage with no outgoings. The reality is that we would find it very difficult to find an example of a person who had absolutely no outgoings. Even a youngster on the minimum wage and living at home would more than likely be paying some kind of rent or board payments to their parents and would have some kind of loans or outgoings that we would take into account in the calculation.

Much has been said about the £68 threshold and, as Colin Lancaster mentioned, it should be stressed that that is a disposable income threshold not an actual income threshold. It also equates to the same free threshold for civil legal aid. The point has been made whether there should be a higher free threshold for criminal legal aid than there is for civil legal aid.

11:45

Graeme Pearson: I understand your point. The science of it may seem lovely in a project but many of these families do not exist in a bubble. They support others in the network. It would be difficult for someone, in filling in a form, to say for example they had to give their daughter £15 because she had nothing or that they had to give something to a friend. That is the kind of social life that many in this client group will have. I cannot see how your system will be able to capture that information in such a way that you can either tick a box to acknowledge the outgoing or decide that the £15 was not well spent.

Dr Lancaster: That is what we do.

Graeme Pearson: Even if a client group’s daughter-in-law is short of money for that month and they hand them the cash, would you take that into your computations?

Kingsley Thomas: We can look at such aspects. That was the reason we were really keen on promoting the undue hardship test, which gives us flexibility to look at assessments in a sensible way according to the individual circumstances. What we did not want was a hard-and-fast rigid test such as the ABWOR test, which asks what the client’s income is, takes off an allowance for dependants and that is it. If the client has to pay out extra in the month, that is too bad because nothing can be done about it.

Every day we take judgments based on individual circumstances and although the applications for legal aid are made online and we receive the information electronically, we can step back from that. The applications are read by humans who can look at the situation and take a sensible approach to such financial matters.

The Convener: That is the discretionary part of the undue hardship test. Currently, in solemn procedure, it is the court that applies—

Kingsley Thomas: Not any more.

The Convener: That is my question.

Kingsley Thomas: That transferred to the board in November 2010.

The Convener: So everything went to the board—everything is within your ambit with regard to the undue hardship test. I take this to mean that even if on paper, or by the ticking of boxes as referred to by Graeme Pearson, a person is deemed to be required to make payment, you could look beyond that. That must imply more work for the solicitor who must submit further information to you on the undue hardship test and for which they are not being paid.

Kingsley Thomas: That may be the case. The ABWOR test is currently a rigid test that is applied by the solicitors. The nature of the undue hardship test will be fully explained to them and published. The flexibility will remain because people’s individual circumstances and how their contributions or eligibility are assessed cannot always be fitted to a policy document.

In the ABWOR situations, if the solicitors who are doing the test think that there is something else that ought to be taken into account and which is not covered by any of the guidance that we have issued, they can ask us for our view on that. We do not know how often that will happen, but I can assure the committee that my department is well able to deal with such matters on an urgent basis.

The Convener: Urgency is the key. In civil proceedings the pursuers are given time. They are thinking about legal aid before they raise the proceedings. The defenders are given time to make an application for legal aid. However, what we were hearing from solicitors was that somebody might just walk into their office with a complaint or a summons. That is urgent business and they may not have time for the niceties that occur in civil legal aid applications. How will that operate? I refer to a case of undue hardship in which, on paper, a person is not entitled to it but the background information shows circumstances such as those that were referred to earlier of a girl getting money, for example, and the person could be required to be in court the next day. How will that work in practical terms, so that they are represented by a solicitor who is covered by legal aid?

Kingsley Thomas: That happens currently, when a solicitor who is in that situation phones us
and asks for advice there and then. We would therefore be able to deal with the situation that you describe. I do not see that as—

**The Convener:** What about an appearance, not advice? If someone had an appearance the next day, would they be covered?

**Kingsley Thomas:** Yes.

**Dr Lancaster:** We can give them advice. They can tell us there and then what the circumstances are and we can give a view. In terms of our turnaround time for returning a grant once an application has been made, we do a ridiculous proportion of such cases very quickly. Kingsley Thomas knows the numbers better than I do.

**Kingsley Thomas:** It takes us an average of 1.1 or 1.2 days to assess the cases for which we do an assessment—that is, the summary and the solemn cases. We prioritise cases. Cases that come to us that are within four weeks of the next court appearance are dealt with on the same day that we receive them. We would continue to do that.

**The Convener:** You are saying that for an accused with a complex financial background, who has a court appearance the next morning, say, the solicitor would be able to know one way or the other whether they had cover for that appearance.

**Kingsley Thomas:** Yes. They would seek advice from us.

**The Convener:** Okay. That is all I wanted to know.

**Dr Lancaster:** The other point relates to the verification of information and whether it all needs to be provided at that initial point. That is another of the concerns that have been raised regarding custody cases when somebody does not have that information to hand. A solicitor will assess their client on the basis of the information that they have before them, but information that came to light subsequently and which suggested that the client had outgoings that would either make them eligible when they had been assessed as not being eligible, or would reduce or remove an assessed contribution, could be forwarded when it came to light.

**The Convener:** It would be backdated.

**Dr Lancaster:** We would say that the information that was provided at the point when the grant was given meant that the grant was still valid, but that the client’s financial circumstances had since become clearer and as a result the contribution could be reduced on that basis.

**The Convener:** Or it could be increased, or they would get no cover at all.

**Dr Lancaster:** If there was a change in circumstances such that somebody came into money—

**The Convener:** No, I did not mean that.

**Dr Lancaster:** Again, we have this situation at present. If the information that is given is incomplete and it subsequently comes to light—

**The Convener:** I am not talking about someone winning the lottery. I am talking about a solicitor taking, in good faith, financial information in urgent circumstances from an accused and getting it off to you that day because they have to be in court the next day and they need to know that they will have cover. You give them cover but they then find out that, although they provided the information to you in good faith, the accused had told them porkies. Would they still be covered for the court appearance in such a case?

**Dr Lancaster:** I ask Kingsley Thomas to say what happens at present if verification is not produced.

**Kingsley Thomas:** Solicitors make grants day in and day out on ABWOR cases, but the board requires the solicitor to have seen evidence of the client’s financial circumstances before it makes the grant. Legal aid is a state benefit that must be verified. If the solicitor was not able to see the verification but can explain to us why that was the case, we can judge whether the grant was valid and, if so, pay the solicitor. However, if the solicitor has just chosen not to seek any verification—

**The Convener:** The bona fide situation that you have described when the solicitor acts in good faith is different—that is parked.

**Kingsley Thomas:** There are a lot of elements to legal aid, but if the solicitor does something in good faith, they will be paid for doing the work that they have done.

**The Convener:** That is fine. That is now on the record. If a solicitor fills in the form in good faith and is told that there is no contribution, or such and such a contribution, but then it all changes because they find out after they have made a court appearance that in fact the information that they were given is not correct and the man or woman involved should never have been given legal aid in the first place, the solicitor will still get paid because they acted in good faith.

**Kingsley Thomas:** It is difficult to say, but we would look at the circumstances and where it was fair to do what you describe, we would do it.

**Graeme Pearson:** That was a maybe.

**Dr Lancaster:** But we do not envisage there being any change from the current—
The Convener: Sorry, but I think that Graeme Pearson is right in saying that Kingsley Thomas’s response was a maybe.

Dr Lancaster: We do not envisage there being any change to the current situation in that regard. At present, solicitors must do an assessment and then provide the verification. We would then question whether the verification satisfied us. The bill’s proposals would not change that situation.

The Convener: So it is all steady as she goes. Was that a yes? A smile does not appear on the record.

Dr Lancaster: That was a yes. There will be no change to the current process.

The Convener: Right.

Alison McInnes: This is all very illuminating, but it is not transparent and it is not my idea of 21st century access to justice.

You heard Mark Harrower from the previous witness panel say that this is basically a back-door attempt to reduce solicitors’ fees and that you know that they will not be able to collect the fees. If the Government had concluded that you should collect all the contributions for the summary cases and the other cases, would you be telling us that it was such a good idea?

Dr Lancaster: That contributions were a good idea?

Alison McInnes: Yes.

Dr Lancaster: We think that, in principle, contributions are absolutely right. In the paper, “A Sustainable Future for Legal Aid”, the cabinet secretary made it clear that, as a general principle, those who can pay should pay; those who can afford to make a contribution towards the costs of the assistance that they are provided with should pay towards those costs. That happens in ABWOR cases and in civil legal aid. There seems to be no reason why we should have in criminal legal aid a system that requires us to grant free legal aid for a case that will cost £300 to someone whose disposable income would require them to pay a contribution of £2,500 were they to have a civil case. It seems absolutely reasonable for a person in those circumstances to make a contribution or, indeed, to meet the whole cost of their case, but the current system does not allow that.

Alison McInnes: You said earlier that collecting fees and charges was your daily bread and butter. Why would your collecting all the charges not be the most efficient way of rolling things out?

Dr Lancaster: I think that we said that assessing eligibility and taking decisions on cases was our bread and butter. On the civil legal aid side, we also collect contributions.

You mentioned collecting fees. This is where the discussion is a little bit strange. We are talking about a system whereby 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 give their fee to the solicitor for the work that the 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.

Alison McInnes: You heard the previous panel say that it made administrative sense to do it that way, because we do not want to see further churn in the system at intermediate diets, at which people say that are not ready to roll because they are not sure that they will get paid. Do you not think that that confuses the whole landscape?

Dr Lancaster: I am not aware of solicitors turning up in court and saying that they cannot proceed with a case for a private client because the private client has not given them the latest instalment. I am not sure, but that 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, and I do not think that solicitors do that in private cases.

I will try to put the issue in context. Again, we can provide this information after the meeting. We looked at a number of firms to find out how often they would have to collect contributions and what the scale of those contributions would be. We looked at a number of medium-sized firms that have fair volumes of summary and solemn business. I will give an example.

Between December 2010 and November 2011, a firm in Glasgow received 256 grants of summary criminal legal aid. We reckon that 17 of those would involve a contribution and that the total value of those contributions would be just under £5,000. That is in the context of the firm earning £138,000 from summary criminal legal aid. As a whole, the firm would be looking at collecting contributions worth £8,300. Its total income from legal aid is £323,000. In total, contributions would have to be collected from 29 clients out of 396 cases a year. We are talking about a small percentage of the firm’s business and a very small percentage of its income. At that level, we are talking about less than 3 per cent of its total
income from legal aid being obtained directly from its clients.

Our best estimate is that between 5 and 10 per cent of many firms’ criminal income comes from private clients. We are talking about firms being required to collect a lower value of contributions than the value of the contributions that they are currently collecting from private clients. When firms say they have no mechanisms to collect fees, I do not know how they get their private fees.

Professor Miller: In answer to that, but also more broadly, the issue of who should recover contributions is clearly one of concern. Is it solicitors? Is it SLAB? The level of eligibility is a real concern. I do not want to dwell too long on those individuals who might bring solemn business to law firms. I am more concerned about the individuals we all know who come into contact with the criminal justice system because of various vulnerabilities, for example mental health issues and physical disabilities. We heard from Capability Scotland about where such individuals come from in society and their socioeconomic status.

If we take a step back from the mechanics—legitimate though they are—and look at access to justice, fairness and proportionality, 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. They will either have to represent themselves—which can cause difficulties for them and for the criminal justice system—or, as we heard this morning from the Law Society of Scotland and others, it is easier and cheaper just to plead guilty than to go through it 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.

After three years, we have just finished mapping the extent to which human rights are realised in Scotland, particularly by the most vulnerable. What we have found is that although the laws and the policies appear to be quite good, for many people, real life gets in the way and they do not get the outcomes that all of us sitting round here assume that they do. Those are invisible human rights breaches, whether they affect older people, disabled people or those who are charged with criminal offences and do not have access to effective representation.

That is why I said earlier that we need more assurances that that will not happen. A lot of the assumptions that are being made by the Government and by my friends and colleagues here are a bit superficial and life gets in the way of some of them.

John Finnie: I wonder whether Professor Miller can expand on his comment about the lack of clarity in appeals in which the appellant dies but would have been entitled to have their expenses met.

Professor Miller: We can discuss only what is in front of us and I believe that there are enough unknown risks about that. Indeed, I think that the policy memorandum’s statement on human rights, which says that there are no risks attached, is grossly inadequate.
Of course, there are a lot of unknowns. I am not going to get into the whole Donald Rumsfeld thing, but the fact is that we know some of them. For example, we do not know what the levels of contribution will be or anything about a deceased’s contributions in appeals. An awful lot has been left to either subsequent regulation or the discretion of the Scottish Legal Aid Board, and the legal profession—or at least some of it—is sceptical about relying on either of those things. The committee needs a lot more information up front about the impact of not only what it sees, but what it does not see, and a proper impact assessment would benefit the committee in its efforts to weigh up what is being said in the bill’s defence and what appears to me to be legitimate concerns about its impact on real life and real people.

Roderick Campbell: You have largely answered my question, but my understanding is that the equality impact assessment has not yet been produced. Disability issues have featured quite strongly in our discussions, but is there any flesh that you want to put on anything else? What other matters should the impact assessment cover?

Professor Miller: You are fortunate, because your first evidence session was trying to do what an impact assessment should have done. There is no public association for the accused that can tell the committee, “This is our experience—listen to us.” The closest you have to that is Capability Scotland, which represents a section of the community that comes into contact with criminal justice, and the lawyers who have daily face-to-face understanding of what life is like for many of those who come into contact with the system. Their evidence raises a very big question mark over the human rights policy statement in the bill that there is no risk to the right to a fair trial.

Without being excessively legalistic, I think that we all sign up to values and principles such as access to justice, fairness and proportionality. Article 6 of the European convention on human rights, which covers the right to a fair trial, is the hard-wired guarantee on this matter, and it is largely missing from the policy assessment and the debate about the collection of fees and eligibility levels. The question is whether there is a real risk that someone will not get a fair trial under the measures proposed in the bill. You might think that that is inevitable. If so, the next question is whether that is a risk worth paying. Are the savings so good that we are prepared to run the risk and hope that no one gets an unfair trial? Are the savings proportionate to the risk that we seem to be running and the thin ice that we seem to be skating on—given the problems that the Law Society has identified—and sufficient to outweigh those concerns, legitimate though they might be? That is a matter for the committee, but I think that it must be open to question.

David McLetchie: Dr Lancaster, did I hear you say that changes to contribution rules in England and Wales had not changed pleading behaviour?

Dr Lancaster: Yes. Over the past five years, the percentage of people pleading guilty has remained pretty much flat.

David McLetchie: I find it slightly difficult to square that evidence with paragraph 11 of the SLAB submission, which states that alignment of the rules for ABWOR, criminal legal aid and so on will effect change as a result of “changes in pleading behaviour”.

Dr Lancaster: It will surprise you to hear that I do not think that those two positions are inconsistent. That part of our submission relates to the timing of a plea rather than entering a plea of guilty where one would not otherwise do so.

The issue at present—as the example that I gave earlier suggests—is that some people are not eligible for ABWOR and if they wanted to have a lawyer represent them when they appeared in court, including for any subsequent plea in mitigation or deferred sentence, their only option would be to apply for summary criminal legal aid. In other words, they would enter a plea of not guilty and apply for summary criminal legal aid so that they could get funding under the disposable income and due hardship test.

Under the proposed change, if a plea of guilty is the appropriate plea to make at the outset, people will be able to do that with the benefit of a lawyer representing them because they will be more likely to qualify for ABWOR than they are at present. The change actually increases eligibility for ABWOR.

David McLetchie: Yes, I can see that, but your evidence on behavioural change—although, as someone once said, “They would say that, wouldn’t they?”—seems directly to contradict Mr Harrower’s responses to my questions. He seemed to think completely the opposite to what your submission and the Scottish Government’s consultation document say. There must be some way of reconciling that, must there not?

Dr Lancaster: I think that we may have been looking at slightly different parts of the evidence and the provisions. We are talking about people who do not qualify for ABWOR pleading not guilty so that they can get the benefit of summary criminal legal aid.

In future, there will be no reason for those people 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. If the advice is that that is the best thing to do, and the client is instructed that a plea of guilty should be tendered at the pleading diet, they will be able to do that and a grant of ABWOR will be made to cover it.

When changes were made to payment regimes under summary justice reform, there was a big increase in the number of people who were pleading guilty at the pleading diet. There was no increase in the number of people who were pleading guilty overall, so there is no suggestion that those pleas were inappropriate, but people who would in the fullness of time have pled guilty at the intermediate diet, or possibly at the trial diet, were pleading guilty more often at the pleading diet, which is the most appropriate point at which that plea should be tendered.

We say that the financial arrangements currently pose a barrier to some people for whom that is the appropriate plea, and we will remove that barrier.

The Convener: I was not a criminal practitioner, but I am sure that people might plead guilty later because the complaint has been amended and reduced, so they are not pleading guilty to the same thing.

Dr Lancaster: No one is suggesting that the only point at which one can or should plead guilty is the pleading diet, because things might change. There are discussions between the Crown and the defence and, if new evidence becomes available, charges can be dropped or amended.

The Convener: A solicitor raised the point that some very smart accused—there are quite a lot of smart accused—in a domestic abuse case, for example, would delay their contributions and refuse to pay them to delay their imprisonment and the criminal prosecution process. Could that be done?

Dr Lancaster: Again, that all hinges on whether the solicitor not having been put in funds would be a valid reason for the continuation of a case.

The Convener: I understand that. If the solicitor is not in funds they will not appear, and they have to ask the court for a continuation. There is a knock-on effect, and Professor Miller referred in a broad way to the impact on justice. I think that we all agree that it is a good idea that people who can afford to pay should pay when they are in court, but it is not as simple as that, as all those other issues that are now emerging show.

Dr Lancaster: The individual’s behaviour is a key element in that regard. Someone on the previous panel talked about a safety net, which I think that we need to consider for that sort of scenario. Although the accused should not be able to dictate the terms of the criminal justice system by refusing to pay, we recognise that it is important for proceedings to be able to go ahead as scheduled.

12:15

Mr Harrower said that some at SLAB would love to see an expansion of the PDSO, but the fact is that the PDSO is available and it could act as a safety net. In 1999-2000, when fixed payments were introduced and the Law Society, the Edinburgh Bar Association and the Glasgow Bar Association said that people up and down the country would be appearing without representation, regulations were put in place to provide for a safety net whereby the PDSO would act in circumstances in which an accused could not find a solicitor to act for them. The safety net was in place but it was never called upon.

We could put a safety net in place for the proposed scenario as well. We could say that, if there was a risk to proceedings, we would appoint a solicitor to act for the accused for the purpose of those proceedings. To be honest, having the PDSO do that is simply a way of minimising any additional cost to the public purse. If the PDSO provides the safety net, there is no additional cost to the public purse.

The Convener: Would that have to be put in the primary legislation?

Dr Lancaster: No, I do not think so. We would have to consider whether regulations would be required for a transfer in those circumstances, but the kind of system that is being proposed would work.

The Convener: We will have to pursue that. You are thinking about it, but we have a timescale and we have to ensure that there are no gaps.

Dr Lancaster, we have had quite a good session. I want to put Professor Miller on the spot now. The bill is in two parts and we cannot reject one part without rejecting the bill in its entirety. Any such amendment would also sabotage the civil part of the bill. How should the committee handle concerns about the operation of the legislation to ensure that the bill proceeds, while taking account of all the serious points that today’s panels have raised? How do we resolve that?

Professor Miller: The committee can take a number of steps to satisfy itself that the proposed legislation is good. A more thorough impact assessment is needed than has been done so far. A pilot could be done to test whether the measures work and whether the concerns that have been raised are legitimate or ill-founded. A sunset clause could be inserted that would allow the legislation to be evaluated to see what impact it had had after a period of time. All those measures are possible.
It might be good to get some clarity on the PDSO issue. I think I picked it up correctly that Mr Pearson asked whether contributions would have to be made directly to the PDSO by the accused. My concern is about someone who is not trying to manipulate the system, but is simply unable to pay the contributions. Having the PDSO as a safety net would not be a safety net for that person if they had to pay. That is my continuing concern.

**The Convener:** I was not talking exclusively about someone manipulating the system, but about either of those circumstances. We need to ensure that justice continues. That was useful; thank you.

Thank you all for your evidence. We now move into private session.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

10:02

The Convener: Item 2 is our final evidence session on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

The first witness is Dr Cyrus Tata, who is a reader in law at the University of Strathclyde. I welcome him and thank him for his written submission, which we have all received.

I remind members that we will focus on part 2 of the bill in this part of the meeting, and I invite them to ask questions.

Roderick Campbell (North East Fife) (SNP): Good morning. I refer to the section in your submission entitled “2. No refund even if you are acquitted: can two wrongs make a right?” Can you talk more fully about international experience of the principle of reimbursing an acquitted defendant?

Dr Cyrus Tata (University of Strathclyde): I start with an apology for the committee’s having received my evidence only recently. My excuse for that—if it is one—is that I was on paternity leave when the call for evidence was made, and I have been playing catch-up.

Roderick Campbell’s question is interesting and important, and I have not yet had time to explore the matter fully, but my understanding is that the proposed approach is not that common. The committee may wish to investigate and take advice on whether it would be in compliance with article 6 of the European convention on human rights. I cannot give chapter and verse on the international comparisons, but I am not aware of too many nations that have taken up the practice of not refunding persons who have been acquitted.

If I might elaborate a little, a fairer approach would be to apply requirements to pay contributions towards the cost at the end of the case, when its outcome is known, rather than before it. It seems to me to be fundamentally unjust to require payment in advance and then not to refund a person if they are acquitted.

I suspect that it would come as a nasty shock to the person who had been through the harrowing process of being an accused person to find that even though they had been acquitted, they were not even to get the money back, having suffered the social stigma and the legal process, possibly having been detained, and having suffered personal collateral consequences such as family breakdown or even loss of employment. I suspect...
that most members of the general public would also find that quite difficult to understand.

Roderick Campbell: Would it surprise you if I was to tell you that I have not, in the relatively short time for which I have been a member of the Scottish Parliament, had a single letter from a privately funded defendant who was acquitted and who was complaining about the system?

Dr Tata: That would not surprise me a great deal, mainly because there are not that many privately paying clients. There are a few, but most are very wealthy. I see where you are coming from with your comparison with such clients, but I am concerned that the bill seems to be motivated by a view that we should be concerned, first and foremost, about fairness to privately paying clients, and that if they do not get a refund when they are acquitted, neither should the rest of us. That seems to suggest rather odd priorities.

Roderick Campbell: Okay.

The Convener: You assert in your written evidence that it is “extremely rare” for there to be privately paying individuals. Can you tell us the percentage of such individuals?

Dr Tata: I do not have the percentage to hand, but I am sure that the Scottish Legal Aid Board could give you that information, or I can provide it later.

The Convener: I would like that, please. It would be useful, given your assertion.

In Scotland, we have a not proven verdict. Are you suggesting that refunds should be extended to that verdict?

Dr Tata: Absolutely. Not proven is a verdict of acquittal.

The Convener: Okay.

Dr Tata: I say that without getting into a discussion about that verdict.

The Convener: I just wanted clarification of that.

Graeme Pearson (South Scotland) (Lab): You talked about the unfairness of people having to pay for the process in the event that they are found not guilty or if the case is not proven. You state in your written evidence that you have looked at the system for the past 20 years. In circumstances where the verdict is not guilty or not proven, would it be appropriate for the judge to decide, based on the circumstances of the case, whether there should be a reimbursement of costs? What I have in mind—I am playing devil’s advocate—is that, if someone’s conduct is such that they have placed themselves before the court, even though it is decided that whatever they were involved in did not amount to their being guilty of a crime, it could be unfair for the state to have to bear the burden of that process. Would that be a fair approach, or would it be too complex?

Dr Tata: I think that the approach would be too complex, although I can see where you are coming from in playing devil’s advocate. The tabloids are always full of suggestions that, even though someone has been acquitted, they are really guilty. In our system of justice, however—or in any system of justice that is based on the rule of law—it is the court of law that determines whether a person is guilty or whether they are to be presumed innocent and therefore acquitted. It would be a dangerous situation were a judge to be asked to look behind his or her verdict, or the jury’s verdict, and then to say, “Well, you were acquitted, but I really think you were sort of guilty, so we’ll make you pay something.” I am also doubtful about the legality of that, given the rule-of-law considerations that apply.

Graeme Pearson: I am grateful for that. The—

The Convener: Before you move on, Rod Campbell has a supplementary question on that.

Roderick Campbell: From what I understand of what Graeme Pearson said, it sounded similar to the practice in England and the opportunity that a judge there would have, so I am a bit surprised by your answer, to be honest.

Dr Tata: My understanding is that a refund is possible upon acquittal. I am not aware—it is something that I can look into or the committee might wish to look into—that a Crown Court judge, for example, can look behind a jury’s verdict and say, “Aha! On the basis of the evidence, even though the jury has acquitted you, you still have to pay some of the costs.” Perhaps I misunderstood you.

Roderick Campbell: No—the decision would be based not on the evidence but on the conduct of the defendant. Perhaps it would be prudent for you to consider that further and to come back to the committee.

Dr Tata: I am happy to do so. May I clarify what you mean by “the conduct of the defendant”?

Roderick Campbell: I mean how the defendant behaved throughout the process.

Dr Tata: Do you mean, for example, whether the defendant was unconvincing as a witness?

Roderick Campbell: I do not mean the defendant’s being unconvincing as a witness; I am talking about a discretion being afforded to judges. I think that the committee would benefit from clarity on the point.

The Convener: I am long out of practice, but I think that in civil cases the sheriff will look at the
conduct of a pursuer or a defender in the broadest sense, in a case that has been prolonged unnecessarily and which has run up costs. There are things like minutes of tender in civil cases that are an alarm about expenses. The sheriff has broad discretion in civil cases to look at how a case has run and to consider how the expenses might be allocated.

Dr Tata: Indeed, convener, but we come to a fundamental distinction between civil and criminal justice, which I am sure you understand. I am concerned that the motivation behind the bill, when it talks about bringing criminal cases into line with civil justice cases, misses that fundamental distinction, which is that it is the criminal law and the criminal process that can deprive one of liberty. The stakes are distinct and are far, far higher. I am rather concerned by the language of consistency and uniformity, and the suggestion that there are anomalies between civil and criminal cases and that we should bring criminal cases into line with civil cases. That is not to discount the real problems in civil legal aid. The outcomes for people in civil legal aid cases are enormous—

The Convener: I do not want you to go into the detail of it. I was just making a comparison about the discretion of sheriffs and the conduct of cases.

Dr Tata: Indeed.

Graeme Pearson: In the final paragraph of your submission, your response to the question, “Will the Bill really save the money envisaged?” is brief. Will you analyse that a bit further for us? I think that the perceived savings were relatively small in the scheme of things. What would your forecast be?

Dr Tata: I am 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.

There are two obvious consequences, which the committee has heard about before and I am sure come to the minds of members. One is that there is likely to be an increase in unrepresented cases. I know that it has been said to you that in England there has been no apparent increase in the level of unrepresented cases. The problem with that is that there are so many variables in the system, and the system has been in place for only a couple of years. It is hard to tell without a dedicated study and we really do not know. There may well have been an impact, but it may have been contradicted by other factors.

An increase in unrepresented cases will be a real headache for the courts. It is quite often said in the popular press that lawyers drag out cases. At the high end—the celebrity end—that may be true, but at the lower end, as I think Mr Pearson and others will be well aware, lawyers tend to deliver settlement. Compared with unrepresented defendants, they are pretty good at getting the case done and at persuading clients to plead guilty to something at some stage. They are very important. In fact, one of the drivers in the history of increases in legal aid has been that it is, in a sense, efficient to have defence lawyers representing clients and delivering speedier outcomes. There being unrepresented clients is bound to lead to delays.

The second factor that is likely to come up is collection of contributions. You have heard from representatives of the Law Society, the Edinburgh Bar Association, the Glasgow Bar Association and so forth on that. I think that their concerns are reasonably well founded.

10:15

SLAB has said that a defence solicitor should make a commercial judgment on whether a client is, if you like, a good financial bet overall and should, in some instances, take the hit if clients do not pay their contributions quickly. According to such commercial logic, the solicitor should drop clients who are considered not to be good bets—for example, the client who is not a regular customer. That might happen in quite a few cases, so there is a real danger of ending up with unrepresented clients as a result.

Those are two key worries. With regard to clients’ not paying contributions—or what, given the suggestion in section 20, we should perhaps call “fees”—one can see defence solicitors using commercial reasons such as “I haven’t had my contribution” or perhaps presenting the same argument in a different way to look for an adjournment, which is bound to slow the system down. SLAB is bound to be better at collecting contributions than defence solicitors; of course, no one wants to do such a dirty job and I think that the idea is to farm it out to individual defence solicitors. If they cannot get the money out of their clients, that will be too bad.

The Convener: As I suggested last week, would the Public Defence Solicitors Office not step in?

Dr Tata: I saw that suggestion in the Official Report. One would hope that it would. I have to say that I am an agnostic in the debate about the PDSO versus the private firm. The question is whether the organisation would have the capacity to do so; as I understand it, the PDSO, too, will have to collect contributions. I might be wrong
about that—I am not sure whether SLAB will do that for it.

The Convener: I think that you are right.

Dr Tata: If the PDSO, too, has to collect contributions, it will be up against the same problem. It might have better resources, but I do not know whether it is better plugged into information systems. If it is decided that the PDSO does not have to collect contributions and SLAB does, one would have to ask about the logic of such a move.

If there is going to be a system of contributions, it seems much fairer for SLAB to collect them, even though it does not want to do so because that would increase its headline budget. The proposal merely displaces the cost on to the Scottish Court Service and other budgets and will lead to adaptive behaviour. Solicitors will look for adjournments and will drop clients, which will slow things down. It seems fairer for SLAB to collect contributions and to do so once the outcome of the case is known—not before. Any other proposal is simply unjust; indeed, I simply cannot fathom the justice in saying that someone who has been acquitted should have to pay the costs of the state’s putting them through the whole prosecution process without getting any refund. That seems a fairly astonishing thing to do.

Graeme Pearson: You might well find that astonishing, but it might be quite a challenge to reclaim costs from someone who did not get the outcome they sought, and I do not think that anyone—whether SLAB or anyone else—would want to volunteer for it.

Thank you for your written submission and your evidence this morning. Having carried out 20 years’ research into criminal legal assistance in Scotland, do you have any advice on how we might improve the system? Obviously, there is a concern about costs.

Dr Tata: I will deal first with your first point. You have hit the nail on the head when you intimate that the concern is about the practical difficulties in claiming back from people if that is left to the end of the case—that is true. We are talking about a relatively small sum of money, and that has to be weighed against the justice of the matter.

Graeme Pearson: I understand.

Dr Tata: Do I have advice for the committee? That is difficult. It seems to me that—

The Convener: We need not necessarily take your advice, but we would like to hear it.

Dr Tata: There must be a proper study of the impact of the proposals. The committee has heard from Capability Scotland, for example, about how the bill might impact on disabled people. There are potential questions about indirect discrimination in that regard, and it will probably hit women harder, too, ironically at a time when we are trying to bring women out of the justice system, particularly the penal system, following the report of the commission on women offenders. A proper pilot is needed.

The financial calculations must take account of not only the so-called savings to the legal aid budget, but the possible—and likely, I suggest—displacement factors in relation to the overall court budget. There also needs to be a proper study of what that will do to the levels of unrepresented clients and the levels of people who make insincere guilty pleas—by that, I mean people who do not think that they are guilty, but who plead guilty to get the case over with.

Jenny Marra (North East Scotland) (Lab): Will you unpack and explain what you meant when you said that the proposals will have a greater impact on women?

Dr Tata: I am no expert on income distribution, but members of the committee will be well aware that women tend to have lower incomes and often bear higher family costs. In its submission to the committee, Families Outside pointed out the collateral consequences of fee payments—or contributions, as they are being called—for families. One could see that having a potentially detrimental impact on women. That may be an issue that needs to be looked at properly but, obviously, accused people do not live in isolation from everyone else—they live as part of families. What consequences will the bill have for single mums, for example?

Where will all this end? Once one accepts the principle that there should be fee payments, even if a person is then acquitted, with even those with a disposable income of £68 a week having to make a contribution, there is a danger of a slippery slope. Will more and more people get drawn into the net? 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?

I appreciate that I have not fully answered your question about women: I am probably not best qualified to do so, but there is an issue there to look at.

The Convener: To clarify, I take it that when you say “pilot”, you mean that, if the bill becomes law, it should run across Scotland for a period to see whether some of the concerns that you have raised happen, including concerns about the
Dr Tata: That is an interesting question. It would be an option to have a sunset clause and to see how things went, but we would need to leave it for two to three years. In previous research, we have tended to find that solicitors do not end up adapting their behaviour for a couple of years. For example, on fixed payments and the introduction of disclosure, it has taken a couple of years for defence solicitors to alter their practices, even though they have been aware of the commercial imperatives. Seeing how things went would involve allowing something to happen for three years that some of us think is fundamentally unjust.

As you say, the alternative is to look at having the system in one area. I do not have a definitive answer to give you.

The Convener: I do not see how we could do that—I do not see how one sheriffdom could run such a system, while contributions would not be paid in other sheriffdoms. I can see that giving rise to all kinds of unintended consequences. It seems to me that we must be extremely careful about using the word “pilot” in such circumstances, when we are concerned about justice, proper outcomes and a proper test of how a system operates in practice. From what you say, I take it that “pilot” is not the word that we would want to use; we would want a more Scotland-wide process.

What does Graeme Pearson have to say about that? I am not asking him to give evidence; I am asking whether he has a similar question.

Graeme Pearson: I put it to Dr Tata that the practice in Scotland nowadays is to collect together cases against a named accused from across the country, rather than to have trials in separate locations. How would a pilot operate in relation to such court cases?

Dr Tata: I take your point. The convener is right that that would lead to all sorts of anomalies and injustices. Equally, the system envisaged in the bill will lead to all sorts of anomalies and injustices. My suggestion to the committee is that it is fundamentally unjust to ask people to pay, especially if they are acquitted.

The Convener: We hear that, but we are testing your proposals and possible remedies.

John Finnie (Highlands and Islands) (SNP): Good morning, Dr Tata. My question is about an issue that arose in the written submission from Professor Alan Miller, the chair of the Scottish Human Rights Commission, which he followed up in oral evidence. It is certainly not one that you mentioned directly in your submission. It relates to section 21 and what Professor Miller felt was a lack of clarity on the appeals process. If an appellant who would have been eligible for aid dies and the family seek to clear his or her name, they will not be eligible for assistance. Do you have a view on that?

Dr Tata: Again, that is highly problematic. Are you asking about the family being asked to make a contribution in the case of a deceased person?

John Finnie: I am talking about cases in which the deceased would have been eligible for assistance to further their appeal, but the family—or, rather, the “authorised person”—would not be eligible for such assistance.

Dr Tata: I do not really have a view on that.

Jenny Marra: I just wanted to add that a pilot was also mooted by Professor Miller last week, so it would be good to look at any joint proposals.

Dr Tata: Okay.

The Convener: Are there any more questions?

Roderick Campbell: I have a small question about the number of unrepresented accused. Would you accept that information on that statistic could be kept fairly easily and that, in a relatively short period of time, we would be able to establish whether there was a problem with the number of unrepresented accused increasing?

Dr Tata: Potentially. The problem with looking simply at whether there had been an increase—after 2013, say—in the number of unrepresented accused is whether there were any other factors that might have influenced that. A dedicated study would be needed that looked at accused persons’ decision making and why they chose to do what they did. There is a potential danger in looking simply at whether the number of unrepresented accused has increased, which is what SLAB says may have happened in England and Wales. The difficulty with that is that other contributory factors to any such change may be masked.

10:30

The Convener: Do you agree with the Government’s suggestion that allowing SLAB to collect contributions for summary criminal legal aid would create a perverse incentive for solicitors to encourage their clients to plead not guilty?
guilty plea. As a result, the point you have highlighted is valid.

However, there is an awful lot of discussion about so-called perverse incentives. When SLAB and the Scottish Government have talked about such incentives in recent years, the only one that they have in mind with regard to pleading is that more people should plead guilty. The Government says that all that it has in mind is earlier guilty pleas, but that has to be balanced against the reality for accused persons, which we must be careful not to be complacent about. People who are accused, including professional people—and, in some situations, solicitors—quickly realise that it is actually an extremely stressful and difficult situation—[Interruption.]

The Convener: I have to wonder why the police are not being as malign as those in my former profession.

Graeme Pearson: I was merely expressing the view that surely a solicitor would not be involved. [Laughter.]

Dr Tata: There are famous cases of solicitors being victims of miscarriages of justice. Even they must have thought, “Surely that can’t happen to me”.

In making the arguments behind the bill, people forget that there are already some very strong drivers for guilty pleas; as research suggests, there is also the real danger that people who plead guilty do not always believe that they are guilty—and, indeed, their solicitors do not necessarily believe that to be the case, either. The bill’s accompanying documents mention only perverse incentives and getting people who want to plead not guilty to enter a guilty plea. We need to balance that against the huge drivers that already exist, such as remand, emotional attrition—in other words, getting the whole thing over with—and the simple fact that most people are not that able to resist the pressure from the entire system and maintain their not guilty plea. Many accused people whom I have interviewed will say—as do defence solicitors in private—that people plead guilty to things that they do not believe themselves to be guilty of. The system contains plenty of drivers to encourage people who might not be guilty at all to plead guilty; instead of doing that, it needs to get things right and ensure that guilty people plead guilty and that those who are not guilty plead not guilty.

The Convener: Thank you very much for your evidence and your helpful written submission. I suspend the meeting for five minutes to allow for a changeover of witnesses.
make-up of the body. The council will primarily advise the Lord President in discharging his responsibilities to ensure the effective administration of the justice system, and we agree that the appointments process must be transparent and robust. I was pleased that the Lord President confirmed his commitment to those principles.

Part 2 sets out our proposals to introduce contributions in criminal legal aid. Again, I am pleased to see that many people in the justice system, including the Law Society of Scotland, have accepted the principle that it is right that those who can afford to pay towards the cost of their defence should do so, as happens in civil legal aid. That must be right when public finances are under such pressure. The expansion of contributions will allow us to target legal assistance at those who need it most and will correct the 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.

I recognise, though, that concerns have been expressed about the detail of some of the proposals, particularly that the income levels are set too low, that collecting contributions will create difficulties for law firms and that it may affect the human rights of accused persons and interfere with the administration of justice. I would like to allay each of those concerns.

On the level of eligibility and contributions, it is important to remember that the starting figure of £68 a week is not gross income or even take-home income but the income that a person has 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 of that, the board has discretion to waive a contribution if undue hardship would be caused. The Scottish Legal Aid Board has provided the committee with a number of scenarios showing that the level of contributions for people earning several hundred pounds a week will often be modest and some people who would already pay a contribution under the assistance by way of representation scheme will actually pay less in future.

I have listened particularly carefully to the concerns that Capability Scotland expressed about disability benefits. It is hard to give definitive reassurances on those benefits when the United Kingdom Government is in the middle of introducing major benefit reforms, but I am happy to give an undertaking that the Government and SLAB will discuss with Capability Scotland what further provisions can be made in the regulations to ensure that disabled people are not placed at a disadvantage.

I also appreciate that many criminal firms will feel that collecting their fees through summary contributions is a further burden being placed on them at a difficult time, but I do not think that it is unreasonable. Most contributions will be for modest amounts and the firm, which has a relationship with the client, will be far better placed to collect that money than the board. SLAB modelling that has been provided to the committee shows that the impact on a firm’s business is unlikely to be large: medium-sized firms might have to collect from between 29 and 167 applicants a year and contributions would amount only to between 2.5 per cent and 4.2 per cent of the legal aid income, not total income. Frankly, I think that if we did not proceed with contributions, the impact on firms of any alternative saving measures would be significantly worse.

Following discussions with the Law Society, we took steps to reduce the impact on firms by, for example, ensuring that solicitors can treat contributions collected as fees. The Law Society has also pointed out that there are problems with collecting contributions when solicitors provide assistance at police stations. I am happy to discuss further with the Law Society whether we can remove those difficulties.

Finally, concerns have been expressed that people who fail to pay their contributions may lose their representation, causing problems for them and the courts. I do not believe that that is a serious risk. The vast majority of people will have no contribution and most people who will have a contribution will have only a small one and most of them will pay it. Currently, solicitors may choose not to collect contributions for advice and assistance at police stations. I am happy to discuss further with the Law Society whether we can remove those difficulties.

As we have done throughout, we will work closely with the board and the Law Society to ensure that practical arrangements can be put in place. I will be happy to report on the outcome of those discussions before stage 2.

I hope that that gives some helpful background and reassurance, but I am of course happy to take the committee’s questions.

The Convener: Thank you, cabinet secretary. I remind committee members that, to aid the official
report and therefore our stage 1 report, we will start with questions on part 1 of the bill, and then we will move on to part 2.

10:45

**Jenny Marra**: Good morning, cabinet secretary. I have three points to put to you. The first two concern the balance of lawyers and laypeople on the council. Has the right balance been struck?

**Kenny MacAskill**: I think so. We have to balance experts from the legal profession, with their clear expertise, and others who are—"less jaundiced" is not the right phrase—able to bring a different perspective. Under the bill, we also have the flexibility to vary numbers. The numbers are slightly below what the current rules councils have, but I think that we have the right balance. If there are difficulties, we will seek to address them in due course, but it seems to me that we have a fairly balanced approach.

**Jenny Marra**: The balance between lawyers and laypeople falls far short of the 50:50 balance that was recommended by the Spencer review in England and Wales, following which a similar civil justice council was set up there. Is there any move from the Government to look at having a balance that is more in line with the Spencer review?

**Kenny MacAskill**: What exists south of the border is slightly different from what we propose as it is a non-departmental public body. We have the ability for the Lord President to include additional interests. It seems to us that the balance is reasonable, but the bill contains powers to make changes to the numbers if that is felt to be appropriate. I think that we should try out the proposed balance and see where we get to.

**Jenny Marra**: On that point, why is the council that is being set up in Scotland not an NDPB?

**Colin McKay (Scottish Government)**: If I may assist on that point, there are various technical questions about what is and is not an NDPB, but we need to go back and consider the function of the council. In thinking about that, we also have to consider the changes that were made by the Judiciary and Courts (Scotland) Act 2008. For the first time, that act put the Lord President at the head of the Scottish judiciary and at the head of the Scottish Court Service as a non-ministerial department, whereas the body down south is an executive agency. There are lots of good reasons why that is the case, but the approach in Scotland put the Lord President at the top with the responsibility to ensure the effective running of the system.

The purpose of the civil justice council is primarily to help the Lord President to do that job effectively and to ensure that he has a broad base of advice and expert support in doing that. The logic is that the body will be part of the framework around the Lord President and the judicial responsibilities of the Lord President and, as such, it does not fall to be considered as an NDPB, just as the current rules councils are not NDPBs. The approach relates to the constitutional architecture of the courts in Scotland.

**Jenny Marra**: That leads me to my third point. Would you consider using the public appointments procedure for the new body?

**Kenny MacAskill**: We do not rule anything out, but what we have is a system whereby vetting will have to take place. The Lord President, who will appoint all but the ex officio members and ministers’ appointees, must publish a statement of appointment practice for non-judge members, which must include a requirement to consult ministers, as well as the Faculty of Advocates when appointing an advocate and the Law Society when appointing a solicitor.

I also understand that the Lord President stated to the committee his intention that appointments will be in line with the principles set by the Public Standards Commissioner for Scotland. I think that we have sufficient safeguards there. We should see how this operates. Given the Lord President’s statement, and the checks and balances about whom he requires to consult, we can rest assured that we have adequate protections.

**Colin McKay**: A small supplementary point is that the public appointments procedure is specifically designed for ministerial appointments. It has been developed over a number of years with that focus. These are not ministerial appointments, so the public appointments procedure would have to be adapted in order to fit what is a different appointments regime, but I am sure that there is a lot that the Lord President would want to take from the public appointments procedure.

**Jenny Marra**: If there is no departure from the principles of public appointments—you are saying that the scrutiny and balance would be there—why not use the public appointments procedure, just to be completely robust and transparent?

**Kenny MacAskill**: I think that we have tried to establish in Scotland that the judiciary are separate from the legislature and the executive. That is why we passed the Judiciary and Courts
(Scotland) Act 2008, to which Colin McKay referred, which gives ministers special obligations. The judiciary are viewed separately and tangentially. However, you have an assurance from the Lord President, who is not a minister of the Crown, on the manner in which he will operate. I think that you would be seeking to make the Lord President act as a minister, or almost to be perceived as a minister, when that is addressed separately through the 2008 act.

Jenny Marra: The Scottish Legal Complaints Commission, the Scottish Legal Aid Board and the Judicial Appointments Board for Scotland are chaired by laypeople. Would you consider having a layperson as deputy chair of the new body, to provide balance?

Kenny MacAskill: That is a decision that I would prefer to leave to the board. The Lord President has to be at the pinnacle. Whether the deputy chair is a layperson or one of the other people on the board is a decision for the Lord President and the council and it would be best dealt with by them. I do not preclude the deputy chairman being a layperson, but I cannot for the life of me see why we should not allow them to discuss the issue and decide who it should be.

Colin Keir (Edinburgh Western) (SNP): At least one previous witness mentioned the powers of the Lord President and the ability of the Lord President to act completely independently and impartially with those powers. If memory serves me correctly, previous witnesses said that there could be conflicts of interest. We discussed that last week with various witnesses. No one is casting aspersions on the ability of the Lord President to carry out their function. However, is there too much of a conflict within the powers of the Lord President?

Kenny MacAskill: I do not think so. Under the system that was established by the 2008 act, and indeed previously, the Lord President is our most senior judge. The act tied that in more closely with the Scottish Court Service. It is appropriate that somebody has to be accountable and call the shots for the judiciary. The purpose of Lord Gill’s review is to try to create a more tapered system. That is to be supported, which is why we support Lord Gill’s view. It is important that somebody is held to account, which is why the Lord President came to the committee.

On the council and how it will operate, 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. Any worries that people may have about checks and balances are dealt with by the make-up of the council. As well as individuals with a great deal of legal expertise and knowledge, there will be lay representatives. I doubt that they will be put there on a whim and a fancy—they will be people who have contributed a great deal to public life and have a great many attributes and talents.

It is appropriate that the Lord President should be at the apex. Equally, I have every reason to believe that he will work in harmony with those on the council with him. If it is ever felt that he is getting out of line—I do not think that that would happen with this Lord President or that that has been experienced before—the council will have sufficient weight and gravitas to provide the counterweight to which you perhaps allude.

The Convener: It sounds as if you bear some scars from previous encounters.

Kenny MacAskill: Perish the thought.

The Convener: We will not investigate that.

Roderick Campbell: Good morning, cabinet secretary. In the first evidence session on the bill, which was before the summer recess, we heard considerable support from Professor Paterson and Professor Mullen for the use of sub-committees of the council that would involve a lot more specialists, particularly for drafting rules. The committee was probably slightly remiss in not addressing in detail the use of sub-committees with the Lord President. In the early years, a lot of the focus will be on rules, which will involve a lot of lawyers. Will you comment on the use of sub-committees? Might the number of lawyers involved drop off over time as we concentrate more on policy matters?

Kenny MacAskill: On your second question, the number of lawyers could change. We always work on the basis that changes occur from time to time to reflect social and societal issues. The number of lawyers might reduce, but that bridge would be crossed further down the line.

In the interim, the use of sub-committees makes an awful lot of sense. People from the Faculty of Advocates sometimes do not know a great deal about sheriff court rules, and people from the sheriff court might not know a great deal about Court of Session rules. Rather than addressing the issue when everybody round the table has limited knowledge, there may be benefit in leaving it to a sub-committee to consider. In this council, as with many others, the use of sub-committees for technical matters would make a lot of sense. I would be happy to leave that issue with the council.

Graeme Pearson: Good morning. There has been a lot of discussion about the six Lord President members. Briefings have suggested that
such members will broaden the experience on the council. Will you explain the thinking behind the provision for those members? What is it envisaged that they will reflect? In what way will they broaden the experience?

Colin McKay: I will build on comments that have been made about the council’s broad make-up. As committee members have said, the council has a number of legal members—that partly reflects the nature of the legal profession. Realistically, the council must have judges from each tier of the judiciary, because we cannot have a council without a sheriff or a Court of Session judge on it. The faculty and solicitors must also be represented on it.

We must also have consumer representative members, but relatively few organisations and people specialise in consumer representation. As the committee may know, Consumer Focus, which is one organisation that would be drawn on, is under significant threat as part of the UK Government’s streamlining of public bodies. We are therefore not necessarily hugely flush with laypeople who would have the right expertise to be on the council.

A lot of the evidence has said that, for example, people from the insurance industry, people with experience of alternative dispute resolution and people with experience of equalities issues might have a contribution to make. All such people could be added to the mix of the council. However, the view was taken that, instead of having a long list of every interest group that might be thought about, which might risk token appointments of people who have no contribution to make but who tick a box, the Lord President should have a fairly large pool of potential additional members from which to appoint people who would have a contribution to make because they represent an interest that might be pertinent generally or at a particular time. That might change over time; the view at one time might be that the needs of women, unrepresented litigants or whatever special interest have to be represented on the council. It gives the Lord President and the council some flexibility to add people as needed.

11:00

Graeme Pearson: Is it envisaged that the Lord President will take advice from council members about who might be considered as LP members, or is that a very individual decision for the Lord President himself?

Colin McKay: The Lord President makes the appointment, but I am sure that, under the statement of appointment practice, he would want to take advice—if the council wanted to give it—on the kind of people who might be needed to fill out representation on the council.

Graeme Pearson: Thank you for that clarification.

Although there have been references to who will fund the council, not much more has been said about funding. Have you made any projections or forecasts about how much the council will cost? Have you worked out the budget? Does the council replace any other expense that the Government faces?

Kenny MacAskill: I understand that, in its steady state after civil courts reform, the council will cost between £313,000 and £375,000 per annum, or between £87,000 and £149,000 on top of the cost of the current councils, which is £226,000. The bulk of the cost is staffing, which is estimated at between £274,000 and £311,000 to cover an additional increase in staff banding. The council will be funded by the Scottish Court Service through the intended increase in court fees.

Graeme Pearson: So it’s good luck recovering the court fees.

Kenny MacAskill: That’s about it.

Graeme Pearson: Earlier evidence suggested that, in some circumstances, it might be difficult to recover court fees. Will the business case surrounding the recovery of such fees and all that entails ensure that the council’s costs are covered?

Kenny MacAskill: The court fees that we are talking about relate to civil matters, not criminal legal aid contributions. In my experience, such fees are simple to recover because, unless you pay, you cannot really get out of the starting blocks and move on. Given the incentive for people who want to keep their cases alive to pay their fees, we do not expect any difficulties in that respect.

The Convener: So it is pay before you go.

Graeme Pearson: Indeed. I just wanted to get that on record, convener.

The Convener: I am going to move on to part 2, on criminal legal aid. I expect that the questions on this matter will be more strenuous—but perhaps not. Perhaps everyone will be gentle now. John, are you going to be gentle?

John Finnie: I strive to be gentle, convener, particularly with the Cabinet Secretary for Justice.

The Convener: You are blushing. [Laughter.]

John Finnie: I have two questions on what could be seen as fundamental rights. First of all, do you feel that the discretion of SLAB to which
you referred is robust enough to deal with the unknowns of the UK Government’s developing welfare reforms?

**The Convener:** Is this the point about undue hardship, John?

**John Finnie:** Yes.

**Kenny MacAskill:** SLAB has very wide discretion in respect of undue hardship; indeed, it will be a catch-all not just with regard to benefit reforms but for people who are caught in the poverty trap but who might have some income from capital or whatever.

The benefit reforms are a moveable feast. I have met Lord Freud to discuss not just legal aid but how we ensure that the people whom we release from custody do not reoffend, particularly by giving them access to benefits sooner rather than later. Some of these issues depend on certain changes, but legal aid regulations have enough flexibility to allow us to catch up. That said, it is very difficult for us to write regulations if we do not know where the Westminster reforms will end up. Nevertheless, as far as undue hardship is concerned, the board has sufficient flexibility to deal with not only benefit but capital-related matters.

**John Finnie:** Secondly, with regard to potential loss of representation, you alluded to the PDSO. Will you confirm that, regardless of location, no one who is accused will go unrepresented?

**Kenny MacAskill:** There are two matters here. First, the evidence from south of the border shows that there was hardly any increase in the number of unrepresented accused following the introduction of contributions. We are happy to discuss the issue with the Law Society, because I would not like to impose anything on it. I am happy to look at the provision of a safety net, which I know committee members feel strongly about, through the involvement of the PDSO. I think that we all know that the relationship between the PDSO and the Law Society can be rather fraught. I will not give the committee a formal commitment that we will do something in particular in case others do not accept it, but I am happy to give the committee an undertaking that SLAB will engage with the Law Society to offer the PDSO as a safety net in any court and consider how that can be done. The Law Society might prefer to deal with the issue in other ways, which is why I added that caveat.

**The Convener:** Would the PDSO collect contributions?

**Kenny MacAskill:** Yes. I can give you the assurance that the same procedure will apply to the PDSO as will apply to private lawyers.

**Graeme Pearson:** Cabinet secretary, you will be aware that solicitors and advocates have expressed a lot of consternation about the contributions proposal. There has been a focus on the savings that may or may not be achieved through it. In his evidence to us earlier this morning, Dr Tata wondered about the knock-on effect in terms of delays for trials and so forth of the non-payment of some costs. Has that all been thought through by those who put together the proposal? What is their estimate of the way forward in that regard?

**Kenny MacAskill:** Those matters have been looked at, and there are two aspects. The contribution proposals are driven by the requirement to address the cost of legal aid. If we are going to be able to target money to ensure that there is access to justice for those who are victims of domestic violence and those who have suffered from asbestos-related diseases, we need to make some savings.

As I have said, there has historically been a particular anachronism, which I think has been referred to in the chamber. It is manifestly wrong that the perpetrator of domestic violence can access legal aid with no contribution while the victim of domestic violence is required to make a contribution to obtain orders, whether an interdict, exclusion order, residence order or whatever protective order. There is therefore a point of principle, which is that in a time of austerity, when we have to impose restrictions on legal aid, perpetrators should also be prepared to contribute as the victims have to.

Equally, we are making the changes as part of the making justice work programme and we wish to reduce case churn. As I said, the evidence from south of the border shows that there was no significant increase in the number of unrepresented accused when a system of contributions was brought in. As you will know from your own experience, Mr Pearson, there are areas—some high profile and some less so—in which people sack their lawyers, which is a matter that must be considered. However, our evidence is that that would not happen more frequently. Equally, I am happy to give you an undertaking that SLAB will discuss with the Law Society the prospect of the PDSO being prepared to pick up matters in various instances to ensure that an unrepresented accused is covered.

**Graeme Pearson:** If a person fails to pay their element of the fees in one case and becomes the subject of prosecution in a subsequent set of unrelated circumstances, will the failure to have paid fees in the first case ensure that they will not be considered for legal aid in the second case?

**Kenny MacAskill:** No, that would not be the case.
Colin McKay: I do not think that that would be the case. There might be ECHR difficulties in such an approach.

Graeme Pearson: Each case would be treated separately.

Kenny MacAskill: I think that each application would have to be considered on its merits, as Colin McKay suggested.

Graeme Pearson: So a person who regularly failed to pay their part of the fees would still come back into the system each time.

Kenny MacAskill: I do not think that that circumstance would arise. Either some arrangement would be made through the solicitor or there would probably be a desire to pursue and take the money back from the person if from the solicitor’s perspective that could occur.

We can give the assurance that such a person would not be automatically precluded from receiving legal aid—we could not preclude them under the ECHR. Equally, I find the circumstances in which somebody would regularly avoid payment hard to imagine: there would be a custodial sentence, or some arrangement would be made.

The Convener: I would like to pick up on your language, cabinet secretary. You said that those who perpetrate should have to pay and then you referred to victims. The basic tenet of criminal law is that a person is innocent until they are proven guilty. The burden of proof is on the Crown, and the matter should be beyond reasonable doubt. It seems to me that you are working on the basis that, if a person is brought before the court, they are guilty.

Kenny MacAskill: No—

The Convener: I would like to develop the point. If a person is acquitted because the verdict is not guilty or not proven, it means that the Crown will have brought a case against them and failed to establish their guilt, but the person will have all the costs that are entailed. Is not that unjust?

Kenny MacAskill: No. I think that the circumstances are different. Currently, people countenance a victim of domestic violence having to go through proceedings and still perhaps having to meet her legal aid contribution, even though interim orders have become permanent. People can face an order for freeing to take their children from them. We have seen high-profile cases in Scotland that have ultimately not been successful, but people have not had a legal aid contribution to make. In civil proceedings, things are done on the basis that those who have the ability to pay should make some contribution, and I think that there should be some parity with criminal proceedings.

I accept that there are slight and significant differences. In some instances, there will be the possibility of a custodial sentence, but that will not be the case in many instances. As I have said, there is the parity argument involving those who are victims, those who face matters that relate to their children, and those who face the challenge of a criminal charge.

It is 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.

The Convener: I will not dispute the point further, but I do not really accept that argument. In civil cases, awards of expenses can be made and parties may have contributions, but if someone receives an award of expenses that will pay for their contributions. However, there will be no award of expenses in criminal proceedings.

Someone could be involved in an extreme case, taken to a criminal trial and found not guilty. It could be found out that the alleged victim concocted the whole story. The person who was found not guilty may have gone through hell and high water, their name could have been all over the papers, and they may have lost their job. We have heard about such things in previous evidence; we know that they happen. The person may be as innocent as the sky is blue, but they will have paid for the Crown taking them before the courts in the public interest. It seems to me that there is an injustice in that.

It is not a matter of like for like in the consequences to people through the processes of the system or in public through the newspapers. There will be no award of expenses, and the person will have been taken against their wishes. A defender in a civil case who does not want to be taken to court and succeeds may very well get an award of expenses against the pursuer.

Kenny MacAskill: We do not have costs in criminal matters—

The Convener: I know that we do not.

Kenny MacAskill: That is the circumstance south of the border. It is clear that expenses can be awarded in civil cases, but that does not apply in various other areas, such as in Her Majesty’s Revenue and Customs investigations. Such matters can be extremely difficult and dangerous for individuals or firms that pay their taxes.
Let us remember what we are dealing with. Some 82 per cent of people will not have any contribution at all to make, and 44 per cent—almost half—of the remaining balance will pay less than £142. That seems to me to be a small amount.

Others will have a contribution to make, but it will not be a huge contribution; it will be related to their income. If we wish to be able to offer legal aid to people in fields other than criminal law—mention has been made of people who have been traumatised—we must to make savings somewhere, and it seems to me that those who face a criminal charge should have to make a modest contribution, when they can, just as those with children or a violent partner who find themselves in extreme circumstances have to do.

11:15

Graeme Pearson: I encourage the cabinet secretary to recognise the apparent inequality in circumstances of domestic abuse, to which he referred. In many cases, the violent partner continues to live within the family unit post the charge, so any contribution is likely to come out of the family budget rather than the perpetrator's pocket. The impact of that needs to be considered.

Secondly, I see nothing in the provisions on legal aid that would deal with a matter of some concern to many members of the public—the fact that there are people who are involved in organised crime who, despite having affluent lifestyles, still seem able to obtain substantial legal aid, for which they pay nothing. How will having to pay £140 help in those circumstances?

Kenny MacAskill: There are two aspects to that question. First, I think that many of the changes on bail that the Crown is making will address the issue of a partner continuing to reside in the household after a domestic violence charge. Such circumstances may arise, but in my experience they are becoming fewer and fewer as the police, the Crown and sheriffs understandably tighten up the approach.

On the second aspect of the question, such people should not be getting legal aid. We have all heard stories, although it would be wrong of me to talk about individual cases, as the committee will understand. It is fair to say that the Legal Aid Board will investigate matters. I put on record that I have not practised for 13 years—it was not something that was given a great deal of scrutiny.

It is a matter of making changes to ensure that the people to whom Graeme Pearson refers—who, I think we would all agree, are entitled to the presumption of innocence when they are subject to criminal charges—do not get legal aid, given the assets that we know they have, by subverting the system.

Graeme Pearson: I again make the point that in many domestic violence situations the various parties come back to live together in a family unit, so the proposed payments would come out of the family budget. I know that it is often difficult to understand why people continue to suffer in that environment, but the truth is that families come back together, often for the children's sake and so forth. Therefore, the contribution will come out of the family unit's budget, rather than just out of the accused person's pocket. I make that point in passing.

Colin McKay: There are a number of aspects of the scheme that could address that issue. In so far as the two people's resources are separable, if there is clearly a conflict of interest, the victim's income or resources will not be assessed as forming part of the contribution. Therefore, any savings that they had would not be part of the contribution. There are also allowances in the scheme for dependants. If there is evidence that what is proposed would cause hardship to a victim or an alleged victim, the board could take that into account to ameliorate the situation.

The Convener: Jenny Marra has a point on the spouse's income.

Jenny Marra: What legal advice have you taken on the legality of considering a spouse's income when a husband is accused? Is it fair to take his wife's income into account? Is that legal? Is it right?

Kenny MacAskill: Yes. That is what we do in civil matters. To some extent, the proposals replicate arrangements that have existed for a long time, whether in the context of divorce, protective orders, accident claims or whatever. Such arrangements have been around for quite some time.

The Convener: Before we deal with that, can I just return to the question of an unsuccessful prosecution? In an extreme case, for instance, where the trial collapses and the sheriff says the Crown has made a mess of the case and it should never have been brought before him, is there not room for the sheriff to have the discretion to rule on whether the accused should pay contributions? If the Crown has made such a mess, the accused should not be out of pocket.

Kenny MacAskill: I am happy to look at that in discussions with the Scottish Legal Aid Board. I think that people would be aghast if, for example, a case were to be subverted because a witness was intimidated or something happened that clearly was a great cause for concern.
The Convener: That is different.

Kenny MacAskill: However, if the committee is so minded, I will be happy to discuss with the Scottish Legal Aid Board whether there is any opportunity to seek such matters. It is fair to say that that would be a complex system, but we have seen matters given to the discretion of the sheriff—indeed, legal aid was at the discretion of the sheriff for solemn matters until the system was changed some years ago.

Such an approach would not be without its difficulties because we do not have the same concept as there is south of the border of people being fined or then having expenses awarded against them. We are talking about what is meant to be the justice system and, in the same way as people pay taxes into it, people will make a modest—I’ll emphasise the word modest—contribution.

There might be an argument that seeking to claim back £85, or whatever, is more hassle than it is worth but, on the point of principle, the fact is that 82 per cent will have to make no contribution at all. Almost half of those who have to make a contribution will make a contribution of below £142. That is a small amount for people to contribute to ensure that we have a legal aid system that can meet the challenges we face and that can provide for everyone—not just for those who face criminal charges but for those who face other matters, such as a child in medical negligence circumstances. All such matters are hugely expensive and need to be supported.

The Convener: We accept the difficulties that you face on the budget, but the point that we are pursuing is that injustices may happen that, notwithstanding pressures on budgets, would not be appropriate, given Scots law and the fairness to the alleged accused in certain circumstances.

Jenny Marra: Cabinet secretary, I am a bit uncomfortable with your answer to my question about spouses. You said that the income of spouses is considered under civil law, but people enter into a civil dispute by choice. Presumably, that is discussed in the home with the spouse, and it is decided to spend money on the case. In a criminal case, a person finds themselves prosecuted not by their own choice. Therefore, do you think it might come into conflict with ECHR law that a spouse’s income is considered as part payment in a prosecution?

Kenny MacAskill: No, I do not. I do not think you are correct in your concept of civil proceedings. I do not think people choose to have their children taken off them. They can volunteer that, but it is usually social workers and council lawyers who choose to apply for a freeing order. I do not think people choose to be beaten black and blue by a violent partner. Sadly, they may sometimes not get out of the situation, but they do not choose that and they have to take protective orders. People do not choose to suffer an industrial accident that affects them and requires them to take action.

I would dispute Jenny Marra’s suggestion that we have litigation of choice. Sometimes, one is left with no alternative but to pursue a civil remedy. It is not a matter people would choose; rather, it is a matter that they must respond to or lose their children, be left incapacitated with no recompense, or suffer violence and abuse. None of those things is acceptable.

Roderick Campbell: We heard from some practitioners with concerns, which I presume relate to summary cases, that the periods of contribution would be so lengthy that the case would have finished before all the contributions could be collected. That could create additional difficulties. Have you had any thoughts about the period of contributions and how it might coincide more closely with the likely length of a case?

Kenny MacAskill: We are happy to look at that, although I do not envisage what you suggest happening. Given that, as the statistics suggest, 82 per cent will not pay anything and 44 per cent will pay less than £142, I think that the sums in question will be collected relatively speedily. In other cases, other arrangements can be made. I do not expect a huge churn, but perhaps Colin McKay has a comment to make on the matter.

Colin McKay: The supposition is that people paying a higher contribution have a reasonable income, which suggests that they have a steady job, a bank account or whatever, and are not the kind of people with chaotic lifestyles who sometimes come before a criminal defence solicitor. Even if, when the case is concluded, the person in question feels no pressing need to keep paying the contribution, the chances of recovering the higher contribution are greater than recovering £20 or £30 from someone who does not have very much money. We do not envisage the issue causing massive problems with collection.

The Convener: Perhaps you can clarify the issue of the parties’ joint income. If, say, a wife is pursuing an interdict, exclusion order or whatever against a defender—whether her husband or partner—is their income considered jointly or separately with regard to legal aid?

Kenny MacAskill: They will be considered as separate individuals.

The Convener: I just wanted that to be clarified for the record. After all, in the circumstances that have been described, one party will be the pursuer and the other the defender. According to you, their incomes and capital are considered separately.
Kenny MacAskill: If there is opposition, such matters have always been considered exclusively.

Colin McKay: The same is also the case in criminal cases.

Roderick Campbell: On a separate point—I declare an interest, as a member of the Faculty of Advocates—last week I asked James Wolfe QC from the faculty whether he had any information on the likely level of reimbursement of expenses for acquitted defendants, particularly in current privately funded cases. I guess that I should also ask you as a member of the Scottish Government whether you have any information on the likely impact of reimbursing expenses to acquitted defendants.

Kenny MacAskill: I do not know whether we have such information; however, I can say that what you suggest has never been the case. Indeed, as the convener has indicated, a person who funds their case privately would not get their money back if they were acquitted and were found to be pristine and clean, and it transpired that the case should never have been brought. The cost simply falls to them.

Colin McKay: We do not have definitive statistics because the cost of privately funded cases is not a matter of public record. It would be difficult even to try to match up court and legal aid statistics to find out who had, among those who had been acquitted, privately funded their cases. However, if it assists the committee, we can see what information we can glean and what modelling we can give you on the costs of privately funding cases, although I imagine that what we can provide will be fairly partial. We can also try to find comparisons with English costs.

Roderick Campbell: My final question is about the general proposals for contributions and the impact on access to justice. If two or three years down the line we find that the move has created a great deal of difficulty or injustice, what steps will the Scottish Government take to improve access to justice?

Kenny MacAskill: Although primary legislation is required to begin with, most matters thereafter can—as with most legal aid matters—be dealt with through regulation. We would be able to—indeed, we will—review the system and make any tweaks or amendments that might be required with regard to civil or criminal matters, ABWOR or solemn and summary cases.

The Convener: I imagine that shrieval discretion to make an award if a case should never have been brought, and a person was found to be as clean as a whistle, would cover all parties, whether privately funded or in receipt of criminal legal aid.

On a separate point, it has been put to us that there should be a pilot, which we considered should be Scotland wide, although it would represent more a sunset clause. What is your view of our taking a kind of “Suck it and see” approach to deal with the stories of unintended consequences, distortion of processes in criminal courts, and dealing in cases?

11:30

Kenny MacAskill: I do not think that a pilot would be feasible. It would be better to deal with matters by way of regulations: I undertake that the regulations will be kept under review, as regulations normally are. Legal aid tends to be dealt with by regulations because—as you know and the committee will have seen—we have to update them, whether in terms of amounts that are paid or of the eligibility criteria. Whether it was conducted in one jurisdiction or across Scotland, a pilot would be a guddle, to be frank, so we would be better off just getting on and dealing with things.

I will go back to your comments about recompense and shrieval discretion. Those things are fraught. You may be suggesting that they should go across the board, whether costs are paid through legal aid or not. At the moment, those who can afford to do so can bring in a high-powered lawyer to find some technicality. If you want to argue that such people should be able to get recompense for that high-powered lawyer, who has come in and found something wrong with a tachograph or a speed camera detector, or whatever, I am happy to consider that. It has always been fairly clear in Scotland that people do not pay contributions or expenses that are imposed by the court, but that we have to make some contribution to meet the costs of legal aid.

The Convener: I was not talking about failure to prove the case evidentially; I am talking about the extreme end, where a case should probably not have been brought in the first place. When there is a good defence counsel, that is fine, but I was talking not about such circumstances, but about cases that the Crown has probably made a mess of and which should never have been brought in the first place. Those circumstances are very unusual, but they happen; sheriffs occasionally say such things. I am talking about only very specific cases having such shrieval discretion. Were sheriffs to start exercising that discretion in the wrong circumstances, there would soon be appeals to the Crown. I will leave that sticking where it is.

Kenny MacAskill: We will reflect upon that.

The Convener: The only thing that concerns me is that you are talking about being able to
change things by regulation, but of course the bill is primary legislation. If we were to find that contributions for criminal legal aid per se are not operating as they should, we would need to do something to the bill. We could amend it. There are two parts to the bill, and we cannot get rid of one part, as that would be a wrecking amendment. I am not suggesting that—I am just putting it out there. We might want to ensure that there will be a review section, or sunset clause, in the bill, although I am not saying that that is how we are thinking. You are quite right to say that a pilot would be “a gudde”. Would you not even consider a review clause?

Kenny MacAskill: We are happy to give you an undertaking to review. The last thing that we want is to tweak one aspect of the legal system, only to have that result in difficulties in another aspect. That is why the bill is part of the making justice work programme. As you correctly said, it is primary legislation. However, as I said at the outset, it is not being proposed simply because we have to make savings in legal aid. If we are to provide for the areas that we all want to provide for, we have to balance the books.

There is a point of principle here: people who face criminal proceedings should also have to make some contribution, if they can afford to, just as those who face challenges in civil proceedings do. I am 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. I have been before the committee on a variety of legal aid Scottish statutory instruments in the past. Many of them go through on the nod, because they are just updates, or whatever. That seems to be the way to go, rather than a pilot, which is not feasible, or a sunset clause, which I think is unnecessary.

Colin McKay: I will give the committee some clarity about what can and cannot be changed. As the convener suggested, the principle of contributions is what the bill is about. Although the bill specifies £68 a week as the starting level at which contributions will be levied, that can be amended by regulations.

The Convener: We understand that.

Colin McKay: The issue about who collects it can be amended by regulations.

The Convener: We understand that some tweaking can be done in regulations; that is the process. However, we are looking at the principle and whether there might be unintended consequences.

Graeme Pearson: I am grateful to the cabinet secretary for his commitment to review the provisions. However, given that the legislation might well be passed this year, I wonder whether he can offer some comfort by putting a date on that review. Will it happen in three years’ time, or whatever?

Kenny MacAskill: I am happy to work with the committee and to hear its preference. I meet the chair and chief executive of SLAB very regularly and am happy to raise in those meetings the committee’s views on when such a review might be carried out. I presume that to do so after a year might be too soon; however, it might be appropriate to review the situation in three years. We could undertake to return at that time to see how things are working out.

The Convener: We can raise the issue during the stage 1 debate and put it on the record not just for the committee but for the Parliament as a whole. Thank you very much, cabinet secretary—that is lovely. We will move on to the next item, for which I believe Colin McKay and Felicity Cullen are staying. When I suspend meetings, members tend to run away and I have to catch them with nets.
Justice Committee
Scottish Civil Justice Council and Criminal Assistance Bill
Written submission from the Association of British Insurers

The UK Insurance Industry

The UK insurance industry is the third largest in the world and the largest in Europe. It is a vital part of the UK economy, managing investments amounting to 26% of the UK’s total net worth and contributing £10.4 billion in taxes to the Government. Employing over 290,000 people in the UK alone, the insurance industry is also one of this country’s major exporters, with 28% of its net premium income coming from overseas business.

The ABI

The ABI is the voice of insurance, representing the general insurance, protection, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, accounting for some 90% of premiums in the UK. The ABI’s role is to:

- Be the voice of the UK insurance industry, leading debate and speaking up for insurers.
- Represent the UK insurance industry to government, regulators and policy makers in the UK, EU and internationally, driving effective public policy and regulation.
- Advocate high standards of customer service within the industry and provide useful information to the public about insurance.
- Promote the benefits of insurance to the government, regulators, policy makers and the public.

Reform of the Civil Legal System

The last formal assessment of the entire civil legal system in Scotland was conducted by Lord Gill in his ‘Report of the Scottish Civil Courts Review’ in 2009. The ABI believes that the majority of the proposals put forward will ensure that litigation in Scotland is more efficient, ensuring that the cases are dealt with expeditiously and cost effectively, in accordance with their value and complexity. The ABI supports in particular:

- Lower value cases being held in a specialist Sherriff Court, with a view to reduce the costs of pursuing these cases. This, in turn should give the Court of Session more capacity to deal with higher value cases. Similarly the creation of district judges will allow lower value complex cases to be dealt with more efficiently. The ABI suggests that district judges hear cases with a value of £10k or less.
- The increase in privative jurisdiction be set at £150k and raised thereafter to £250k to avoid the alienation of litigants in the first instance. It is also
suggested that more specialist courts be established in Scotland to ensure access to justice on a wider geographical scale.

- The introduction of compulsory pre-action protocols, providing they include provisions which enable the defenders to make fast decisions on liability based on an initial submission of basic information by the pursuer’s solicitor, which is reflected by lower legal costs. This should ensure that the simpler cases are appropriately dealt with in terms of work done and costs incurred at the early stages. A good example of a compulsory pre-action protocol operating in England and Wales is the RTA Portal, introducing staged fixed costs in April 2010 to those matters where liability is admitted, and where there is focus on early disclosure of information and enhanced communications between the parties to bring about a quicker resolution.

- The revision of the rules of offers of settlement, to ensure such offers are effective and provide an equal position for pursuers and defenders.

- The introduction of more formalised case management as the increased power of courts to manage the pace and process of cases will ensure that where possible, they are dealt with more efficiently and cost effectively. The ABI suggests a formal judicial training scheme in regard to this proposal.

- The encouragement of mediation and other forms of alternative dispute resolution can be an effective means of resolving a dispute, which is most effective where all parties are willing participants.

We understand that a body should be responsible for the implementation of those reform proposals outlined in Lord Gill’s report. The ABI therefore supported the creation of a Civil Justice Council in their response to the consultation in September 2011.

Summary

The ABI welcomes the creation of a Scottish Civil Justice Council (“the Council”) as proposed in the Scottish Civil Justice Council and Criminal Assistance Bill (“the Bill”). The creation of the Council will ensure that the system is kept under review so that procedural problems can be identified early and addressed in an expeditious manner.

We particularly welcome the proactive step of including non-legal members on the Council, referred to in the Bill as “LP members” and “consumer representatives”. However, the proposed membership of the Council must accurately reflect those who utilise the Scottish Court System which includes not only legal representatives but insurers, consumer groups and local authorities. Presently, insurers have a fiscal interest in 80% of litigated cases, making them the largest user of the Scottish Courts System; this must be accurately reflected in the composition of the Council by appointment at least one or even two representatives from the insurance profession. At present insurers are not specifically identified in the Bill as an interested group, despite being the predominant user group of the Courts.
Written evidence on the Scottish Civil Justice Council and Criminal Assistance Bill

1. The ABI largely agrees with the proposed functions of the Council, including reviewing practice and procedure, preparing draft rules for procedure, as well as broader considerations including how to make the civil system more accessible, fair and efficient. It is essential to view the litigation system in conjunction with other methods of dispute resolution, in order to fulfil that responsibility.

2. The ABI agrees that the Council should have the ability to draft and submit rules of Court as the Council would be in the best position to do so for two fundamental reasons; relating to the purpose and composition of the Council. First, a key duty of the Council would be to keep the civil system under review, when a procedural issue is identified then it would appear that the Council would also be the best body to deal with proposing a practical solution, namely by way of draft rules. Secondly, the composition of the Council should ensure that a sufficiently wide body of opinion has been involved in the drafting of those rules.

3. The ABI agrees that the overall responsibility for the Council should remain with the Lord President as set out in the Bill. This preserves the current position in which the Scottish Government is not responsible for the formulation of new rules of the Court and ensures that the statutory responsibilities conferred on the Lord President are fulfilled.

4. As highlighted in our consultation response in December 2011 the ABI believes that in order to have a full spectrum of opinion from the legal profession; those practising advocates and solicitors appointed should be from both pursuer and defender representative backgrounds.

5. Insurers fund or have a financial interest in approximately 80% of litigated cases, making them the single largest user group of the Scottish courts system. Moreover, on average, 9 out of 10 personal injury claims are settled at the pre-litigation stage, circumventing the necessity and added cost of taking a claim to Court. The ABI believes it is vital to ensure that the composition of the non-legal Council members accurately reflects the interests of those who utilise the Court system. There needs to be clear and lasting channels of communication between all parties involved in both the pre-litigation stages and when a claim is taken through the Court process. The Bill states that the following non-legal representatives should be appointed:

“(h) at least 2 persons (“consumer representative members”) who, between them, appear to the Lord President to have—
(i) experience and knowledge of consumer affairs,
(ii) knowledge of the non-commercial legal advice sector, and
(iii) an awareness of the interests of litigants in the civil courts, and
(i) up to 6 other persons considered by the Lord President to be suitable to be members of the Council (“LP members”).”

6. The ABI believes that there is an integral need for at least one representative from the insurance industry on the Council. The representative from the insurance
industry would not only have knowledge and experience of the court system, but also
the pre-litigation measures that should be followed and exhausted before resorting to
the Courts. This is particularly important if pre-action protocols are to become
mandatory. For the reasons given above, 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.

7. The ABI believe there should be a general requirement for the Council to
consult and work with other groups and bodies when carrying out their
responsibilities. This is to some extent outlined at clauses 3(2)(d) and 3(2)(e) of the
Bill. This would mirror the system which currently operates within the Civil Justice
Council of England and Wales (“CJC”). For example, the CJC have been assigned
the task implementing the package of measures recommended in Lord Justice
Jackson’s Review of Civil Litigation Costs. In response to this task a CJC expert
working party was set up to help develop the practical proposals to assist with the
implementation of secondary legislation. The working group consisted of both CJC
and non-CJC members. It would be prudent to adopt a similar system by employing
those persons with more specific knowledge to assist with the implementation of the
Gill proposals for civil reform in Scotland. This approach should ensure that issues
are examined with sufficient expertise and improve the efficiency of the process.

8. The ABI agrees, as outlined in clause 5 of the Bill that the Council also
construct an annual plan as an additional means of reporting, this measure should
focus the Council as to their objectives. With this in mind, the ABI would also be in
favour of a Code of Practice for the Council which sets out the goals and guiding
principles of the body. Such a code can be cross-referenced when the Council drafts
or amends the business plan; this should ensure that the Council fulfils its spectrum
of responsibilities.

9. Whilst the ABI has previously made comparisons between the existing CJC in
operating in England, it is important to note that there is also a Civil Procedure Rules
Committee (CPRC), responsible for drafting up new Civil Procedure Rules, direction
is taken from the CJC. The CPRC sit nine times a year and deal with the
implementation of recommendations of the CJC, they do not have a policy objective
to fulfil. It is composed of both senior and lower level members of the judiciary, legal
practitioners, a representative with knowledge of consumer affairs and one member
with experience of lay advising. As the proposed Council is to encompass policy,
administrative and drafting responsibilities as outlined in the draft bill, this remit
which would appear to be very wide there must be sufficient time and resources
available for the Council to deal comprehensively with the wide ranging responsibility
before them.

Association of British Insurers
26 July 2012
Scottish Parliament Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated Wednesday 16 May 2012, requesting comment on the Scottish Civil Justice Council and Criminal Legal Assistance Bill and can confirm that this has been considered by Crime and Criminal Justice Business Areas and can offer the following by way of comment.

Part 1 of the Bill sets out a number of recommendations for reform of the civil court system. It is viewed that none of these would directly impact on the police service.

Part 2 of the Bill introduces financial contributions in criminal legal aid to ensure those who are able to pay towards the cost of their defence do so and makes changes to financial eligibility. It is viewed that such changes would have little or no direct impact on the police service. It is worthy of note, however, that should the Bill be enacted in its current format, there may be consequential non-cashable police savings and efficiencies. The proposed re-structure of the fees available through Legal Aid and Assistance by Way of Representation (ABWOR) would appear to support the efficient operation of the justice system by removing perverse incentives. Should the re-balancing of the fee structure result in earlier pleas, outcomes would include a reduction in the number of officers being cited for court and a reduced administration process e.g. submission of statements, processing of productions, officers being cited to attend court etc.

Ciorstan Shearer
Chief Superintendent
ACPOS Criminal Justice Business Area
26 July 2012
Summary

- Capability Scotland welcomes the opportunity to respond to this call for evidence from the Justice Committee of the Scottish Parliament. We have a particular interest in this area having carried out extensive research in 2009/10 on behalf of the Justice Disability Steering Group (JDSG). The JDSG is a group comprised of the key agencies representing the justice sector in Scotland, including the Scottish Legal Aid Board (SLAB) and Scottish Government Justice Directorate, and we continue to work on issues relating to justice and disability.

- Capability Scotland welcomes the creation of a Scottish Civil Justice Council. We hope that such a body will help to ensure a holistic approach to reform and ensure that the views of all stakeholders – including disabled people – are taken into account. We believe that the best way for the legislation to address this would be by requiring the Scottish Civil Justice Council to appoint an equalities representative to ensure that disabled people and those with other protected characteristics have their views and experiences taken into account.

- In relation to changes to Criminal Legal Aid, Capability Scotland accepts that those people who are able to make a contribution towards their legal costs should be asked to do so. However, our concern is that many disabled people who cannot afford to make contributions to their Criminal Legal Aid will be asked to do so as a result of this Bill. This will lead to increased poverty amongst disabled people and will create further barriers to justice. This is not acceptable given that our research found that 40% of disabled people do not feel they have equal access to the justice system.

Part 1 of the Bill: A Scottish Civil Justice Council

1. As stated above, Capability Scotland fully supports the creation of a Scottish Civil Justice Council. Our main concern in relation to the new council is that it has an adequate understanding of the obstacles to civil and administrative justice faced by disabled people in Scotland. Research conducted by Capability has revealed that 40% of disabled people do not feel they have equal access to Scotland’s justice system.

2. Clearly this is not only a practical and moral concern; it is also a legal one. The Human Rights Act 1998, European Convention on Human Rights and the International Covenant on Civil and Political Rights and Fundamental Freedoms all guarantee a right of equal access to justice, free from discrimination. In particular, article 13 of the UN Convention on the Rights of Persons with Disabilities states that,

1 http://www.capability-scotland.org.uk/what-is-capability-doing-for-me-now/campaigns/jdsg/
“State parties shall ensure effective access to justice for persons with disabilities on an equal basis with others including through the provision of procedural accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses in all legal proceedings.”

3. It is therefore essential that all bodies with a role in administering justice, including the Scottish Government, take positive steps to ensure that the needs of disabled people are taken into account at all stages of policy development.

4. We believe that this objective can be best achieved through the inclusion of a disability and/or equalities representative on the Scottish Civil Justice Council. We believe such a person would help to ensure that the work of the Council is beneficial to all sectors of Scottish society and that it helps to develop a system which meets the needs of vulnerable individuals and minority groups. A disability representative would be a welcome addition to the list of members presented in the consultation document previously issued which included persons with experience and knowledge of consumer affairs and persons able to represent the interests of particular kinds of litigants, such as businesses or employees.

5. A person representing the needs of disabled people and those with other protected characteristics might be selected for:

- Direct or indirect personal experience of disability
- Knowledge and understanding of the civil justice system in Scotland including structures, rules and procedures
- Knowledge and understanding of equality and human rights legislation and how it relates to the civil justice system in Scotland.

6. Such an appointment would help to ensure that any reform overseen by the council contributes to the removal of barriers to justice and to the fulfilment of human rights. It would also assist the court service and Scottish Government in fulfilling their duty to make reasonable adjustments for disabled people who face a substantial disadvantage in accessing their services.

7. Whether or not a disability and/or equalities representative is appointed it is essential that the council takes a proactive approach to including and consulting disabled people and others with characteristics protected under the Equality Act 2010.

8. Our involvement work as part of the JDSG highlighted that disabled people do not currently feel that their needs, views or opinions are reflected in Scotland’s justice system. We would therefore ask the Scottish Government to consider some of the points raised by disabled people through our work with the JDSG which are relevant to civil justice reform.

Part 2: Contribution for Criminal Legal Assistance and Changes to Financial Eligibility

9. Capability Scotland accepts that those people who are able to make a contribution towards their legal costs should be asked to do so. However, our
concern is that many disabled people who cannot afford to make contributions to their Criminal Legal Aid will be obliged to. This will lead to increased poverty amongst disabled people and will create further barriers to justice.

10. While we accept that the Undue Hardship Test is not based on income alone, we would urge the Committee to consider that disabled households are three times less likely to earn over £40,000 than other households. Furthermore, 49% of households including someone with a long-standing illness, health problem or disability have net annual incomes below £15,000. This is likely to mean that many disabled people who previously qualified for criminal legal aid will now be asked to make a financial contribution to the cost.

11. In applying the Undue Hardship test it is also essential to acknowledge that the disposable income of disabled households is often greatly reduced as a result of the costs associated with living with disability. Research conducted in 2005 concluded that the added weekly cost of having a disability can range from £7.24 to £1,513. We are therefore very pleased to see that solicitors will be encouraged to take ‘regular costs associated with disability’ into account when calculating available income. This is clearly a very positive step. However, the difficulty of proving and calculating disability related expenditure should not be under-estimated. Even the Social Work departments of local authorities often have difficulty calculating disability related expenditure or fail to take it into account when calculating how much a disabled person will be charged for their care. This is despite the existence of extensive guidance on the issue.

12. We would therefore recommend that reference is made, either in primary or secondary legislation, to the need to take disability related expenditure into account when calculating available income. We would also recommend that either the Scottish Legal Aid Board or the Scottish Government develop clear and detailed guidance for calculating disability related expenditure in partnership with disabled people and disability organisations.

13. We would also ask the Committee to consider the impact of the following changes on the calculation of a disabled person’s contribution to criminal legal costs.

- **Reduction in the number of people eligibility for disability benefits**
  The Policy Memorandum accompanying the Bill states that, “Non-passported benefits will be taken into account as income although they may be cancelled out as being used for unavoidable expenditure.” We would urge the committee to ensure that Disability Living Allowance and Personal Independence Payments (which will begin to replace DLA from April 2013) are never taken into account as part of an individual’s income.

---

2 Scottish Government (2009) **Scottish Household Survey Annual Report - Scotland’s People**
3 Scottish Government (2009) **Scottish Household Survey Annual Report - Scotland’s People**
This is essential if disabled people are not to be further discriminated against in relation to accessing legal services.

It is also essential that solicitors are made aware that excluding DLA/PIP from the calculation of income does not exclude them from having to calculate disability related expenditure as well. In many cases DLA will not cover all the costs associated with a person’s impairment or condition.

- **Reduction in the number of people eligible for means tested benefits**
  The Policy Memorandum also states that “Those on passported benefits and those who have less than £68 disposable weekly income will not be liable to pay a contribution.” It is important to highlight that, as a result of the Welfare Reform Act 2012, far fewer people will be eligible for these benefits (and/or their replacement Universal Credit) than is currently the case. We would therefore urge the Scottish Government to consider transitional arrangement that will protect those on the lowest incomes and minimise the administrative burden on solicitors.

14. As well as the financial impact of the changes, we are concerned that the Bill will make it more difficult for disabled people to access a solicitor. In particular we are concerned that a minority of solicitors may take a prejudicial approach to selecting their clients in order to minimise financial risk. They may be less willing to take on clients who will qualify for legal aid due to the arduous process of calculating and recovering a contribution. Given that disabled people are over-represented in lower income groups this is likely to have a disproportionate impact on them. Furthermore, the calculation of available income is likely to be more complicated and arduous in relation to disabled clients who may have disability related expenses which should be taken into account.

15. There is also a real concern that the need to make a financial contribution could lead clients who are under financial strain to change their plea. Facing a fine, for instance, might be a cheaper alternative than paying the legal aid contributions required to plead innocent.

16. The experiences of disabled people also suggest that many solicitors are already reluctant to take on disabled clients. Individuals who use British Sign Language (BSL), for instance, have reported difficulty accessing solicitors for Advice and Assistance or Assistance by Way of Representation because of the need for a BSL interpreter. In some cases, solicitors are reluctant to cover the cost of interpreters – even where the client qualifies for legal aid – because the process of reclaiming their expense from SLAB can take up to 18 months.

17. Many of the participants at our JDSG involvement events also felt that the cost of making reasonable adjustments might dissuade solicitors from taking on disabled clients. One participant discussed the issues he had encountered when trying to access a solicitor to help him with his divorce. The Law Society gave him details for twelve lawyers that could potentially help him with this case. None of the solicitors’ offices was accessible and the participant had to phone eight of the solicitors on the list before finding one that would do a home visit. This meant he had
no choice of lawyer. We would urge the Committee to consider how the current Bill could further limit the choice disabled people have when selecting a criminal lawyer.

18. Finally, while we are against clients being asked to make a contribution when they qualify for criminal legal aid, we are in favour of the introduction of the ‘undue hardship test’ in relation to Advice and Assistance and ABWOR. This should lead to fairer outcomes for disabled people in that it will allow for disability related costs to be taken into account.

19. Thank you for the opportunity to response to this call for evidence.

About us

20. Capability Scotland will be a major ally in supporting disabled people to achieve full equality and to have choice and control of their lives by 2020. The organisation’s direct service provision is combined with campaigning, consultancy and advice to ensure that the organisation functions as an ally of disabled people as they strive to gain full equality, choice and control in their lives.

Hanna McCulloch
Senior Policy Advisor
Capability Scotland
30 July 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Aid Bill

Written submission from the Church of Scotland

1. The Church of Scotland is committed to supporting a justice system which is available to all. The Gospel has a bias to the poor, and our priority is always the most marginalised people in society.

2. The Church of Scotland has not considered the details of the proposals, and so we do not have a firm view on the specific measures in this Bill. However, we have some questions arising from our principle of bias to the poor which we would urge the Committee to consider during its work.

Criminal Legal Aid – Test in relation to income

3. Given the pressures on public finances at this time, it would be unwise to call for additional expenditure without indicating where resources would come from. However, changing criteria for something as fundamentally important as criminal legal aid must only be done if the reasons are right – and that no-one should be denied justice or made impoverished because they have had to unfairly bear a financial burden themselves. We welcome the fact that people who receive the key means-tested social security benefits would not be required to contribute.¹ Our question is whether it is fair to ask people with a disposable income of £68 per week or more, and/or £750 capital, to contribute, or if this threshold is too low; what is the strength of the argument which says that this is the appropriate level? A comparison is made to the similar thresholds for civil legal aid – is it right to compare the two? To some extent, civil litigation can be discretionary (with family law being a notable exception), whereas if an individual is being prosecuted, he or she does not have a great deal of choice. If our priority is to ensure that the least well-off and those least empowered to respond to the complexities of law are given access to justice, how far do these proposals take this into consideration, and how much is it about simplification or cost-cutting?

The treatment of contributions where the accused is acquitted

4. We note the concern outlined by the Faculty of Advocates and others that there is no proposal in the Bill for the refund of contributions in the event of acquittal.² We would be concerned that people who are poor or vulnerable may feel a perverse pressure to plead guilty or even to move out of work and onto benefits in order to be eligible for non-contributory legal aid. We would urge the Committee to seriously consider this issue and to put this question to the Scottish Government.

² Ibid., p. 25
Solicitors to collect contributions in summary cases

5. In summary cases it is for solicitors to collect the contributions; if they fail to do so then it is they and not SLAB who will bear the loss. If there is significant non-recovery then it may cause solicitors to rethink whether to be involved in criminal legal aid at all. Might this have important repercussions about the availability of legal services to accused persons?

David Bradwell
Scottish Churches Parliamentary Officer
30 July 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Citizens Advice Scotland

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

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

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

General Comments

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

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

Key Points

Citizens Advice Scotland believes that:

- The policy function of the SCJC should be of primary importance over rule making functions. We see the SCJC as a policy and research body integral to the success of the reforms and operational model the Making Justice Work Programme (MJWP) is working towards

- It will be crucial that there is a body to take strategic oversight of civil justice for end-users, the judiciary and the system as a whole during the reforms and then afterwards to the end of maintaining a sustainable civil justice system

- The Council should promote accessibility to individuals seeking justice as its primary audience through clearly written procedural rules, in plain English and free from legal jargon
• Alternative dispute resolution (ADR) should be promoted at the earliest possible stage and consideration of resolution methods other than courts should be enshrined in legislation from the establishment of the SCJC, not added to the remit as the priorities in the civil justice landscape change with the implementation of the MJWP

• The powers of the Council should be less discretionary and the Council should be required to exercise certain powers

• The SCJC should be required to report to the Scottish Ministers as well as the Scottish Parliament and Scottish Ministers should be required to take note of such policy

• Membership of the Council should represent a more equal and legislated balance of judiciary and practitioners from all tiers of the new civil justice landscape envisaged in the MJWP: there should be equal representation of Courts, administrative justice and ADR from the inception of the Council

• The criteria for lay and consumer members should be legislated and the balance of judges/practitioners and stakeholders should be more equal

• As the consumer champion going forward and in light of the civil justice work carried out by the Scottish Association of Citizens Advice Bureaux, CAS should have a place as a member of the SCJC

• The appointment process for membership of the Council should be in line with the public appointment process

Provisions of the Bill

Section 2: Functions of the Council

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

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

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

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

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

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

**Functions**

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

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

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

In maintaining access to justice as framed in the Gill review and the MJW programme, users are rightly at the centre of considerations. We would regard litigants as the primary user audience: those individuals seeking justice. Through the
in-court advice projects, Citizens Advice has experience of the common difficulties faced by those individuals in accessing the legal system.

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

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

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

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

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

**Principles**

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

s2(3)(a) and (b) outlines the principle that the civil justice system should be fair, accessible and efficient, with clear procedural rules. These are principles which CAS believe should undoubtedly underpin the work of the SCJC but there should be clarity here as to the intended audience. CAS believes that these principles should be executed with litigants or potential litigants as the primary audience and legislation should reinforce this. The balance of fairness, accessibility and efficiency
should never be to the detriment of end-users and procedural rules should be in plain English with no difficult legal terminology or jargon.

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

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

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

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

Section 3: Powers of the Council

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

In any body which performs a function of ultimate interest to the public, transparency, accountability and consistency should underpin the powers that body holds.
Although the SCJC is not to be a public body in operation the public interest in the work of the Council should mean that its framework for operation is akin.

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

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

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

Section 4: Court of Session to consider rules

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

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

Section 5: Annual programme and report

CAS agree with the provision that the Council should prepare an annual report of its objectives and priorities at the outset of the period and a report of its activities at the end of the period. We also agree that the report should be presented to Parliament
but further we believe that the report should be presented to Ministers of the Scottish Government. Before the publication of the objectives and priorities, we believe that there should be a requirement to consult on this annual plan with relevant stakeholders.

Section 6: Composition of the Council

General comments on membership

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

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

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

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

Consumer membership

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

The UK Government announced in (April 2012) new proposals to officially make the Scottish CAB Service a champion for consumer information, advice, education and advocacy – in addition to its current role as a provider of free, impartial and confidential advice. As a result of these changes, CAS (and Citizens Advice England and Wales) will become the publicly-funded voice of consumers across Great Britain, championing their needs and empowering them to make the right choices for themselves.
Not only are CAS the consumer body going forward, projects within the Scottish Association of Citizens Advice Bureaux currently represent users in the civil justice system at many levels. In 2011/2012, the Citizens Advice Bureaux in Scotland made 5,500 representations in courts and tribunals, not counting the cases which were resolved before the point of representation. Accordingly the Scottish citizens advice service is in an excellent position to represent the consumer interest as well as provide a perspective on engagement with the civil justice system.

**The role of the Lord President**

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

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

**Section 7: Lord President appointment process**

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

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

**Section 10: Expenses and remuneration**

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

**Section 11: Chairing of meetings**

We can see arguments for and against the chair being a senior judge. However, given the success of lay chairs in SLAB, the Judicial Appointment Board and the Scottish Legal Complaints Commission, we think there is a strong argument for a lay
vice chair with the power to chair meetings of the SCJC when the main chair is not present.

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

**Section 13: Committees**

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

Lauren Wood
Social Policy Co-ordinator
July 2012
Evidence correction

During the oral evidence session I mentioned the Citizens Advice Edinburgh in-court mediation project but I have since learned that the statements I made in relation to the project were partially inaccurate. I wished to draw these inaccurate statements to your attention along with accurate corrections.

The first statement is:

“In our submission, we mentioned the Citizens Advice Scotland in-court mediation service that works in Edinburgh sheriff court. I admit that I noticed a mistake when I read over the submission again this morning, so I will submit an amendment. The sheriffs do not send on more than 90 per cent of the civil business in the court to the mediation service, because that would be overwhelming; they send on 90 per cent of the small claims business. More than 80 per cent of the cases that they submit to the service are resolved through mediation very quickly—often within an hour.”

Although I noted at the time there were inaccuracies in the written submission (which have subsequently been amended) I have received information from the project to the effect that while they do collect statistics on small claims referrals to the mediation service they do not keep statistics on the overall number of small claims cases that go through the court. As such it is not possible to accurately present the percentage of the total number of small claims cases referred to the mediation service based on the information available to the mediation project and the percentage above cannot be relied upon. However, it is possible to say that only a small percentage of cases are currently resolved through mediation. Further, two hours is an accurate average for a mediation. The recorded statement that the project is run by CAS is factually inaccurate as it is run by Citizens Advice Edinburgh – this is an inaccuracy I have asked to be changed for the record.

The second statement is:

“One problem with the in-court mediation project at Edinburgh sheriff court is that cases have to be referred to it by a sheriff, and the case then has to be closed in front of a sheriff”

It has been brought to my attention that cases can in fact be self-referred and do not have to be closed in front of a Sheriff.

Thank you for your consideration and I look forward to receiving a copy of the report.

Lauren Wood
Social Policy Co-ordinator
27 September 2012
Justice Committee
Scottish Civil Justice Council and Criminal Legal Assistance Bill
Written submission from Consumer Focus Scotland

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

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

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

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

Key Points

1. Consumer Focus Scotland supports the establishment of a Scottish Civil Justice Council (SCJC). We consider this to be an important means of ensuring the effective operation of the civil justice system. Critical to this is its planned policy function, and we support this function extending beyond the civil courts to the wider civil justice system. We would support the SCJC’s remit including administrative justice.

2. We believe it is essential that the structure and operation of the SCJC reflects the following:
   - The SCJC will have a policy function, rather than simply be a rules-making body.
   - Its remit extends to the wider civil justice system rather than just the civil courts.
   - The civil courts and civil justice system provide a public service\(^1\) and there is therefore a clear public interest in the work of the SCJC.

---

3. We believe the needs of users of the civil justice system must be central to the work of the SCJC. To reflect this, we think the SCJC should have regard to two additional principles when undertaking its functions:

- The need to improve the operation of the civil justice system to the benefit of its end users.
- Ensuring that the needs of all interested parties, including users and potential future users, are taken into account, through a process of proactive engagement.

4. We do not believe that the proposed composition of the SCJC is appropriate to undertake its full range of proposed functions. We believe the following changes are required:

- Additional criteria should be used to ensure the membership contains the necessary expertise to undertake its functions.
- There should be equal members of ‘lawyer’ and ‘non-lawyer’ members.
- The role of the Lord President in relation to the SCJC should be reconsidered.

5. It is essential that the SCJC is accountable and transparent, and that its work is subject to appropriate scrutiny. Areas where we believe the Bill should be strengthened in this regard are:

- There should be a general requirement for the SCJC to consult and work with other groups and bodies with an interest in the civil justice system, including users.
- The Court of Session’s ability to reject or modify the rules proposed by the SCJC should be applied only when the rules fail to meet certain specified principles. Reasons for the decision to reject or modify proposed rules should be given.
- The process for appointing members to the SCJC and its sub-committees must be transparent. We believe that all judicial, advocate, solicitor and non-lawyer members of the Council should be appointed within the principles of fair and open competition and best practice for public appointments.
- There should be a clear separation of roles and responsibilities between the SCJC and the Lord President.
- The SCJC should be required to submit its annual plan and annual report to the Lord President.

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

Introduction

1. Consumer Focus Scotland, and its predecessor organisation, the Scottish Consumer Council, have campaigned for many years for improvements to the civil justice system to ensure it better meets the needs of its users.

2. We support the establishment of a Scottish Civil Justice Council (SCJC). We believe its creation will be a key means to avoid in future the type of piecemeal reforms that were criticised by the civil courts review, and which have led to a
court system that does not deliver ‘the quality of justice to which the public is entitled.’

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

Comments on the Bill’s provisions

Clause 2: Functions of the Council

Functions

4. We support the functions of the SCJC as set out in the draft legislation. We agree the SCJC should have a policy function. It should be able to proactively keep the civil justice system under review and be able to make recommendations to the Lord President and Scottish Ministers. We believe the SCJC’s policy function should be its primary function; it is through the undertaking of this function that the drafting of new rules would likely be required. Having such a strategic oversight of the civil justice system will be an important means of ensuring the system is operating effectively in the interests of its users. We believe it will also help to prevent more costly wholesale reforms being required again in the future. It will be essential that the SCJC has sufficient resources to enable it to undertake its wide range of functions.

5. We welcome the intention that the SCJC’s remit should extend to the wider civil justice system rather than simply the civil courts. One of the key benefits of establishing the SCJC is its potential to consider and oversee all different elements of the civil justice system, including how they are functioning together as a whole. We are therefore pleased that one of the key principles of the SCJC is to promote, where appropriate, methods of dispute resolution which do not involve the courts.

6. We would also support the SCJC’s remit being extended to include both administrative justice and tribunals. The administrative justice system is a hugely important means for consumers to resolve their disputes. The organisation with current responsibility for keeping the administrative justice system in Scotland under review, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), is intended to be abolished by the UK Government. It is vital to ensure that the functions of the SCAJTC, particularly in relation to making administrative justice and tribunals increasingly accessible, fair and effective by ensuring that the needs of users are central, are retained. We would suggest that the SCJC may be an appropriate body to assume such functions, provided it is suitably constituted. We would have concerns if there was a gap between the abolition of SCAJTC and the SCJC assuming such functions, resulting in the


\[\text{Administrative Justice and Tribunals Council Framework Document, Ministry of Justice, November 2007}\]
needs of users being insufficiently represented at a time of substantial change in the administrative justice system.

**Principles**

7. Overall we support the principles to which the SCJC must have regard, subject to the following comments.

8. The civil courts and civil justice system are an important way for people to assert or defend their rights. As such, they have been recognised as providing a public service. Any reforms to the system must therefore be designed around the needs of those who ultimately use it. The needs of users of the civil justice system must be therefore be central to the work of the SCJC.

9. To reflect this, we think the SCJC should have regard to two additional principles when undertaking its functions:

10. Firstly, we think the SCJC’s work should be underpinned by the need to improve the operation of the civil justice system to the benefit of its end users – by this we mean litigants, potential litigants or users of other justice services, rather than lawyers, judges or court staff.

11. Secondly, we think the SCJC must ensure that the needs of all interested parties, including users and potential future users, are taken into account when undertaking its functions, through a process of proactive engagement. This was recently recommended by the Civil Justice Advisory Group, chaired by Lord Coulsfield. Such engagement will be necessary to ensure the work of the SCJC is suitably informed by all relevant interests, and is subject to appropriate scrutiny. It will be particularly important for the SCJC to seek innovative ways to gather the views of individual users of the civil justice system, who likely to be members of ‘seldom heard’ or harder to reach groups. We do not think simply giving the SCJC the power to consult and co-operate with appropriate persons is sufficient to address this - ensuring such engagement should be a fundamental principle under which the SCJC operates in order to ensure transparency. This engagement should include ensuring that the work of the Council, including the introduction of new court rules, is appropriately communicated to relevant parties.

12. We have the following observations on two of the proposed principles:

13. S2(3)(b) (rules relating to practice and procedure should be as clear and easy to understand as possible.) It is crucial that this means as clear and easy for litigants to understand as possible, rather than the judiciary or legal professionals.

---


5 Consumer Focus Scotland (2011) Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group, Glasgow: Consumer Focus Scotland, recommendation 15
The civil courts review, for example, recommended that its proposed simplified procedure for claims under £5000 should have rules ‘drafted for party litigants rather than practitioners.’ We believe that rules should, where possible, be straightforward, easy to understand and drafted in plain English. If any rules require a degree of complexity, there should be a presumption that explanatory notes for litigants accompany the rules.

14. S2(3)(c) (practice and procedure should, where appropriate, be similar in all civil courts.) We would broadly welcome attempts to simplify the current complex set of court procedures, and to ensure consistency of practice, particularly across sheriff courts. We know that sometimes the same types of cases can be dealt with differently in different sheriff courts, and believe that users should be entitled to expect consistent treatment regardless of which sheriff court district they happen to live in.

15. However, it is essential that the requirement to have regard to this principle does not prevent the SCJC from taking fully into account the different environments that exist in the sheriff court and the Court of Session when determining civil procedure. We have previously expressed concerns about some proposed consistent approaches being disproportionate for application in the sheriff court. We would be concerned if the desire for a similar approach led to increased formality in the sheriff court. Moves towards consistency should not be at the expense of allowing flexibility to take account of the differences in case type, complexity and formality of proceedings, type of litigants or level of legal representation in the sheriff court.

Clause 3: Powers of the Council

16. It is essential that the SCJC operates in an open and transparent fashion in order to ensure it is subject to an appropriate degree of scrutiny. This is because there is a clear public interest in the broad range of functions the SCJC is to perform. If it operates effectively, it should be highly influential in the future development of the civil justice system in Scotland. It is therefore crucial that those affected by any changes to policies or procedures – in particular users of the courts and wider justice system - are given sufficient opportunity to input into the SCJC’s work.

17. We note the provisions of clause 3 are permissive (that the Council may make use of certain powers). This leaves the use of such powers as discretionary. We have particular concerns if the powers of the SCJC to consult such persons as it considers appropriate (s3(2)(d)) and co-operate with, and seek the assistance and advice of, such persons as it considers appropriate (s3(2)(e)), were to be seen as optional. In order to ensure the work of the SCJC is suitably informed by relevant interests, and is subject to appropriate scrutiny, we believe there should be a general requirement for the SCJC to consult and work with other groups and bodies with an interest in the civil justice system, including users.

---

7 Consumer Focus Scotland (2011) Consumer Focus Scotland’s response to the consultation on lay representation in the Court of Session and the Sheriff Court, Glasgow: Consumer Focus Scotland
18. In particular:
- The SCJC should consult on all significant proposed rules changes, to enable all interested parties, including court users, the opportunity to comment on the proposals.
- The SCJC should proactively co-operate with, seek the assistance of, and consult with users of the court system as well as other relevant interests, as part of its policy function of keeping the system under review.
- The SCJC should consult widely on its annual plan, in order to ensure it is focusing on the appropriate issues. This would be in keeping with the current practice of other relevant organisations, such as the Scottish Law Commission.

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

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

Clause 4: Court of Session to consider rules

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

22. In light of this, we believe the Court of Session should be able to reject or modify the rules proposed by the SCJC only when the proposed rules fail to meet certain identified principles. Examples might include if the proposed rules were incompatible with other rules, or disproportionate. Where the decision was taken to reject or modify the proposed rules, we think it would be appropriate for reasons to be given by the Court of Session for why that is the case. We believe this should be set out in the legislation.
Clause 5: Annual programme and report

23. We agree that the SCJC should prepare an annual plan and annual report and lay both documents before the Scottish Parliament.

24. We note from the policy memorandum that it is intended that the SCJC is to be accountable to the Lord President. As the Bill is currently drafted, we are not entirely clear how this is to be achieved. In order to ensure that the SCJC is accountable to the Lord President, we think the SCJC should also be required to submit its annual plan and annual report to the Lord President.

25. As noted above, in order to ensure that the SCJC is focussing on the appropriate issues, we believe the SCJC should also be required to consult widely on its annual plan. This would be in keeping with the current practice of other relevant organisations, such as the Scottish Law Commission.

Clause 6: Composition of the Council

26. We do not believe that the proposed composition of the SCJC is appropriate to undertake its full range of proposed functions. In particular we do not think the proposed membership reflects the SCJC’s policy function, or that its function extends beyond the courts to the wider civil justice system.

27. We have three key comments on the SCJC’s membership:
   - Additional criteria should be used to ensure the membership contains the necessary expertise to undertake its functions.
   - There should be equal members of ‘lawyer’ and ‘non-lawyer’ members
   - The role of the Lord President in relation to the SCJC should be reconsidered.

Additional membership criteria

28. It is important that within the membership of the SCJC, there is the range of necessary knowledge and expertise required for the SCJC to undertake its statutory functions effectively, and to ensure it is able to have regard to the principles set out in the legislation. It is important that knowledge and expertise of the membership reflects the fact the SCJC has a policy function as well as responsibility for preparing court rules, and that its policy function extends beyond the courts to the wider civil justice system.

29. We think it is desirable for the required knowledge and expertise required within the membership of the SCJC to be set out on the face of the Bill. Membership criteria for the consumer representative members are currently specified in the Bill. There are other areas where we believe the functions (or intended functions) and principles of the SCJC require additional membership criteria to be used to ensure sufficient expertise:

30. We believe it is necessary for at least one member of the member of the Council to have knowledge or experience of some form of alternative dispute resolution (ADR). Ideally, this should include one member from a specific ADR background. This is important to ensure that the SCJC has the necessary expertise when
having regard to the principle that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

31. If, as intended, the SCJC’s remit is widened to include administrative justice, it is important that the membership should include members with knowledge and experience of the administrative justice system. We would suggest that at least two members would be appropriate: one with knowledge of tribunals, and one with knowledge of the wider administrative justice system, such as an ombudsman or complaints handling process. This is to reflect the current remit of the Scottish Committee of the Administrative Justice and Tribunals Council.

32. If such issues are of sufficient importance to be included within the functions and principles of the SCJC, then we believe they are sufficiently important to warrant the explicit requirement that the Council membership includes persons with knowledge of such issues.

Categories of membership

33. We support the inclusion of consumer representative members, and agree with the criteria proposed for such membership.\(^8\) We do, however, think the number of such representative should be increased to ensure the consumer representative members reflect the broad range of interests of those who use the courts and wider civil justice system, including members of the public and other specific interest groups, such as business users.

34. We would emphasise however, that membership of the Council should not be limited only to those who can bring the perspective of different elements of the civil justice system. It would also be desirable to include some ‘public interest members’ so that the SCJC can benefit from the insight brought by those from different walks of life, and particularly those without any legal expertise.

35. The SCJC’s proposed maximum 20 members is already significantly larger than proposed in the Scottish Government’s consultation, which suggested around 15 members. In order to ensure good governance, we do not think that applying additional membership criteria should result in a Council larger than 20 members. It may be desirable for the membership, in practice, to be less than 20 members.

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

Equal numbers of ‘lawyer’ and ‘non—lawyer’ members.

36. The current design of the SCJC is weighted in favour of the judiciary and other legal interests (‘lawyer’ members) rather than user or other relevant interests (‘non-lawyer members’). While the ‘LP members’ could be used to increase the proportion of ‘non-lawyer’ members on the SCJC, such members are discretionary.

37. It is our view that there should be equal numbers of ‘lawyer’ and ‘non-lawyer’ members on the SCJC. We believe it is important that the equal numbers of
‘lawyer’ and ‘non-lawyer’ members be set out on the face of the Bill. As noted above, we also think it would be appropriate for some of the membership criteria to be explicitly set out in the legislation.

38. Including sufficient ‘non-lawyer’ members will be an important means of ensuring that the work of the SCJC is sufficiently informed by user rather than ‘provider’ interests. This is particularly important given the SCJC is to have a policy function as well as a rule drafting function, and its remit extends beyond the courts to the wider civil justice system. Within such a context, and in recognition that the courts and civil justice system provide a public service, we do not believe it is necessary or appropriate for the SCJC to be dominated by judicial and legal interests. ‘Non-lawyer’ members can provide valuable insight into issues that are of particular importance to non-professional users of the system. These insights will be particularly important when the SCJC is considering issues other than courts.

39. The SCJC having equal numbers of ‘lawyer’ and ‘non-lawyer’ members would follow best practice, and would be in keeping with similar bodies within the justice field, such as the Judicial Appointments Board and the Scottish Legal Complaints Commission. The Civil Justice Council in England and Wales has moved to equal membership following an independent review which found its previous composition was too weighted towards judges and legal practitioners and did not feel user driven.⁹

The role of the Lord President in relation to the SCJC

40. We agree that the SCJC should be accountable to the Lord President as head of the Scottish Court Service. However, to ensure the SCJC is seen to be transparent and accountable in its operation, we believe there requires to be a clear separation of roles and responsibilities between the SCJC and the Lord President. We therefore believe the role of the Lord President in relation to the SCJC needs to be reconsidered, and in particular, whether he should be a member of the SCJC and act as chair.

41. As currently proposed, the Lord President has a range of different roles relating to the SCJC. These include:

- The SCJC is intended to be accountable to the Lord President.
- The Lord President is to sit on the SCJC and can act as chair.
- The Lord President has responsibility for appointing the judicial, advocate, solicitor, consumer representative and LP members of the SCJC.
- The Lord President can inform the remit of the SCJC by asking it to provide him with advice on particular issues.
- The Lord President will have responsibility for implementing, if appropriate, the policy recommendations of the SCJC in his role as head of the Scottish Court Service, and approving (with or without modification) or rejecting the draft rules of procedure prepared by the SCJC in his function as presiding judge of the Court of Session.

42. We believe it is important that the SCJC provides independent advice to the Lord President, to assist him in his responsibilities. In order that this advice is – and is seen to be – independent, we think there requires to be a clear separation of roles and responsibilities between the SCJC and the Lord President. We believe the Lord President’s position on the Council itself, and the process to be used by him to appoint members, are the key areas in need of review.

43. In order to create a separation of roles and responsibilities between the SCJC and the Lord President, we would suggest it is not appropriate for the Lord President to sit on, or chair, the SCJC. In order to ensure that the SCJC is sufficiently accountable to the Lord President in his role as head of the Scottish Court Service, however, we think the SCJC should be required to submit its annual plan and annual report to the Lord President as well as the Scottish Parliament.

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

44. We welcome the requirement that the Lord President is prepare and publish a statement of the appointment practice he will follow. However, there are two ways in which we believe these provisions should be strengthened.

45. Firstly, we believe s7(2) should be widened to include the judicial members. As currently drafted, there is no requirement for the Lord President to publish a statement for how judicial members will be appointed to the SCJC. In the interests of transparency, we believe the Lord President should be required to publish a statement of how the judicial members will be appointed.

46. Secondly, we believe the provisions should be strengthened to ensure the process for appointing all judicial, advocate, solicitor, consumer, and any potential LP members, is a transparent appointments process, operating within the principles of fair and open competition and best practice for public appointments. For example, we would be concerned if the Lord President was able to continue with the current system for appointing legal members to the rules councils – whereby the Law Society of Scotland and Faculty of Advocate nominate members to the Lord President – when appointing legal members to the SCJC. We believe such a process would lack transparency.

47. In light of the SCJC’s functions, in which there is a clear public interest, we think that appointments for all of the judicial, advocate, solicitor, and non-lawyer members, should be made through a transparent appointments process, operating within the principles of fair and open competition and best practice for public appointments. Our preference is for such appointments to be made by means of a selection panel.

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

48. We would suggest it may be appropriate for the Lord President to prepare a policy covering the procedure to be used when considering whether to remove a member from the SCJC.
Clause 10: Expenses and remuneration

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

Clause 11: Chairing of meetings

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

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

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

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

Clause 13: Committees

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

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

\(^{10}\) Judiciary and Courts (Scotland) Bill Policy Memorandum
(Lord President appointment process). We believe the appointment process for committee members should be transparent and the requirement to produce and publish the appointments process should be set out in the legislation.

Consumer Focus Scotland
21 June 2012
Introduction

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

User representation on the Council

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

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

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

---


\(^2\) We would not seek to preclude people with law degrees or even a solicitor qualification, or some experience of working in another branch of the legal sector, from being included within the ‘non-lawyer’ category. We make the distinction to illustrate that the non-lawyer members represent a particular constituency. As stated within our original written evidence to the committee, we do think there would be benefits in including some ‘public interest members’ on the SCJC, who could bring expertise from outwith the legal system.
can bring expertise of how the system is functioning and what needs to be done to improve it. User representatives will likely have extensive working knowledge of the civil justice system, but will bring a different perspective from professional interests, which would add significant value to the SCJC.

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

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

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

7. At the oral evidence session on 26 June we were asked to clarify our written evidence in relation to clause 4: the Court of Session’s ability to consider rules. Our written evidence stated that we believed the Court of Session should be able to reject or modify the rules proposed by the SCJC only when the proposed rules fail to meet certain identified principles.

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

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

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

**Whether the staffing resources planned for the Council are appropriate**

11. At the oral evidence session on 26 June, we were asked our views on whether the staffing resources planned for the SCJC were sufficient to meet its remit. We have now had the opportunity to consider the Financial Memorandum in more detail. We are not in a position to estimate how many staff, or what grade of staff, will be required to implement the civil courts review reforms. We do, however, have some concerns about the staffing resources that are being allocated to the SCJC.
when it moves beyond implementing these reforms to its ‘steady position’ of rule-drafting and keeping the civil justice system under review.

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

13. We do not think the current estimated costs accurately reflect the required costs of the SCJC undertaking its policy functions. As we highlighted in our oral evidence, no resources are currently allocated to enable the SCJC to undertake research, which the Bill’s explanatory notes make clear would be within its powers.

Undertaking such research would likely assist the SCJC during the programme of civil courts reforms, and would likely be essential in its role of keeping the civil justice system under review.

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

15. We are disappointed that remuneration of Council members is not included in projected costs of the SCJC, despite such remuneration being permitted by the Bill. Enabling the Scottish Court Service to remunerate certain categories of members is desirable; this could result in a potential widening of the range of people who apply to be members, and in particular could be an important means of encouraging diversity in appointments.

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

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

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

---

Scottish Civil Justice Council and Criminal Legal Assistance Bill Explanatory Notes at paragraph 34
Scottish Civil Justice Council and Criminal Legal Assistance Bill Financial Memorandum at paragraph 145
running the SCJC will be borne by civil court users, in line with the Scottish Government’s policy of moving towards a system full cost pricing through court fees. We believe that taxpayers should have some responsibility for contributing to the funding of the SCJC on an ongoing basis. We have two main reasons for this:

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

Consumer Focus Scotland
25 July 2012

---

6 Such as observation was made by the Civil Justice Council in England and Wales: Full costs recovery: a paper by the fees sub-committee; Civil Justice Council, 2002
7 Scottish Civil Justice Council and Criminal Legal Assistance Bill Explanatory Notes at paragraph 28
Part Two of The Scottish Civil Justice Council and Criminal Legal Assistance Bill proposes a radical expansion of the current system of contributions by persons who are in receipt of Criminal Legal Aid in Scotland, the practical effect of which will be that a significant proportion of individuals who currently qualify for Criminal Legal Assistance and do not require to pay a contribution towards their legal costs will now be required to pay a contribution towards their Legal Aid case costs.

As a matter of general principle, The Edinburgh Bar Association is opposed to the requirement of financial contributions from accused persons towards the cost of legal representation. This Association is firmly of the view that Legal Aid should be available for those individuals who deserve it and who have a genuine need for it. The current system of assessment for Criminal Legal Aid applies appropriate eligibility limits above which no Criminal Legal Assistance is available. This Association believes that expanding the scope of contributions to all aspects of the Criminal Legal Aid system will result in vulnerable individuals and persons on low incomes being excluded from it and give rise to more cases being delayed. Further, it is submitted that the proposed system of collection of contributions in summary criminal cases by solicitors will impose an unnecessary administrative burden on a profession which has already had to cope with a number of funding cuts in recent times and is under significant pressure as a result.

The Law Society of Scotland has indicated that it welcomes the policy priorities behind Part 2 of the Bill and has stated that it 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. In these circumstances the Edinburgh Bar Association’s view is that if contributions are to be introduced in relation to Criminal Legal Aid, the following should apply:

1. The Scottish Legal Aid Board should be responsible for the collection of contributions for all types of Criminal Legal Aid.

2. The threshold disposable income level at which a contribution is payable should be considerably higher than the levels currently proposed. Additionally, this should be a genuine “contribution” to the cost of their defence, rather than the client paying the full cost of the case which amounts to funding under another name.

3. Non-passported benefits, such as Disability Living Allowance, should be removed from the disposable income calculation. Certain benefits are assessed as payable by the Government due to an individual’s specific personal needs. This would protect vulnerable individuals from either being excluded from the Legal Aid system or having to pay an unaffordable contribution towards the cost of their defence.
The Criminal Bar in Scotland has, in recent years, fully engaged with the programme of Summary Justice Reform (SJR) and has undertaken more intensive work in the initial stages of a summary case in accordance with the SJR's programmes of “frontloading” the system. Additionally, since Devolution, successive Scottish Governments have introduced new legislation at pace, creating dozens of new criminal offences in the process resulting in an increasingly complex and growing body of legislation which requires to be implemented and debated within Scottish Criminal Courts on a daily basis. There now exists a wider range of criminal offences for which individuals can be prosecuted and it is necessary that the citizens of Scotland are afforded the means to defend themselves. Under the proposals introduced by Part 2 of this Bill, a significant number of these individuals will simply be unable to afford to do that.

**Impact on Vulnerable People**

This Association is of the view that the proposed lower income threshold of £68 is unacceptably low. The Joseph Rowntree Foundation Minimum Income Standards published in 2012 states that a single person now needs to spend £192.59 per week to reach a minimum standard of living. In these circumstances, for the disposable income level to be set at £68 per week will result in people being left with themselves stark choice of either paying the essential costs of living or paying a contribution to the cost of their defence. Even if most benefit types are eventually disregarded from disposable income, the proposals will still affect students, apprentices and those on War Pensions. Setting this threshold at such a low level will simply, in real terms, exclude a number of people from access to justice.

The Scottish Government’s strategy underpinning the introduction of the Bill appears to be the “harmonisation” of Civil and Criminal Legal Aid and the drawing of comparisons between the two systems, whilst highlighting perceived anomalies that exist between the two. The fact that the figure of £68 is already the lower income threshold in Civil Legal Aid is just one example of an approach which this Association contends is both unhelpful and misleading.

In truth, the only real similarity between the systems of Civil and Criminal Justice at Sheriff Court level is that both systems operate in the same building and the Sheriffs who hear both types of case are the same, albeit on different days, in different court rooms and under entirely different procedural rules. At the same time that it is implementing this Bill, the Scottish Government is considering the Gill review, which contains proposals to further differentiate the two systems, with measures designed to free up existing Sheriffs to hear more Civil business in the Sheriff Court and introduce a new breed of “Summary Sheriff” who will hear only summary criminal cases. In the Justice of the Peace Court, where the business is all at summary level, the subject matter is purely Criminal.

In Civil Court procedure a Pursuer steps into court willingly, having made a conscious decision to do so. A Defender will make a decision as to whether or not to defend the action, with or without legal advice and will either enter court or step away accordingly. In the Criminal Courts, an accused person has no choice when he is either taken to Court by the police or is ordered to appear – he cannot walk away.
In the Civil arena the Defender faces an individual, corporate body or Government department. However, in the Criminal Courts an accused faces the combined resources of the Police and Prosecution Service with all the resources of the State behind them.

If one is successful in the Civil Courts, success may bring a financial settlement and/or an award of expenses from which legal fees are commonly paid. In the Criminal Courts the best that can be hoped for is an acquittal and a huge sigh of relief, for there is no financial compensation available for the stress, loss of earnings associated with compulsory court attendances (usually more than one) or damage to reputation which are the consequences of being prosecuted, even if acquitted. Nor is there any scope for the recovery of contributions by persons who are acquitted contemplated by these proposals (unlike in England), therefore no award of expenses in favour of an accused person is ever possible in Criminal Procedure.

Civil cases operate different rules of evidence, different standards of proof and vastly different time limits to Criminal cases. Civil case law has little application to Criminal cases and vice versa. Most importantly however, the dire consequences of loss in the Civil courts rarely involve the loss of liberty.

Access to Justice

Under the new proposals a person working a 39 hour week at the minimum wage of £6.19 per hour would take home a wage of roughly £220 per week net of Tax and National Insurance. It is unclear at this time what deductions will be allowable by SLAB, but should an individual be in receipt of a weekly disposable income of less than £180, they will require to pay a large contribution. Anyone with a net weekly disposable income of £160 would in fact pay a contribution equal to the current fixed fee (net of VAT) which is £485. These measures are quite simply a means whereby, in practical terms, the number of people who are eligible to receive Criminal Legal Aid will be reduced and will result in many people who, at present, qualify for full Criminal Legal Aid without a contribution having to pay their entire defence costs.

This Association contends that to describe the shift towards full funding of their legal costs by accused persons that these proposals are designed will produce as the introduction of “contributions” is misleading for many cases. An accused person in receipt of a disposable income of between £160-£222 appearing in a summary criminal case in the Sheriff Court will be due to pay a contribution larger than the whole current fixed fee of £485.

Capital allowances will also be affected. The current savings limit in all criminal cases is presently £1716 whereas it is £7853 for Civil Legal Aid. Under the new proposals, anyone who has built up savings in excess of £750 would be liable to pay a contribution. Savings of £750 will not cover an individuals basic funeral expenses.

This Association believes that the people who will be most affected by these measures are in the margins of our society. If these proposals are enacted in their present form the vulnerable and those on low incomes will be seriously discouraged and in some cases prevented from challenging the State and accessing justice for themselves. If the State is to prosecute its citizens then it must afford adequate Legal Aid provision to enable its citizens to access justice. This
Association contends that these proposals seek to convert a system which appears to achieve that into one which will not.

**The collection of contributions**

Under the current system, contributions are payable by a relatively small proportion of individuals who are eligible to receive Advice and Assistance or ABWOR (Criminal legal Assistance available for initial advice or summary cases not involving pleas of Not Guilty). Since the introduction of fixed fees in 1999, fewer solicitors undertake summary criminal business, and those that do are processing more cases. Following the Summary Justice Reform programme of 2007/2008, summary Sheriff Court cases have become generally more complex and more serious. The legal changes subsequent to the Cadder decision place regular demands on solicitors time outwith office hours whilst increases in running costs have affected solicitors firms in the same way as other businesses. Financial pressures on solicitors firms are significant and solicitors are working hours longer than before.

Following a review of summary criminal business by Sheriff Principal John McInnes, in 2004 The Scottish Legal Aid Board (SLAB) issued a consultation document proposing changes to the system of Criminal Legal Assistance as part of a greater programme of reforms designed to achieve greater efficiency in the summary criminal courts. These changes included a recommendation that criminal legal assistance contributions be removed entirely, recognizing that in most cases, solicitors did not collect them.

Many solicitors take a conscious decision to write contributions off, due principally to a shortage of free time to devote to the practical difficulties associated with attempting to extract monies from a client group who are involved, in some way or another, in the Criminal Justice system. Most firms which undertake Criminal Defence work are small, specialist practices with a low partner to employee ratio. They do not have debt collection systems or complex systems of billing of the sort which would be required to monitor, for example, a 20 week payment plan involving payments of £10 per week. They have no in-house systems of recovery in the event of default and in order to pursue unpaid contributions, solicitors would require to set up their own debt collection systems at additional cost, or engage outside debt collection agencies. Neither system would inspire a greater expectation that monies will be successfully recovered from individuals who are, in all probability, already being pursued for other debts which probably rank higher in the individuals list of priorities, such as court fines.

Further, their pursuit is seen as detrimental to the solicitor-client relationship in which the trust of the client when giving advice and the availability of the client in order to give it is crucial, even more so since SJR where the acceptance of timeous and trusted advice by the accused is often leads to the early resolution of the case.

Indeed, the importance of the solicitor-client relationship to the efficient running of the system is recognised by SLAB, and was key in achieving a marked increase in the early resolution of cases post reform-

“The client’s solicitor of choice will in most cases be likely to have a more detailed knowledge of the client and his circumstances. He will also be more likely to make a
more comprehensive appraisal of the situation, and perhaps advise the most appropriate plea to the client.”

This relationship, which has proved so successful in achieving the aims of SJR thus far, is likely to be damaged if solicitors become representatives of accused persons and their pursuers at the same time.

Of the solicitors who do attempt to recover a contribution, many are unsuccessful for the same reasons that in January 2012, saw unpaid fines in Scotland amount to some £10m with no payments at all having been made in 20,000 cases. Anyone who has experience of the difficulties solicitors face in retrieving the necessary documentation in order to vouch a Legal Aid application will understand the challenges that would be faced in attempting to retrieve a contribution from an individual who may be in employment one week and not the next, who may be moving from address to address, or simply unmotivated to pay, because after agreeing a payment plan, the speedy resolution and disposal of his case means that he no longer has an incentive to ensure that his solicitor is “adequately rewarded for necessary work done”. For these reasons, it is submitted that a large proportion of contributions will prove to be unrecoverable.

The effect of nonpayment of contributions on the courts
It is far from clear, insofar as the documentation available to this Association is concerned, as to what is proposed should happen in the event that an accused person fails to pay the contribution to his solicitor as agreed whilst the case is not yet concluded. The 2012 Consultation Report on the introduction of Financial Contributions in Criminal Legal aid and Changes to Financial Availability states:

“It is unclear what options a solicitor might have when dealing with a client who does not make payments as required. Under the proposals in the Bill, a client assessed as liable to make a contribution will be responsible for making payments over a number of weeks. The original consultation (Scottish Government 2011d, paragraph 64) suggested that it may be possible for solicitors to withdraw their services in less serious cases where there is non-payment as the client “has, in effect, chosen not to have a solicitor”. However, if this were to happen in more serious cases, there would be human rights implications. It is not clear where the dividing line between less and more serious cases might lie. “

It is submitted that further thought must be given to this important issue before solicitors are asked to bear the brunt of an estimated loss, through non-payment, of in excess of £3m (up to 30% non-payment in “only” 18% of cases based on summary criminal, ABWOR and advice and assistance expenditure of £56.4m in year 2010/2011). For specialist Criminal Defence firms involved in a large amount of summary business, this will represent a sizeable proportion of fee income. This Association's view is that an unpaid contribution is a deduction from the fee, and given that SLAB accept that a significant percentage of contributions will go unpaid, this represents a further cut in summary fees under another name and comes hot on the heels of cuts imposed in 2011.

The consultation documents draw many comparisons between the Civil and Criminal systems of justice, but these are unhelpful in assessing the level of disruption which
will ensue in the Criminal Courts once non-payment of contributions becomes an issue, as it undoubtedly will. Cases qualifying for Civil Legal Aid routinely last between 6 months and 5 years. During the period if contributions are being paid (directly to SLAB in Civil Legal Aid cases), and the assisted person defaults in payment, the Legal Aid Certificate is suspended. If, after 28 days payments have not resumed, the Certificate is terminated. Thereafter, if the client wishes to continue to be represented he will require to pay the solicitor privately or clear his arrears with SLAB. If this is too expensive, the client can always abandon the case or decline to defend it if he does not want to represent himself.

The range of options open to a non-Legally Aided accused is rather narrower. In the Criminal Courts if there is a difficulty with Legal Aid a brief postponement may be granted but at the end of the day the case will proceed regardless of the Legal Aid position. The timelines for summary criminal cases are far shorter, the government aiming for an average of 20 weeks and these are shortened further if the accused is in custody (up to 40 days) or his case is subject to a particular pilot project, such as the Domestic Abuse Court in Edinburgh sheriff Court which requires a trial diet to be fixed within 8 weeks of a not guilty plea being tendered. For cases involving a “contribution” of the entire sheriff court fixed fee of 485 (not including VAT), which would be the case for anyone with a weekly disposable income in excess of 160, it is understood that payment should be made over 26 weeks, meaning that 112 plus VAT would be outstanding after the conclusion of the case and the removal of any real compulsitor for payment. Solicitors are unlikely to be content to conclude a case with that level of the fee outstanding.

Summary cases where an accused appears from custody and is dealt with there and then commence and conclude on the same day. Because the client is in custody and unable to access any paperwork or his bank account until he is released, solicitors find that it is difficult enough getting accused persons to produce financial verification documents after their case is finished and the threat of custody has diminished, let alone getting them to pay their bill. The likely result will be an increase in continuations without plea at first calling in order to secure the abovementioned documentation and/or contribution whilst the solicitor can, which will lead to a reduction in the number of cases resolved at first calling. The more court diets in a case, the more it costs the system to process.

It must be remembered that in criminal cases there is no prospect of a financial settlement which can be controlled by the solicitor or the recovery of an asset from which to pay the contribution, as there is often in a civil case.

Further, accused persons being prosecuted by the state are not willing participants in the court process, unlike those who chose to pursue or defend civil actions. They are likely to register any resentment they harbour at being brought into court against their will by withholding or delaying payment of the contribution wherever possible. It may even suit them to delay the outcome of their case, for example where a custodial sentence is likely. The context in which contributions are to be recovered in criminal cases is very different from that which underpins civil procedure.

The Consultation Report seeks to allay valid fears of court cases being increasingly delayed due to unpaid Legal Aid contributions by informing that last year most
summary criminal applications were processed within four days and that applications will be processed as quickly as possible. This has in fact little to do with the practical recovery of the contribution itself. Since the contribution element of the fee ranks first, in other words is deductible from the fee first with SLAB paying any balance, solicitors will be entitled to suspend completion of work, including appearing in court on behalf of the accused, until the contribution is paid in full, especially given the high probability of non-payment as recognised by the Report itself. As can be seen from the illustration above, in many cases this may not have taken place prior to the case reaching an advanced stage. There will likely therefore be an increase in motions to postpone leading to delays in cases reaching a conclusion with the resultant consequences for others, including witnesses and prosecutors. This will undoubtedly lead to a rise in individual case costs and will likely cancel out whatever savings are expected to be made by these proposals.

Cases involving serious crimes must be prosecuted speedily, with as little delay as possible. The inevitable rise in party accused will result in delays and disruption for the Courts and for Prosecutors: what will happen to the elderly accused facing a sexual allegation, who has more than £750 in the bank, but come the intermediate diet has failed to pay his contribution? The accused cannot represent himself and the solicitor will withdraw, whilst the legal aid certificate becomes suspended and non-transferrable; and what becomes of the accused facing a drugs charge who has failed to pay his contribution and is left standing in the dock by his lawyer who has been unable to get him to part with it? – do the already overburdened forensic scientists who analysed the drugs require to attend court because the crown cannot enter into a minute of agreement of their evidence with the accused? Will the crown provide him with sensitive witness statements to enable him to prepare his defence? Or CCTV discs? Or expert reports? The burden of solving this problem will fall to Sheriffs and Justices to resolve.

It must also be recognised that the consultation documents seem to assume that there will be no decline in the number of accused applying for legal aid, but it is inevitable, given the levels of “contribution” proposed, that there will be an increase in the number of accused persons who decide to represent themselves from the outset of proceedings and not consult a solicitor at all. This figure is almost negligible in the sheriff court at present, and low in the Justice of the Peace court but is sure to rise.

Sheriffs and Prosecutors know only too well that many accused persons are simply incapable of representing themselves – it is unclear whether there were any contributors to the consultation document who had ever conducted a summary trial with a party accused. Many accused persons come from the most disadvantaged sections of society and it is inaccurate to argue that these individuals would be most likely all be in receipt of passport benefits and therefore not require to pay a contribution.

A 2007 research paper published by Strathclyde University reporting on research commissioned by the Scottish Executive found that:

“the relatively weak social and economic resources of most clients in summary proceedings coupled with the immediate stress and anxiety which the criminal
process brings means that clients tend to be in a particularly poor position to take firm command of their defence...many clients tended to have some difficulty accurately explaining the charges against them (or indeed those amended charges which they chose to plead guilty to). Furthermore, many clients tended to conflate legal culpability with a wider view of moral culpability....Even among more experienced clients who professed initial confidence, when pressed to provide clear explanations, most clients admitted that they had a fairly vague idea of the procedure in their case."

Thus, many party accused would be unable to prepare or conduct their own defence in the context of themselves increasing complexity of summary criminal cases, which now routinely involve CCTV evidence, expert reports, measures for child/vulnerable witnesses, identification parades, the requirement for intimation of special defences and notices, and complex sentencing options, not to mention the plethora of statutory offences enacted since devolution. At the moment, party are rare and those who represent themselves at trial even more so. Cases involving a party accused require a greater degree of input from the bench so that the accused, who is unlikely to appreciate the finer points of criminal procedure, is treated fairly. This Association predicts that such cases will become more common. The potential for Human Rights arguments due to the reluctance of the prosecution to divulge sensitive material directly to accused persons and the likelihood of miscarriages of justice will increase, both being scenarios which bear a high cost to the public purse and to public confidence alike.

In relation to cases which do not proceed to trial, there is a considerable advantage to the courts and prosecution in having the same solicitor represent an accused person where that person has more than one outstanding case. Plea bargaining across a number of cases can be a relative straightforward process and, at the time of sentence, only one plea in mitigation is required. However, as these clients begin to run up debts to their solicitors of choice, they are likely to turn to other solicitors to represent them in relation to any fresh charges in order to avoid an awkward meeting with the former solicitor which would no doubt involve the giving of an ultimatum requiring payment before representation.

This situation will cause real problems for prosecutors and agents alike as they try to identify which offices hold the accuseds various cases and hold multi-party discussions in an effort to resolve them. It is predicted by this Association that there would be a detrimental effect on the percentage of cases resolved at an early stage, a rate which has seen large improvements since SJR. In addition at the time of sentence, more than one solicitor would require to appear, each giving individual pleas in mitigation in order to justify the appearance fee. This would increase the court time taken up by these cases and defeat the sliding scale currently in place whereby a solicitor can only claim a percentage of the fees where guilty pleas are tendered across a number of summary complaint at the same diet, and would make it difficult to restrict deferred sentence fees across a number of complaints calling at the same diet when more than one solicitor was appearing. The rise in costs would again eat into any savings which had been achieved.

In all of these circumstances, it is submitted that SLAB, a quasi-governmental body removed from the solicitor-client interface is the appropriate body to recover
contributions from accused persons. SLAB already has the mechanisms in place to recover contributions and the experience of recovering them. It has stated its intention to recover contributions in solemn criminal cases and already recovers themselves in Civil Legal Aid. If it is felt that it would be a relatively straightforward matter to collect contributions in summary cases then this Association believes that it would be far more straightforward for SLAB to extend its existing system to recover summary criminal contributions as well than to require individual solicitors to introduce schemes of their own which will lack uniformity.

This Association does not agree with the claim that an individual solicitor’s direct relationship with the accused would make collection easier than it would be for SLAB for the reasons stated above. SLAB is already aware that many solicitors do not collect contributions. The truth is that SLAB has a far greater likelihood of being able to collect a sizeable proportion of contributions than individual solicitors and would be able to enlist Government mechanisms to assist it, for example by extending recovery procedures already in place for Proceeds of Crime or introducing measures to enable deduction at source. It is of note that the contributors to the consultation were unanimous in the view that SLAB should collect.

This Association will make representations to the Government through Members of the Legal Aid Negotiating Team of the Law Society but, at this stage, wishes to make it clear that the Association reserves its right to take independent action in the future in relation to any or all of the issues raised in this Response Paper.

Edinburgh Bar Association
9 August 2012
In April 2012 the Scottish Government published its Consultation Report on the introduction of financial contributions in criminal legal aid and changes to financial eligibility. This Report (as it name suggests) reports on the Consultation Paper published by the Government in March 2011. In doing so, the Consultation Report describes the “three broad proposals” set out in the Consultation Paper. Part 2 of the Bill contains the framework whereby the proposals are translated into law (largely by providing for the promulgation of subordinate legislation by Scottish Ministers and the Scottish Legal Aid Board).

The Faculty responded to the Consultation Paper and, in doing so, provided its views as to the general principles behind the proposals contained within it. Those proposals proved to be largely impervious to the consultation process and accordingly there is little material difference between what was initially proposed and what now appears in the Bill. It follows that the principles underlying the Bill have not changed from those already commented upon. Neither have the Faculty’s views. Rather than simply reiterate arguments that have already been presented, the Faculty respectfully invites the Justice Committee to revisit the Faculty’s response to the earlier document in order to find the reasoning behind the Faculty’s position, which can be summarised as follows:

Proposal 1: Changing the assessment of financial eligibility
In its response to the Consultation Paper, the Faculty indicated its agreement to the proposal that the assessment of financial eligibility for ABWOR, summary and solemn criminal legal aid should be similar. The Faculty remains of that view.

Proposal 2: Introducing contributions in criminal legal aid
In its response to the Consultation Paper, the Faculty indicated that it would support in principle the introduction of financial contributions, but that fairness requires that an individual who is brought to trial and ultimately acquitted should be left, as far as possible, in no worse a position than he was prior to the commencement of proceedings against him. Accordingly, the Faculty could only support the introduction of a system of contributions in circumstances where contributions would be refundable to an acquitted contributor.

The Faculty recognises the financial imperative behind the proposals now included in Part 2 of the Bill. However it remains of the view that the introduction of contributions, without any system for refund in the event of acquittal, is fundamentally unfair. It also adheres to the additional concerns expressed in its earlier response: i.e. (1) that a contributions system (with no prospect of recovery) will act as a strong incentive to plead guilty irrespective of the guilt of the accused, and (2) that it will act as a disincentive to someone facing criminal charges to remain in employment. The Faculty also reiterates its previously expressed concern that the
governing principle of proportionality militates against any system of contributions (whether refundable or non-refundable).

Proposal 3: Collection of contributions
The result of the Government’s consultation exercise was clear and unambiguous: i.e. (as per the Consultation Report) “the respondents were clear that they believed the [Scottish Legal Aid] Board should have responsibility for collecting all contributions. There was no support for the other two suggestions.” Given the unanimity of opinion, it is hard to recognise the scheme now incorporated into the Bill (which requires solicitors to collect contributions in summary cases) as a “compromise” (as it is characterised by the Government in the Policy Memorandum accompanying the Bill). The Faculty considers that this outcome calls into question the value of the entire consultation process, and demonstrates the extent to which financial necessity has overridden proper consideration as to the potential impact of this Bill upon the fundamental principles of access to justice and the need to ensure that all accused persons have adequate facilities for the conduct of his/her defence to criminal charge(s).

Faculty of Advocates
30 July 2012
Response by the Faculty of Advocates

Introduction
The consultation is designed to obtain views on general principles [para 1] and we therefore restrict our response to these principles. However, it should be noted that the absence of detailed proposals and any clear evidence base for the proposals makes it very difficult to assess them.

In general terms, whilst we agree with the governing principles set out, we consider that access to justice and enabling an accused person access to adequate facilities for the conduct of his/her defence is the fundamental principle here and any other considerations must give way to secure this principle.

In addition, any system of contributions must be rigorously fair. One of the principles listed is fairness to the accused and the taxpayer. Fairness and respect for our criminal justice system, in our view, requires that there be a procedure for recovery of contributions made by persons acquitted – unless there are circumstances which make it inappropriate.

Finally, we agree with the principle of proportionality but suggest that it will cause problems for any fair contributory system. We suggest proportionality is best met by a system which seeks contributions after conviction.

Fairness requires recovery of contributions
One of the stated governing principles is ‘Fairness to the accused and the taxpayer’. This is a principle that the Faculty supports. Fairness demands respect for the presumption of innocence. Fairness requires that an individual, who is brought to trial and ultimately acquitted, be left, as far as possible, in no worse a position than 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.

Paragraph 53 states that:

(a) That a recovery system “is not being considered within the scope of this consultation”. This presents a serious problem for the process being undertaken – not least that in our view, in principle, a system of contributions is only fair when it involves a system for recovery. The failure to address recovery at this stage undermines its introduction.

(b) “A system of contributions could operate without introducing a mechanism for recovery of costs”. The Faculty rejects that proposition.

Fairness surely requires that there must be a mechanism for recovery of contributions in cases where an accused is acquitted. That is the principle behind
recovery in civil proceedings and the consultation paper states that it seeks to introduce parity with civil proceedings [paras. 21-23].

Moreover, recovery is common practice in other developed jurisdictions which, again, the consultation paper acknowledges is relevant [para 24].

Fairness demands that there can be no degrees of acquittal if the presumption of innocence is to remain at the heart of our criminal justice system. The presumption continues throughout the trial until verdict. It is only the members of a jury who judge guilt or innocence. The suggestion at para. [52] that acquittal – whether not proven or not guilty - is not the same as innocence is inconsistent with the rule of law and cannot properly found any policy. The Faculty is of the view that contributions should be refundable in all cases where guilt is not established. In England and Wales, full defence costs are recovered unless the court is of the view that the accused brought suspicion upon themselves: Criminal Procedure Rules 2010, r.76.(5)(a)(ii); noted in Archbold: Criminal Pleading, Evidence & Practice, 2011, para. 6-100g. The Faculty suggests that defence contributions should be recoverable in all cases where an accused is not convicted but the court can limit the amount recoverable if it is felt inappropriate.

Finally, the alleged anomaly whereby non-legally aided funded people are left at a comparative disadvantage [para 52] already exists, in that at present some receive free assistance and others do not. It is not, we suggest, a persuasive reason against recovery within a contribution scheme. Alternatively, if it is considered an issue of principle, then a simplified recovery procedure could be considered allowing all parties to recover costs from a central fund similar to the one that exists in England and Wales.

Example
Consider the example of an Independent Financial Advisor (IFA) who faces charges of fraud in relation to 100 mortgage applications. There are 20,000 case papers. Several expert witnesses need to be instructed (accountants, handwriting experts, etc.). The case takes many hundreds of hours to prepare. Preparation time is 18 months. The trial lasts 6 months. The IFA has disposable income of £1000/week. Over 2 years he contributes £104,000. He is acquitted – the jury accept his defence that he had no involvement in any criminality. He is innocent.

It cannot be fair that such an accused walks away from a 2 year ordeal without a stain on his character yet £104,000 poorer. No taxpayer would wish to be in such a predicament. The example given is perhaps extreme but not uncommon. It illustrates clearly the unfairness of a one-way contribution system. Where is the fairness in asking an acquitted contributor to personally meet a bill of £104,000, £10,000 or even £1000?

Further concerns
   a. Potential Disincentive
Under a no-refund system, an innocent accused, such as the IFA above, may take the view that rather than parting with £104,000, which he has no prospect of recovering, he will plead guilty to a much reduced libel to bring matters to a
conclusion - albeit that he is innocent – solely to avoid the financial ramifications. Under a refund system such examples of injustice would not occur.

b. Disincentive to Employment
Under a no-refund system an accused might simply leave work, transfer all assets to a partner and thereby claim that he has no disposable income. The taxpayer would therefore bare the full brunt of the costs. With a refund system in place such a course of action would or could be avoided.

c. Fairness
The use of enhanced powers of recovery makes a refund system all the more necessary in the interests of fairness to the accused and the taxpayer.

d. Prior Consultation
Prior consultation has demonstrated a majority in favour of a process for refund or recovery of contributions – Advice for All: Public Funded Legal Assistance in Scotland – The Way Forward (Analysis of Written Consultation Responses), p.91, Table 31.

e. Scottish System
In paragraph 53, reference is made to the different criminal justice systems existing in Scotland, and England and Wales. This seems to be put forward as an explanation why applicants in Scotland should not be entitled to any refund. This seems somewhat at odds with the explanation given in paragraph 6 for the introduction of financial contributions that “this will also bring criminal legal aid into line with practice in many other developed jurisdictions”.

Practical considerations for recovery
The consultation paper also suggests that a reason against it is that refunding contributions would constitute a bureaucratic nightmare. It is difficult to understand the thinking behind this statement. No detail or evidence (such as comparison to other systems) is provided.

Why should it be any more difficult to refund payments than it would be to pay them? Indeed it should be easier as at the time of acquittal it will be known what contributions have been made.

A simple way to avoid much of this “bureaucratic nightmare” would of course be to provide that any contributions would be collected at the end of the case once the outcome of the case is known. In the event of an acquittal no contributions would be required.

Moreover with a refund system in place there are further avenues of financial recovery that could be considered. Upon conviction a contributor, as part of the sentencing process, could be ordered by the court to make further contribution to the total defence costs – presuming his ongoing contributions have not met the full defence costs. Further, the court could, in certain situations, order a convicted contributor to make a contribution to prosecution costs. Such recovery schemes exist in England and Wales. Such further recovery offers fairness to the taxpayer and, with a refund scheme in place, could not be said to be unfair to an accused.
Paragraph 53 states that in England and Wales defence contributions are recoverable from the Crown. For the avoidance of doubt Crown means ‘out of central funds’ or the ‘Ministry of Justice’, not the Crown Prosecution Service.

**Proportionality**  
The potential range of savings is suggested at between £2.8 and £5 million.

The Faculty is of the view that such savings, whilst welcome, are minimal when set against the total legal aid bill. Further, such savings are dependent on there being collection by solicitors and a no refund system. The Faculty can support neither proposition.

If a refund system were introduced the suggested savings would be eliminated – not only because of the refunds themselves but because of the administrative machinery and its associated costs. Yet as we suggest fairness requires a refund or recovery system where a contribution system is introduced.

Even with no refund scheme in place the cost of the administrative machinery should not be underestimated.

Enforcement would be difficult. For that reason alone contributions would need to be collected centrally with statutory enforcement powers available.

The Faculty, whilst supporting a refundable scheme of contributions, is concerned that the governing principle of proportionality militates against both a refundable and non-refundable scheme.

**Proposals for introducing contributions in criminal legal aid**  
Whilst we accept and recognise the need to reform and refine procedures, with regulations to reflect changing times and circumstances, any proposals for change would require to adequately balance the interests of the taxpayer and the applicant. There are real concerns that some of the proposed changes do not properly achieve that balance, and if implemented may well result in the accused person’s full access to justice being heavily compromised in a number of important areas.

**Concerns:**

(1) **The Risk of Perverse Incentives**  
Paragraph 33, which reflects the Governing Principles of any proposed change, states, “it is essential that there are no perverse incentives which damage the efficient and effective operation of the justice system.”

Any change therefore, must ensure that the regulations should not bring about perverse incentives (in the form of financial disincentives) which ultimately may save the taxpayer money, but may well threaten the integrity of the justice system by providing an incentive to applicants to take a particular course of action based on purely financial reasons rather than having regard to the proper interests of justice.

Whilst it is acceptable in principle, that graduated contributions be introduced to ABWOR and criminal legal aid, the overall emphasis should be to ensure that any
contributions should be both reasonable and affordable. That being so, it is concerning that a number of the various options suggested, appear to be neither reasonable nor affordable to applicants on low or modest incomes. This last statement applies in particular to the examples given in paragraph 45.

Indeed, the example in paragraph 45 would appear to be at odds with one of the governing principles stated at paragraph 33. The example given could be said to provide the very type of perverse incentive sought to be avoided.

The perverse incentives anticipated in the paper, appear to relate to decisions taken in respect of the case itself, such as whether to plead guilty or not guilty, but there is a real danger that further perverse incentives could arise in areas indirectly linked to the case. For example, as mentioned above, any system must also ensure that there remains a positive incentive for someone with low or modest income to remain in permanent employment.

Having regard to the interests of the taxpayer, an applicant should not have to decide that, in order to ensure proper access to justice, he or she would be better off if they were not in employment. Such a disincentive fails both the justice system and the taxpayer. In the example given, reference is made to disposable income, but no indication or assistance is given as to how such disposable income is to be calculated.

(2) Contribution Amounts
Furthermore, in the example given, a person earning between £100-£120 would be better off financially than someone with a disposable income in excess of £160. The opening statement in paragraph 45 makes no sense. If this was to be applied, someone in the first band would only be contributing 50% of their disposable income but someone in the latter band would be contributing 100% of their disposable income, and as we are dealing with disposable income, a person in Band 1 would be financially better off than someone in Band 4, thereby providing an incentive to work less or not at all. In any system that is introduced, such anomalies must be avoided.

(3) Payment Periods
Paragraph 46 gives different options for payment periods, but these options do not seem to strike the balance between access to justice and the interests of the taxpayer, the balance being heavily weighted in favour of the taxpayer. This is because, whereas it may be appropriate in certain cases for there to be a financial contribution, there is a real risk in the options given, that their application would result, not in the accused on low and modest incomes paying a contribution, but in fact bearing the full financial responsibility for their legal costs.

This is because paying contributions over the lifetime of the case takes no real account of the length of time, that, in particular, a solemn criminal case can take, and that the length of time that a case takes is something outwith the control of the applicant.
Example
A person with a disposable income of £150 per week appears on petition, they fall into Band 3 and therefore their contribution would equate to £120 per week.

- the case clock has stated ticking
- the Crown in theory have 12 months to bring the applicant to trial
- for a considerable period the defence can do nothing other than wait for the Crown to serve an indictment.
- in the meantime the accused would be required to contribute up to £120 per week
- in a High Court case the Crown indict for a Preliminary Hearing after 10 months and the Preliminary Hearing is heard one month later, at the moment it is common for the 12 month Time Bar to be extended as a matter of routine because of the difficulty in finding dates for trial
- allowing for continued PH’s and a trial diet it is possible for the case to take up to 18 months for completion.
- Taking account of the different options for payment suggested it is possible that in the above example the applicant’s contribution could amount to £9360.00 (£120 x 78 weeks)
- Applying the same situation to someone falling into Band 4 and contributing £200 per week this means that their possible contribution would amount to a maximum of £15600.00
- In both scenarios the amount of contribution due would mean that the applicant would in all likelihood be paying the full amount of the case
- It cannot be fair or justifiable to require someone on a low or modest income who has passed the interest of justice test to fund their own legal costs without any hope of a refund even if acquitted.

Rather than paying a financial contribution, the reality would be that someone on a low or modest income would become responsible for his or her full costs.

In effect, by forcing someone to contribute all or most of their disposable income, that provides them with a real incentive not to work for the duration of their case. As such, any scheme would have to ensure that the resultant payment from the applicant would be what the reforms are meant to achieve – a contribution.

This would ensure that it would only be those who could really afford to do so would bear full responsibility for their costs.

The same principles must apply whether the contributions are based on capital or income.

Evidence based approach
There are no details of any evidence or research behind these proposals. This means that much is speculative – for example

- the impact on applicants and the estimates made in paragraph 51.
- the average case cost or average lifetime of a case
No detail or evidence is cited for how ‘the average case’ has been established. Our experience suggests this is a rare creature.

The Faculty consider that there are so many estimates and assumptions being made here that it would be advisable to conduct proper evidence based research before embarking on any national scheme. In particular, absent any research or pilot schemes, we cannot make a reasonable assessment of whether an income based or capital based or a mixed system is preferable. In any event, no issue of principle properly applies here.

**Appeals**

There appears to be an assumption that contributions would apply to appeals – the only issues raised are regarding the position of re-assessment of contributions [para 49]. Most appeals in criminal procedure require leave to appeal and involve a point of law only. This will often consist of a material irregularity or failure by the trial judge or the prosecution in the course of the trial proceedings. In principle, one might be expected to only have to contribute to criminal proceedings which are properly and fairly conducted. Consideration should be given as to whether such failures, which are deemed as arguably resulting in a miscarriage of justice by the High Court sift, should cause the appellant to be liable for contributions. Certainly, fairness demands that recovery be provided for.

**Proposal 3 – Collection of contributions**

Civil contributions are collected by SLAB. If much is made of avoiding anomalies why should the situation be different for Criminal Legal Aid? If contributions are to be made in Criminal Legal Aid cases then the board should also collect these.

This would avoid wasting court time and money caused by solicitors having to cease work when there is a change of circumstances (and awaiting any consequential decisions by SLAB) or by solicitors ceasing to act when the applicant fails to make payment.

Paragraph 57 suggests that if the Board were to collect contributions this would move away from the current process in which solicitors have an existing responsibility to collect contributions under ABWOR. However this is somewhat misleading because at present this relates to the collection of a one off payment the maximum amount of which is £135.00.

Paragraph 64- legal aid should not be terminated in the most serious cases, *i.e.* solemn cases as to do so would simply add to the financial burden of the taxpayer in other areas such as court delays etc.

**QUESTIONS**

Our response to these questions is limited as they largely do not address matters of principle

1. Yes
   Emphasis should be on fairness and access to justice, as rehearsed above.

2. Yes
We would support a unified test applied by the Board

3. Qualified Yes – we only support a system of contributions which allows for recovery or refund on acquittal

4. - 9. Answers dependent upon more evidence and research as rehearsed above.

10. Yes as rehearsed above.
Justice Committee
Scottish Civil Justice Council and Criminal Legal Assistance Bill
Supplementary written submission from the Faculty of Advocates

PART 1 OF THE BILL

1. General Observations

1.1 The Faculty of Advocates (“the Faculty”) welcomes the proposed creation of the Scottish Civil Justice Council, together with the conjoining within that body of the roles presently carried out by the Court of Session and Sheriff Court Rules Councils.

1.2 The Faculty observes that there is scope for an overlap between the Council and the Scottish Parliament (and its Justice Committee) in relation to policy issues. In particular, the Faculty notes the breadth of the functions given to the Council under section 2 of the Bill, which includes a general requirement “to keep the civil justice system under review” (section 2(1)(a)). While the Council will have an important role to play, society as a whole, represented by the Parliament and its Committees, has an interest in and responsibility for broader policy issues concerning the civil justice system. The work of the Council should be seen as complementary to the role of the Parliament.

1.3 The Faculty observes that, in light of present uncertainty as to the manner in which UK Tribunals operating in Scotland are to integrate into the overall Scottish justice system, there is an inevitable degree of uncertainty as to the role which the Council should fulfil moving forward. The Faculty also acknowledges that, in its initial phases, it is anticipated that much of the work undertaken by the Council will deal with implementation of the recommendations of the “Gill Review”; it is further anticipated that, once this is done, the Council will face a less burdensome workload.

In light of the foregoing, the Faculty would suggest that there may be merit in a two stage approach – the creation of a body that would be charged with the implementation of the “Gill Review” recommendations, with the establishment of the Council on its permanent basis being postponed until after this process has taken place, by which time it would be hoped that the issues relating to Tribunals had been clarified. This would enable the Council to move forward on a clear footing and with a clear remit, which, it would be hoped, would not have to be changed in a piecemeal fashion over the following years.

1.4 The Faculty would suggest that the proposed membership of the Council may result in a Council which is too unwieldy to carry out its functions with ease. As matters stand, section 6 of the Bill provides for up to twenty members to sit on the Council at any one time. The Faculty would suggest that a smaller number (say, fifteen) would be more conducive to the Council fulfilling its functions.
2. **Specific Observations**

2.1 **Section 1**

In section 1, a “body” is established which is to be known as the Scottish Civil Justice Council.

The Faculty assumes that it is intended that this body is to have a legal personality and is to be a body corporate. On the basis that these assumptions are correct, it is suggested that it would be prudent to make these matters express within the drafting of section 1.

2.2 **Section 2(2)(1)(a)**

Further to the observations made at paragraph 1.2 above, it is submitted that this section should be revised so that this function of the Council is “to keep the practices and procedures of the civil justice system under review”.

2.3 **Section 6**

Further to the observations at paragraph 1.4 above, it is suggested:

(a) that the proposed Council members listed at sections 6(1)(c) and (d) are not required and can be dispensed with; and

(b) that the number of “LP members” as provided for in section 6(1)(i) could be restricted.

2.4 **Section 9(3)(b)**

The justification for the requirement that the Lord President to consult the Scottish Ministers before removing an LP member of the Council is not apparent to the Faculty. Parliament may wish to consider whether such a provision is necessary or desirable.

2.5 **Section 13(2)**

Section 13(2) provides that a person who is not a member of the Council may be appointed to be a member of any committee established by it. The Faculty assumes that it is intended that any such appointment would be made by the Council (rather than, for example, the committee in question). On the basis that this is correct, the Faculty would suggest that this matter is clarified (by addition of the words “by the Council” after “may be appointed”).

**Financial memorandum**

2.6. The Faculty notes that the Scottish Government expects that increased fees in the Court of Session will enable the Scottish Court Service to meet the costs of the SCJC (as well as other aspects of civil courts reform). In the context of the current
proposal to increase the privative jurisdiction of that court to £150,000, the Faculty questions the prediction that there will be an aggregate increase in fee income.

James Wolffe
Faculty of Advocates
30 August 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Forum of Scottish Claims Managers

Summary

We agree that an over-arching Scottish Justice Council would be a progressive, forward thinking step which will facilitate court reform and if the Council includes not simply legal profession court users (also insurers, consumer bodies and champions, local authorities and the like) the council could enable change that users and consumers want and would fully endorse.

The proposed membership should reflect a fair representation of the actual users of the court system, by which we mean not only the legal professionals, but insurers, consumer bodies, local authorities and specific interest groups representing areas such as family law which together with insurance matters would account for the majority of court time.

About the Forum of Scottish Claims Managers (FSCM)

The Forum exists as a lobbying organisation on behalf of its members and to represent their interests in the handling of insurance claims.

It is the Forum’s desire to be actively engaged, with all interested parties, in discussions and debate relating to Third Party claims** in Scotland including Pre and Post-litigation.

A membership list and more information on the Forum is appended below.

Evidence on Scottish Civil Justice Council and Criminal Legal Assistance Bill

1. Contrary to popular belief, Insurers do not benefit by delaying settlements or by creating unnecessary delays in getting compensation to Consumers.

2. In fact, the exact opposite is true and insurers actively seek to reduce the time taken to get fair and reasonable compensation to the affected Consumer.

3. Our trading experience has shown that the longer claims remain outstanding, the more they ultimately cost and the more overheads are incurred as a result.

4. On average, 9 out of every 10 of our Personal Injury claims settle pre-litigation – in other words, settle without the need for intervention by the Courts.
5. In terms of current civil court usage in Scotland, we fund or have a financial interest in approximately 80% of cases which makes us the single largest user group of the courts in Scotland.

6. The present system is reactive in that when change occurs, we have to simply adapt or adhere to the proposed changes. The Scottish Civil Justice Council is a leap forward to making the system more proactive and if it is made inclusive of users like ourselves, it will bring a more forward thinking and robust system.

7. It is vitally important that the proposed Scottish Civil Justice Council comprises members who understand what precedes the litigation process and what factors ultimately lead to litigation and the Court service being the last resort. As such, the Council can safeguard against unintended consequences of any changes being detrimental to consumers and all court users.

8. Non-legal members of the Council with this dual understanding of litigation and what precedes litigation would make it more inclusive and lead to wider acceptance of change that court users and consumers want and would fully endorse.

9. The proposed membership should reflect a fair representation of the actual users of the court system, by which we mean not only the legal professionals, but insurers, consumer bodies, local authorities and special interest groups representing areas such as family law, which together with insurance matters would account for the majority of court time.

10. In Clause 6 of the draft Bill dealing with the composition of the Council, we believe that there is an omission in that in addition to the Consumer representative members, there should also be non-legal members who represent and reflect other areas of court usage.

11. We would submit that for the reasons outlined above, Insurance should be represented and recognised within the Council as one such important area and that member(s) should be sought from FSCM.

12. In the alternative, Insurance should be represented and recognised as an area of importance within the body of “LP Members” as set out in Clause 6 (1) (i) and member(s) should be sought from FSCM.

13. One example of this understanding would be the proposal of mandatory Pre-Action Protocols to assist all parties in achieving quicker settlement of claims by introducing a framework for narrowing areas of dispute and encouraging early dialogue between both sides. They would enable the Courts to consider pre-litigation conduct by both parties and impose sanctions on either party who fail to properly engage in compensating the Consumer. This would lead to more cases
settling without recourse to the courts and a smoother process for the Consumer.

14. The voluntary Pre-Action Protocol was a big step forward and has, by clear consensus, been a success. I think it is worth pointing out that this arose directly from many meetings between FSCM and the Law Society of Scotland. It therefore serves as a perfect example of a successful change implemented when insurers, in particular FSCM, are involved and inclusive discussions take place.

15. We can bring a wealth of experience to support any proposed changes to the law, legal processes or pre-litigation practices and conduct in Scotland to the benefit of the Consumer.

16. Our experience derived from other legal systems (and their pitfalls) where we operate can assist in modernising the Scottish Courts to adapt to the changes outlined and proposed by Lord Gill making Scotland a forum of choice.

In conclusion, to properly consider change for the better and adapt the courts, the Council must have members who understand what processes and drivers precede litigation to ensure that the courts do not become clogged up with unnecessary litigation or rules which promote same.

Any reforms or changes made by the Council will influence pre-litigation behaviour and ultimately influence the volume of cases entering the judicial system. Insurers are well placed to inform of any unintended consequences before proposed reforms are implemented and therefore inclusion of Insurers within the Council would lead to more improved, forward thinking procedural change.

Inclusion of insurers must not be viewed as advancing the interests of one particular class of litigant over another as we submit that the Council membership should be balanced and fair.

To decide not to include non-legal court users or view them as special interest groups rather than members would in our view, hamper reform and give the Civil Justice too narrow a view on the effects and ramifications of future change.

Alan Rogerson
Vice Chairman of the Forum of Scottish Claims Managers
20 June 2012

**Third Party Claims definition:**

Personal injury or damage to property arising out of a party’s negligence – be it a personal (consumer) matter or a commercial (business) matter, road traffic accidents and accidents in the workplace.
Further information on the Forum of Scottish Claims Managers (FSCM)

1. The Forum aims to promote improvements to the law to enable consumers easier and quicker access to justice.

2. The forum membership covers a number of major insurers, financial institutions together with claims handling companies and Local Authorities.

3. The individual members of FSCM are all senior professionals being Claims Managers or equivalent within their respective organisations with a wealth of experience in Insurance claims matters.

4. To provide some context of the size and scale of our membership:
   - We directly employ approximately 5,550 people in Scotland, solely in insurance
   - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums)
   - Solely on claims, we spend £1.257 billion annually in Scotland
   - Glasgow is the largest insurance centre in the UK, outside London and is seen as core pool of talented resources

5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

Membership:

ACE European Group Ltd
Allianz
Aviva Direct
Aviva Insurance
AXA
Chartis
Churchill
Direct Line
Eagle Star Direct
Esure
Equity Red Star
Halifax
Liverpool Victoria
More Than
NFU Mutual
NIG
Pearl
Privilege
Prudential
PSV Claims Bureau Ltd
QBE
RAC Insurance
Royal & Sun Alliance
Travelers Insurance
UKI Insurance
Zurich Municipal
Zurich Insurance plc

Glasgow City Council
North Lanarkshire Council
Motor Insurers Bureau
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Friends of the Earth Scotland and the Environmental Law Centre Scotland

About Friends of the Earth Scotland
Friends of the Earth Scotland (FoES) is an independent Scottish charity with a network of thousands of supporters, and active local groups across Scotland. We are part of Friends of the Earth International, the largest grassroots environmental network in the world, uniting over 2 million supporters, 77 national member groups, and some 5,000 local activist groups - covering every continent. We campaign for environmental justice: no less than a decent environment for all; no more than a fair share of the Earth’s resources.

About the Environmental Law Centre Scotland
The Environmental Law Centre Scotland (ELCS) is a charitable law centre using law to protect people, the environment and nature, and increase access to environmental justice. We help protect the environment and support sustainable approaches and solutions by providing advice, advocacy, training, updates and research. We work with both local communities and other non-government organisations to use law to protect the environment. We seek to test the law, and work to ensure that Scotland complies with its European and international obligations.

This written evidence is supported in addition by the Legal Governance Group of Scottish Environment LINK. LINK is the forum for over 30 of Scotland’s voluntary environment organisations. It represents a range of environmental interests with the common goals of contributing to a more environmentally sustainable society and pursuing environmental justice.

Summary

1. FoES and ELCS welcome the Bill introducing a new Scottish Civil Justice Council, and broadly speaking support its functioning as outlined in the draft Bill. However, as it stands the Bill’s provisions in a number of key areas are not adequate to secure reform of the more problematic and outdated aspects of the how the existing Councils operate, and ensure the new Council is fit for purpose.

2. In particular we consider provisions should be amended and strengthened in relation to:

- **Appointments**: in the interests of openness and transparency it is vital that the Bill ensures an appointment practice akin to regulation by the Public Appointments Commissioner is put in place.
- **Consultation**: as it stands the Council may chose – but is not obliged – to consult in relation to its policy remit nor on new rules of court.
- **Membership:** provisions on membership could lead to a significantly legal professional-heavy Council, at the expense of lay members.
- **Remit:** the Council should have an explicit duty to consider how to make the civil justice system more accessible, fair and efficient.
- **Role of Lord President:** in relation to the Council should be reconsidered in terms of fairness, transparency and public perception.
- **Rules:** the Bill should outline under what conditions Rules of Court may be amended or rejected by the Court of Session.
- **Administrative justice:** the Bill should contain provision to ensure there is no gap in oversight of administrative justice.

**Introduction**

3. FoES and ELCS are working together for improved access to environmental justice in Scotland and full compliance with the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

4. The Aarhus Convention recognizes every person’s right to a healthy environment – as well as his or her duty to protect it. The EU and the UK are signatories to the Convention, and the Scottish Government is bound to comply with the Convention. EU Directives¹ are in place to facilitate member state implementation of the first two pillars of Aarhus – the right to be informed about and the right to participate in decisions that impact on the environment – and in Scotland these are translated into freedom of information² and environmental assessment³ legislation.

5. The third pillar of Aarhus requires that, members of the public have access to justice if rights under the former pillars are denied or if national environmental law has been broken. Under Article 9 (3) these procedures must provide effective remedy and be “fair, equitable, timely, and not prohibitively expensive”. ⁴ It is our position that the Scottish Government has not yet adequately complied with these obligations, and that this has a knock on effect on the performance of aspects of the other obligations of Aarhus, since there is little credible threat of legal action from citizens wishing to challenge decisions adversely impacting on the environment.

---

6. This is supported by the ongoing infraction proceedings against the UK for non-compliance with the Public Participation Directive (which contains some Aarhus access to justice provisions), particularly in relation to costs.\(^5\) Whilst the referral was prompted by reports of English cases, we understand the written case for the Commission includes an analysis of, and complaints in respect of, the position in Scotland. Indeed our research\(^6\) shows that compliance in Scotland is demonstrably worse than in England and Wales.

7. Aarhus also actively places a duty on citizens to “protect and improve the environment for the benefit of the present and future generations”.\(^7\) This illustrates the wider policy issues that drive environmental law and set it apart from other areas of public law. It also explains why the Government is obliged to introduce certain measures in relation to access to justice in environmental matters, and why it should keep reforms to the civil justice system under continuous review to ensure they meet Aarhus requirements.

8. The broad role of the proposed new Scottish Civil Justice Council means the body will have a significant influence over the way environmental law develops in Scotland and impact on the way that individuals, communities and NGOs engage in the justice system. It is vital therefore, that the new Council is established in keeping with the principles of accountability, openness, transparency and participation in decision making as upheld by the Aarhus Convention.

**Evidence on Part One of the Scottish Civil Justice Council and Criminal Legal Assistance Bill**

9. Broadly speaking, we support the creation of a Scottish Civil Justice Council as recommended by Lord Gill’s 2009 review of the Civil Courts, and with the functions outlined in the Bill. The work of the two current Rules Councils is not widely enough understood, and they do not provide a strategic overview of the courts systems. The creation of a new Civil Justice Council offers the chance to remedy that.

10. An overlying theme of Lord Gill’s review was that the legal system is a public service, and its structures and functions should be funded, modelled and operate with that function as a core principle. Gill recommended that a new Scottish Civil Justice Council would be a non-departmental public body\(^8\) and as such subject to the standards expected of public bodies.

11. We consider that whether or not the new Council is to be nominally an NDPB, recognition that the civil justice system provides a public services and

---


\(^6\) See our “Tipping the Scales” report: http://www.foe-scotland.org.uk/tippingthescales

\(^7\) Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

\(^8\) Lord Gill, Review of the Scottish Civil Courts 2009 Vol 2 chapter 15, p54
acts on behalf of the public should be more explicit in the Bill and relevant best practice in public standards explicitly provided for in the Bill.

Functions and Powers

12. We support the new Council in having a policy remit, and think it vital that a key function of the Council is to keep the civil justice system under constant review. We would envisage this as being the primary remit of the Council, following the implementation of the Gill reforms, through a process of continuous review, both ensuring that the system provides a fit public service and avoiding the need for a future costly overhaul. Given this, and the importance of rules of court in how cases are heard, and the impact this has on litigants, we feel strongly that the whole process of making rules, and how the Council operates, must be as transparent and inclusive as possible.

13. The existing Rules Councils are not obliged to consult on changes to rules or the introduction of new rules, and such consultations are very rare. The Court of Session passes rules as an Act of Sederunt (a form of SSI), and while all Acts of Sederunt must be laid before Parliament, this check is largely to examine technical drafting and competency to make rules, and does not provide for scrutiny beyond this.

14. Our view is that as a rule the Council should be required to consult before adopting new rules, in all but the most exceptional of circumstances. The Council should also be required to consult broadly and work with interested groups and bodies in areas where it has the policy lead, to ensure all parties have the opportunity to contribute and that broad specialist knowledge is accessed. The Spencer Review, which looked at the performance of the Civil Justice Council in England and Wales, emphasised the importance of such consultation, and noted that this did not always happen where it ought. The Review specifically pointed to increased consultation as a means to improve stakeholder perceptions in regard to openness and transparency in the workings of the Council.9

15. Power to approve or reject Rules of Court is retained by the Court of Session in the draft Bill, with no guidance as to under what conditions a Rule recommended by the Council may be amended or rejected. This significantly weakens the role of the new Council.

16. Including administrative justice and tribunals under the purview of the new Council (if the UK Administrative Justice and Tribunals Council – and therefore its Scottish Committee – is abolished) would enable a fuller ‘whole system’ viewpoint and help to ensure that the importance of this area of justice is more formally recognised. However, it is not yet clear whether and when the UK Administrative Justice and Tribunals Council would be abolished, and the Bill makes no provision for taking on the functions of the Scottish Committee. This could result in period when administrative justice has no oversight.

9 Spencer. J., Review of the Civil Justice Council 2008, 6.15
17. Recommendations:

- The Bill should include a provision to explicitly give the new Council a duty to consider how to make the civil justice system more accessible, fair and efficient, in relation to its functions. This would strengthen existing provisions that simply require the Council to have regard to certain principles in carrying out its functions.

- Given that civil justice as a whole falls under the policy remit of the Scottish Government it seems reasonable that in section 2 (1) (c) and (d) the function of the Council should be to provide advice and recommendations to the Scottish Government as well as the Lord President.

- As it stands the Council may choose – but is not obliged – to consult in relation to its policy remit or on new rules of court (at section 3(2)(d)). We would recommend amending the provision to state that the Council ‘must’ consult with ‘a broad range of stakeholders and interested parties’. Further, we consider that amending the provision at section 3(2) from ‘may’ to ‘must’ would strengthen the other provisions in this section.

- At section 4 the Bill should outline under what conditions Rules recommended by the Council may be amended or rejected by the Court of Session, i.e. where Rules are incompatible or where other Rules have superseded them. The Court of Session should give reasons for any amendments or rejection.

- The Bill should include provision for taking on the remit of administrative justice as soon as the Administrative Justice and Tribunals Council is abolished, to ensure there is no gap in oversight of this important area of justice.

Membership of the Council

18. Lord Gill proposed that the membership of a new single Council would include a number of lay or non-legal members. The Spencer Review recommended a re-balancing of membership to achieve parity between legal and non-legal members on the England and Wales Council. As it stands the Bill leaves it open for as few as two non-legal members to be appointed to the Council.

19. In keeping with the main thrust of the Gill Review – that the civil justice system is a public service – and the recommendations of the Christie Commission\textsuperscript{10} – that effective public services must be designed with and for people and communities – we consider that membership of the council should not be dominated by judicial and legal practitioners. There should be parity

\textsuperscript{10} Christie Commission, 2011 Report on the Future Delivery of Public Services
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.

20. We have serious concerns about the lack of transparency and
openness in appointments to the existing Rules Councils. The Faculty of
Advocates and the Law Society of Scotland each appoint five members to the
Court of Session Rules Council (CSRC) with little or no accountability. For
example, the Law Society’s Civil Justice Committee nominates lawyer
members to the CSRC without any external consultation or advertisement.
That the current Council of 13 members and five invited attendees includes
only one woman is strongly indicative of the Council’s lack of representation.
We consider that the current process for appointing members to the Rules
Councils is not compatible with a modern democratic society, and must not be
carried over to the new Council.

21. While the Scottish Government have yet to publish its analysis of
responses to the consultation on the creation of a Scottish Civil Justice
Council, a brief examination of published responses\textsuperscript{11} indicates that more than
a quarter of respondents raised the issue of transparency in appointments,
with a considerable number indicating that appointments to the new Council
should be made by a selection panel in an open and fair process. Of the
remaining three quarters there was little by way of substantive support for the
appointments process for the existing Councils and that proposed in the
consultation.

22. We consider that the best way to ensure this is through regulation by
the Public Appointments Commissioner. Appointments to the Civil Justice
Council in England and Wales – upon which this new Council is in part
modelled – are regulated in this way, as are appointments to the Judicial
Appointments Board for Scotland, the Scottish Law Commission and the
Scottish Legal Aid Board. All appointments to the Council with the exception
of those who are members by virtue of their office at SCS and SLAB and the
civil service representative should be subject to public appointments
standards. Where the Council carries out work through sub-committees and
ad-hoc groups, appointments to these should also be regulated by the Public
Appointments Commissioner.

23. If it is not possible or desirable to assign the new Council as an NDPB
thereby automatically falling under public appointments regulation, we
consider it essential that the Bill is amended to include strong provision
ensuring that appointments (to both the Council itself and sub-committees)
are advertised in accordance with equal opportunities and made by a
selection panel in an open and transparent way. Given the public service role
of the Council it is not appropriate to leave it to the discretion of the incumbent
Lord President to establish appointment criteria. It is difficult to see how

\textsuperscript{11} http://www.scotland.gov.uk/Topics/Justice/legal/Civil/Scottish-Civil-Justice-Council
regulation by the Public Appointments Commissioner, or statutory adherence to the same standards, would interfere with judicial independence.

24. We consider that the power invested in the Lord President to remove individuals from the Council is too broad, and he/she should consult with Scottish Ministers before removing any member, to improve accountability.

25. We support the provision in the Bill for members of the Council and sub-committees to receive expenses and remuneration. This is particularly important to ensure that both legal and lay membership of the Council is genuinely open to for example, individuals who work for small or impecunious firms and organisations, or are self/unemployed, not simply individuals from larger organisations who may be better able to absorb the time and financial cost of involvement in the Council.

26. We are concerned however, with the suggestion in the Policy Memorandum that members generally would not be paid, and hope this does not indicate a bias towards membership from larger organisations.

27. Recommendations:

- Section 6 should be amended to ensure parity of legal and lay members on the Council. Definition of what constitutes being a legal and lay member should also be included (perhaps at section 16) in the Bill, to ensure clarity of the role of, for example, non-practicing lawyers.

- In the interests of openness and transparency it is vital that section 7 of the Bill is revised. The Bill should provide for appointments to be regulated by the Public Appointments Commissioner for Scotland or through procedures akin to this. Such standards should apply to all members of the Council and sub-committees excepting those who are members by virtue of their office at SCS and SLAB and the civil service representative. This should be explicitly spelt out in the Bill and not left to the Lord President to implement a suitable appointment practice.

- Section 9 (3) should be amended so that the Lord President must consult with Scottish Ministers before removing any member from the Council.

Other

28. We note that Consumer Focus Scotland has raised concerns about the multiple roles of the Lord President in relation to the new Council. CFS note the complex situation that is proposed: the Council is accountable to the Lord President, s/he sits on and can chair the Council, appoints a significant majority of its members, informs the remit, is responsible for passing (or

---

12 Scottish Civil Justice Council and Criminal Legal Assistance Bill, 2012, Policy Memorandum p19
13 Consumer Focus Scotland, 2012, Written Evidence to Justice
rejecting) new rules, and is responsible for implementing certain policy recommendations. In the interests of good governance and transparency in decision-making we support the call for the role of the Lord President in relation to the new Council to be reviewed.

29. We would also like to note that the current Scottish Courts website is not user friendly and it can be difficult to gather information about the work of the current Rules Councils. For example, the CSRC minutes are not usually posted until the following meeting leaving a four-month lag in publicly available information about the work of the Council.

30. The new Council should ensure that accessible, current information is available online. Given the likelihood of long gaps between the Council’s meetings, draft minutes should be published promptly and accessibly to plug the information gap. When the Council are considering a specific piece of work, it would be good practice for background information to be made available to the public via the website. In addition to the annual report being laid before Parliament, the report should be made available on the Council and other relevant websites, promptly and accessibly. Best practice in information sharing will be even more important given the extended policy remit of the proposed new Council.

Friends of the Earth Scotland and the Environmental Law Centre Scotland
1 August 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Glasgow Bar Association

This submission is a response from the Glasgow Bar Association on behalf of its members to the terms of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. The Glasgow Bar Association represents legal practitioners in Glasgow practicing in areas that link them with the Scottish Civil Justice Council and also practitioners practising in the area of criminal law in Scotland. The Glasgow Bar itself comprises a significant majority of the criminal solicitors practising Criminal Legal Aid in Scotland.

1. The Glasgow Bar Association welcomes the bill insofar as it relates to the Scottish Civil Justice Council and believes that the proposed functions and powers of the Council are adequate.

2. The Glasgow Bar Association is of the view that the Scottish Civil Justice Council in assuming the responsibilities of both the Court of Session and Sheriff Court Rules Councils will be able to work towards a consolidation of the rules and procedures in civil cases in Scotland. Consistency and clarity of procedures will be to the benefit of practitioners and members of the public accessing the justice system alike.

3. The Glasgow Bar Association considers that there should be more than two practising solicitors on the composition of the Council. In this respect it is submitted that there should be at least four practising solicitors two with Court of Session experience and two with Sheriff Court experience. That representation would be more proportional. The number of solicitors appearing in both Sheriff Court and Court of Session with the practical experience and knowledge that they can bring to the Council is invaluable. The Glasgow Bar Association consider it essential that if there are to be only two practising solicitors on the membership of the Council at least one of those practising solicitors should be conducting cases in the Sheriff Court.

4. It should be borne in mind that the legally qualified members of the committee are likely to have extensive other time demands and a higher number of solicitors would allow fairer division of the work that will be required if sitting on the committee.

5. Criminal Legal Assistance – The Glasgow Bar Association accepts that members of the public who are financially able to pay for their defence should pay towards their defence. The Glasgow Bar Association however has significant concerns about the level at which contributions will be payable by accused persons and about the method of collection of those contributions. Notwithstanding requests for confirmation of the levels of contributions to be set and transparency those levels have not been disclosed.

6. The Glasgow Bar Association is concerned that many people who cannot afford to make contributions to their Criminal Legal Aid will be asked to do so as a result of
this bill. There must be a distinction drawn in relation to the innate difference between criminal cases and civil cases. In relation to civil cases Pursuers in particular have the choice about whether to litigate or not. They therefore have a choice about whether on their level of income they wish to take on the level of contribution that they are assessed at in order to litigate. They also if they are successful in their actions either as Pursuer or Defender may well recover their contribution by way of judicial expenses. The same does not apply in relation to those assessed as having a contribution under a Criminal Legal Aid Certificate. The decision on whether to go to court is not taken by them it is taken by the Procurator Fiscal. They have no control over the proceedings. There is no provision whereby if they are acquitted they can recover the cost to them of their contribution.

7. The Glasgow Bar Association has consulted in particular with Capability Scotland and is very concerned that this bill may lead to a discrimination against disabled people who cannot afford to make contributions to their Criminal Legal Aid Certificate. We are advised that 40% of disabled people already view that they do not have an equal access to the justice system. We are concerned that as a result of the contributions and the method being introduced to assess contribution levels this will lead to the creation of further barriers for access to justice by the disabled.

8. The Glasgow Bar Association notes with concern that the bill imposes upon solicitors the burden of taking “regular costs associated with disability” into account when calculating available income. The Glasgow Bar Association is very concerned that solicitors have neither the knowledge nor the expertise to be able to carry out such calculations. We are concerned that there is no specification of what documentation the Scottish Legal Aid Board will require from solicitors to be satisfied that the calculation made by the solicitor is an acceptable one. The Glasgow Bar Association understands from Capability Scotland that the weekly cost of having a disability can range from £7.24 to £1513.00 (figures dating from 2005). In those circumstances we would submit that it will be impossible for a solicitor to be able to assess what the regular costs associated with disability are in order to take these into account when calculating available income. The Glasgow Bar Association would welcome the Scottish Government developing clear and detailed guidance for calculating disability related expenditure for use by its members.

9. The Glasgow Bar Association notes the proposal that there should be a scheme of eligibility drawn up by The Scottish Legal Aid Board setting out the financial circumstances in which the Board considers that paying the fees and outlays of representation will result in undue hardship for a client or the dependents of a client. The Glasgow Bar Association does not consider this appropriate. We view that the scheme of eligibility should be drawn up by the Executive and that any amendments to the Scheme of Eligibility should be by way of Statutory Regulations.

10. The Glasgow Bar Association welcomes that there will be a consistency of approach in relation to ABWOR, Summary and Solemn Legal Aid in relation to the application of the undue hardship test. We are concerned that the bill introduces a two tier step for ABWOR as where there is to be an undue hardship aspect to the application that requires to be determined by The Scottish Legal Aid Board leading to delays in decisions on ABWOR being made.
11. The Glasgow Bar Association is opposed to the proposal within the bill that contributions in Criminal Summary Legal Aid cases should be collected by the solicitor with contributions in Criminal Solemn Legal Aid cases only being collected by the Board. The Board collects contributions in virtually all Civil Legal Aid cases. We see no reason why Criminal Legal Aid cases should be differentiated. The ethos behind the bill was to bring into alignment the treatment of those receiving either civil or criminal Legal Aid in the courts in Scotland. By imposing the collection of contribution on solicitors rather than the Board in criminal summary cases this purpose is defeated. There is no doubt that the vast majority of contributions will be made in summary cases as the vast majority of cases are summary. It is inequitable that the administration costs for collection of these contributions should be imposed upon the solicitor when the board already has the collection facility at its disposal. Further it is incorrect to proceed on a supposition that because there is a solicitor client relationship the client will be more likely to pay the contribution to the solicitor than they would be if the contribution was to be made to the Board. In fact The Glasgow Bar Association considers that the opposite is the case and that clients will be much more likely to pay their contribution to the Board who they will consider as having much greater powers of collection than to their solicitor with whom they may well be very familiar.

12. Unlike Advice and Assistance it is not anticipated that the contribution will be paid as a one off payment. It is anticipated in the bill that the contribution maybe payable by way of instalments potentially depending on the level of contribution over a lengthy period. This places an unreasonable administrative burden on the solicitor in terms of collection who is already working on a reduced fixed rate fee.

13. The Glasgow Bar Association considers that there will be a much higher success rate of collection if the Scottish Legal Aid Board collects all contributions in the same manner as it does in Civil Legal Aid cases. In particular if accused are advised that the Scottish Legal Aid Board will terminate their certificate if they do not pay their contribution it will be a compelling reason for them to ensure that they make payment. As a result of the existing relationship between the solicitor and the accused it will be much more difficult for the solicitor to indicate that they will withdraw from acting than it would be for the Board to simply to terminate the certificate. It is inappropriate to differentiate between Criminal and Civil Legal Aid given the purpose of the bill was to equalise the two.

14. The Glasgow Bar Association is concerned about the impact that payment of contributions in Criminal Legal Aid cases may have on the administration of justice in the courts. They are particularly concerned that the level above which a contribution requires to be paid is fixed at only £68 per week. Whilst contribution levels have not yet been disclosed we are concerned that in the event of non payment of contribution and withdrawal of solicitors from acting this will cause a huge disruption and cost to the Scottish Courts system and those costs will offset against any benefit derived from contributions once those levels are set and assessed.

Bernadette M Baxter
President
Glasgow Bar Association
27 July 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from JUSTICE Scotland

I refer to the above and letter of 13th August 2012 inviting a submission from JUSTICE Scotland on the above Bill.

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

Particularly, the views of JUSTICE Scotland are sought upon the compatibility with the European Convention on Human Rights of the requirement of criminal accused to fund, or contribute to the funding of, their legal representation.

JUSTICE Scotland has not, thus far, made any submissions upon the Bill. We note that there have been detailed submissions upon the Scottish Civil Justice Council, which appear, in our view, to highlight the various concerns about appointment to the Council. Given that these matters have been ventilated in full we see little point in rehearsing them. The Committee has been well furnished with views in this regard.

In relation to Part 2 of the Bill - the introduction of significant changes to criminal legal assistance - again we note that the Committee has been furnished with the views of practitioners. We therefore limit our submissions to the area requested.

The particular Convention right at issue will be Article 6. In terms of Article 6(3)(c):

“3. Everyone charged with a criminal offence has the following minimum rights: ...
(c) to defend himself in person or through legal assistance of his own choosing …"

Successive cases before the Strasbourg Court have pointed up the importance of that right.

In Poitrimol v France, Application No. 14032/88, ECHR, 23rd November 1988, the Court declared:

'Although not absolute the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.'

This was reiterated in a number of judgements from the Court including Lala v The Netherlands, Application No. 14861/89, ECHR, 22nd September 1994

The Strasbourg Court is not prescriptive as to the manner, and upon the conditions, that such representation should be provided. It affords to States a margin of
appreciation as to how that is carried into effect. The Court would be concerned as to whether an accused's fair trial rights have been compromised.

Similarly, the Court would wish to be satisfied that any rights exercised under the Article 6(3)(c) would be effective rather than illusory. The Court explains that:

“this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive” Gabrielyan v Armenia, Application No. 8088/05, ECHR 10th April 2004

This was a matter of some significance for Scotland even prior to the incorporation of the Convention in domestic law and the ability to invoke it before the Scottish Courts.

In the case of Shaw & Milne Petrs., 1998 SCCR 672, 1999 SLT 215, the Lord Justice General (Rodger) discussed the interplay between the Legal Aid (Scotland) Act 1986 on the one hand, and Article 6 of the European Convention on Human Rights on the other. He discussed with reference to the cases from the Strasbourg Court the importance of the right in question. He recognised that the right was not absolute but pointed up that:

“An accused person’s interest in having a fair trial is not simply his own private interest: it is an interest shared by society as a whole and it is one which our system of criminal justice exists to uphold.”

The Lord Justice General continued:

“… even uninstructed by the decisions of the Strasbourg Court, we should have little difficulty in concluding that the availability of legal aid is of fundamental importance in helping our criminal justice system to achieve its objective of ensuring that accused persons … have a fair trial. Section 24(1)[of the Legal Aid Scotland Act 1986] points to such a conclusion in this specific context.”

On one view, therefore, the availability of legal aid and the statutory criteria laid down in the Legal Aid (Scotland) Act 1986 are evidence of Scotland meeting its international obligations.

In determining upon an application for legal aid in criminal proceedings the Board must be satisfied that an accused qualifies on financial grounds – “the expenses of the case cannot be met without undue hardship to him or his dependents” - section 24(1)(a) of the 1986 Act. Further, the Board must be satisfied that it is in the interests of justice that the accused be granted legal aid – section 24(1)(b) of the 1986 Act

There appears to be no impediment per se under the European Convention on Human Rights to the State asking for a contribution from an accused person to the funding of his representation. What is being suggested is an administrative move in connection with certain forms of legal aid to be dealt with differently by the Board in order that the cost to the public purse be reduced. That reduction is to be met by, in the main, contributions from accused persons.
There are a number of important caveats:

1. The eligibility criteria must not be drawn such as to exclude from the ambit of legal aid those with insufficient means. To do so would mean that the right to State funded representation would be rendered illusory; and

2. The practical effect of the movement between schemes and any eligibility criteria must not be such as to amount to such a significant impediment to the grant of legal aid such that representation is unable to be secured.

The groups representing solicitors have pointed up the formidable administrative difficulties that they will encounter in collecting contributions. It is clear that by directing that contributions must be collected by solicitors it is they who remain exposed in relation to the possibility of non-payment. There is conflicting information about estimated non-payment rates and about the breadth of these across different legal aid types. For Convention purposes, however, the focus must be upon the fairness of the trial. The question therefore to be asked of the Committee, and perhaps by the Committee to those who will attend, is what the effect of these new provisions will be in practice for the conduct of trials.

In the event that contributions go unpaid solicitors will be unpaid. If the consequence of that is that they withdraw from acting and/or legal aid is revoked, suspended or terminated, then an accused person will go without representation. That may amount to unfairness such as to taint the proceedings.

Dealing with the practical situation of a client failing to pay, or failing to maintain payments of contributions, it respectfully appears to us far from clear how that will be dealt with by the Board or the individual solicitor.

The solicitor may take the view, having regard to the sum in question, and the work to be done, that he should continue to act. He may do so having regard to economic factors including not interrupting the solicitor/client relationship with an eye, for example, to future business. In that circumstance, the solicitor ensures, by his taking a view of the matter, that there is no interruption to the criminal process.

The solicitor may, upon non-payment, intimate an intention to withdraw. The situation may improve by payment. It may deteriorate, or may deteriorate after further payments have been made. The solicitor may, following upon a missed payment, or a number of non-payments, cease preparations until the situation is remedied. That hiatus in preparation may well hamper the future expeditious progress of a case.

The solicitor may at some point take the view enough is enough. He has two options:

a. To withdraw from acting and advise the Board of him ceasing to act and the reasons therefor;

b. Advise the legal aid board of the position and have them arrive at a decision upon the termination or revocation of legal aid.
In both of these instances one can readily anticipate problems arising.

In the first instance, the accused person may take issue with the factual basis or otherwise of the decision of the solicitor. The applicant’s financial circumstances may have altered. He may seek to bring payments up to date. He may not be in a position to do so. He may have an explanation or excuse in respect of the late payment. The solicitor may have to decide whether to accept instructions again. One would expect this to be resolved one way or the other by the solicitor adhering to his decision or reviewing it. If the solicitor withdraws he must advise the Board of the reasons for ceasing to act: Regulation 17(1), Criminal Legal Aid (Scotland) Regulations 1996.

In the event that the legal aid board have been advised of the position they will have to reach a view upon termination or revocation of the legal aid certificate. The Board would have to have regard to the various factors enumerated by Regulation 18 of the Criminal Legal Aid (Scotland) Regulations 1996. The applicant has a right of review and at least ought to be afforded an opportunity to make representations. That decision could well be the subject of separate challenge. An accused may petition the *nobile officium*: Lamont Petr. 1995 SLT 566. See also, in the civil legal aid context, *Martin v Legal Services Commission* [2007] EWHC 1786 (Admin).

In all of those situations the accused person’s right to representation in the continuing legal process will have been thrown into some doubt and potentially confusion.

One can readily imagine the knock on effects:

1. The Court may only be advised of the situation at a procedural or trial diet. It may be prayed in aid as a basis for adjourning a diet. Failure of the accused to furnish the solicitor with contributions, and a delay, in either bringing these up to date, or in resolving precisely what ought to happen, may mean that preparations have been hampered. It may be thought that this is a sound reason for a lack of preparation at a procedural or trial diet such as to justify an adjournment of a diet. If the alternative view is taken a trial may have to proceed with the matter not fully prepared. That may be down to sound reasons or none. The fact that adjournments may be sought on this basis may become known to accused persons.

2. At a procedural or trial diet an agent may, for the first time, intimate his/her intention to withdraw from acting. That leaves an accused unrepresented. He may wish to seek to adjourn the diet. His future chances of securing representation will, however, be seriously impeded. He may find it difficult to secure representation when legal aid has been granted and then revoked or a solicitor withdraws. He may be held liable to pay a contribution, again, to another solicitor. What is the effect of the previous non-payment upon the certificate? In light of his previous failure to pay a solicitor may be wary of receiving instructions.

In those circumstances a difficult situation arises for the presiding judge. As Lord Justice General Rodger observes in *Shaw & Milne*, having secured the benefit of legal aid, satisfying the statutory test:
“.... It is not in the interests of justice that he should not have legal aid available to him for his trial and for the preparations for his trial. In concrete terms, the withdrawal of legal aid will mean that [the accused] will require to go to trial without any professional representation against the professional and qualified procurator fiscal”

In determining whether there is a potential violation of Article 6, the presiding Sheriff will undoubtedly have to have regard to the fact that the legal aid board has determined that legal aid should be made available to the accused. That decision would have been arrived at by the Board having regard to the various statutory criteria in determining that it is in the interests of justice. Clearly those factors take into account the wider system of criminal justice in the prosecution of crime by the State with all its resources and qualified personnel. Lord Justice General Rodger recognised this when acknowledging that representation was not simply a private right of an accused but rather, also, a societal right. In all those circumstances, it would be a difficult decision to choose to proceed to trial with an unrepresented accused. That is not to say that representation per se is required to ensure the fairness of every trial (Gayne v Vannet 2000 JC 51; 1999 SLT 1292; 2000 SCCR 5).

As we have pointed out though, the jurisprudence of the Strasbourg court and the 1986 Act underlines the importance of representation.

The SPICE briefing on the Bill seems to have regard solely to the gravity of the case as a situation where difficulties will be encountered. It goes on to narrate that the consultation equated non-representation with a form of waiver, asserting that in a non-payment situation the client “has, in effect, chosen not to have a solicitor”. That is to presuppose that there are no possible explanations or excuses for non-payment other than a choice being made about representation. The matter is not that straightforward. The gravity of the case is not determinative. The statutory criteria have regard, amongst other factors, to the vulnerability of the accused in relation to articulacy, the complexities of the case and the sentencing powers of the judge.

Conclusion

In all the circumstances, we do not think that the proposed alterations to the legal aid regime are bound to amount to a violation of the Convention.

However, in the practical day-to-day operation of the Courts, it is not difficult to see that problematic situations will arise. The potential for a finding of a violation of Article 6, and the steps taken to avoid that scenario, may well result in disruption to the operation of the Courts, further delays in trials proceeding with all of the concomitant increase in inconvenience, expense and inefficiency that ensues therefrom.

We hope this is of some assistance to the Committee and are in a position to assist if further information is required

Tony Kelly
Chair, Scottish Executive Committee
12 September 2012
Introduction

The Law Society of Scotland (“the Society”) aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Society welcomes the opportunity to comment upon the general principles of the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

Comments on Part 1 of the Bill

At present the functions proposed for the Civil Justice Council under Section 2 of the Bill are dealt with by the Sheriff Court Rules Council and the Court of Session Rules Council. Presently, there are 10 solicitor members sitting on these two Rules Councils, 5 on each.

The overarching Council that is proposed is commended as being eminently sensible. The Council will require to be adequately resourced in order to fulfil the broad range of responsibilities proposed in the Bill. In particular the Council should be able to call on the experience of a broad range of individuals who have experience of work in both the Sheriff Court and the Court of Session. The solicitor profession has developed specialisations in the last twenty years in response to increased complexity and detail in the law, evidence and procedure. In particular different considerations apply to those working in different areas such as Family Law, Personal Injury Work, Debt Recovery and Commercial cases.

The Society is concerned that the Bill proposes only two solicitor members in the composition of the Council. The Society’s Civil Justice Committee consider this to be inadequate to cover the variety of cases dealt with by the Civil Courts.

There has been no cogent reason put forward for the reduction of the solicitor membership to two. Solicitors are the largest group of regular court users and appear daily in Sheriff Courts throughout Scotland. Their experience of the courts and procedures is wider and deeper than any other group of participants.

We accept that too many members on the Council could dilute its efficiency, however the Council needs a sufficient breadth of solicitor experience and expertise to
maintain credibility with the profession.

In order to contribute to the Council’s deliberations about the different sectors of civil work, the Society is of the view that the Civil Justice Council should contain at least six solicitor members.

This, we consider, provides the right balance between streamlining the Council and retaining the necessary breadth of expertise needed to contribute in a positive and meaningful way.

The Society also suggests that the Council could consult with relevant stakeholders on the content for its annual plan. The Society would welcome the opportunity to contribute to the Council’s annual plan.

**General Comments on Part 2 of the Bill**

The Society welcomes the policy priorities behind Part 2 of the Bill and 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. However, we believe that Sections 19 and 20 require revision to ensure that access to justice is preserved and that the Scottish Legal Aid Board (“SLAB”) is solely responsible for collecting criminal legal aid contributions.

We have two areas of serious concern in relation to Part 2 of the Bill:

1) **Access to Justice** – the Scottish Government should take steps to ensure that the proposed system of contributions does not include those who cannot afford to pay those contributions, and

2) **Collection of Contributions** – the collection of contributions for summary criminal legal aid should be undertaken by SLAB and not by solicitors or their firms.

**Specific Comments on Part 2 of the Bill**

1) **Access to Justice**

   **Section 19: Clients’ contributions for criminal assistance by way of representation, and Section 20: Contributions for criminal legal aid**

   **Disposable Income Threshold**

   Section 19 of the Bill inserts new section 11A into the 1986 Act and section 20 of the Bill inserts new section 25AC into the 1986 Act. Section 11A(1)(b)(i) specifies that, for criminal assistance by way of representation (“ABWOR”), the threshold for disposable income at or above which a contribution is payable is £68 per week.

   Section 25AC(2)(b)(i) specifies that, for criminal legal aid, the threshold for disposable income at or above which a contribution is payable is £68 per week.

   We do not believe that it is realistic to expect anybody who has a disposable income of only £68 per week to be required to pay towards their legal costs.

   An assumption seems to have been made that the amount of “disposable income” will be available for a (in most cases unforeseen) legal defence.
We believe that by setting the threshold at such a low level, SLAB risks requiring a payment from people who cannot afford it. The threshold of £68 is the current lower income threshold in civil legal aid but, in our view, there should be recognition that criminal court proceedings are different from most civil court proceedings in that they are at the instance of the Crown, do not involve financial awards and can result in extremely serious consequences such as custodial sentences. The threshold also needs to take into account the impact of the changed economic climate. The term “disposable income” is defined in the 1986 Act as a person’s income after making such deductions and allowances as regulations may prescribe. Paragraph 54 of the Policy Memorandum provides examples of unavoidable expenses such as rent, child care and mortgage payments which will be subtracted from eligible income. Bare essentials such as household repairs, transport costs, food and clothing are not included in the examples of unavoidable expenses. We believe that the disposable income threshold figure of £68 is intended to cover these bare essentials. However, the report by the Joseph Rowntree Foundation “Minimum Income Standards” published in July 2012 states that a single person now needs to spend £192.59 a week (excluding rent and childcare) to reach a minimum standard of living. We believe that an accused person with a disposable income of only £68 per week will have to make a decision between paying essential costs or paying the contribution to his or her defence. Being placed in such a dilemma could compromise his or her rights to a fair trial under Article 6 ECHR.

We believe that rather than setting the threshold so low and running the risk of excluding some accused persons from access to justice, it should be set at a higher level ensuring that those people who are required to pay a contribution are likely to be able to afford to do so.

Contribution Levels
Although there are no contribution levels on the face of the Bill, paragraphs 60 and 61 of the Policy Memorandum provide a guide as to how the contributions payable might be assessed. We have serious concerns about the proposed contribution amounts.

Some of the levels of contributions payable have the potential of being greater than the defence costs. In these circumstances, it is suggested in the Policy Memorandum that the client will have to pay the cost of the defence case rather than the assessed contribution (paragraph 60). The term “contribution” is misleading, given that the size of the contribution required by some may in fact be equal to the full costs of their defence. In other words, the practical effect of the contribution system will be to exclude some accused individuals from any legal aid whatsoever and therefore, potentially, from access to justice.

We have a concern that the system will create perverse incentives for clients who feel that they cannot afford to pay the contribution which has been assessed. For example, with reference to the table at paragraph 61 of the Policy Memorandum, an accused with a disposable income of between £160 and £222 and who is due to appear in a summary case in the Sheriff Court will have an assessed contribution

---

1 Section 42(1) of the Legal Aid (Scotland) Act 1986.
greater than the fixed fee sum of £485. If the client pleads guilty he or she will have
to pay the fixed fee of £485 which is less than the assessed contribution amount.
However, if the accused person pleads not guilty, the case is likely to become more
expensive and he or she will therefore have to pay the full contribution amount which
could be as much as £1118. ³ This could lead to a perverse incentive which could
undermine the just disposal of the case as clients might be inclined to plead guilty
simply to avoid paying the assessed contribution amount.

For example a client who is on minimum wage with no outgoings will have a net
weekly disposable income of £196.02. ⁴ Under the current legal aid system he or she
will be eligible for legal aid with nil contribution. Under the proposed system, for a
summary Sheriff Court case, he or she would have an assessed contribution of
£800.20 under ABWOR or £847.80 under summary criminal legal aid. He or she will
either have to plead guilty and pay the fixed fee of £485 or plead not guilty and
potentially have a lengthy trial which could result in him or her paying the full £847.80
which is approximately the equivalent of his or her full month’s wages after tax.

We believe that a fairer system would involve the client paying the same amount
regardless of the costs of the case. Also, the amount payable should be a genuine
“contribution” by the client to the costs of their defence case rather than the client
potentially paying the full costs of the case.

The Need for an Impact Analysis
Without a full impact analysis of various possible contribution levels and contribution
systems measured against a range of sample accused persons the system cannot
be considered to be complete. The Society does not have the resources to
undertake such an impact assessment, and is therefore not in a position to make any
suggestions as to possible contribution levels. We strongly suggest that the
enactment of this Bill be delayed until this work has been properly carried out.

Non-Passported Benefits
Non-passported benefits are currently taken into account in determining financial
eligibility for criminal legal aid⁵ but not for determining financial eligibility or
contribution eligibility for ABWOR. ⁶

Paragraph 54 of the Policy Memorandum states that non-passported benefits will be
taken into account in disposable income calculations and paragraph 49 makes clear
that the financial eligibility tests will be aligned across ABWOR, summary criminal
and solemn criminal legal aid.

The proposed system will involve benefits such as disability living allowance and war
pensions being treated as income for the purposes of determining financial eligibility

³ Please see paragraph 61 of the Policy Memorandum which provides a table of contribution levels.
⁴ Based on National Minimum Wage Rates that apply from 1 October 2012 - £6.19 per hour.
⁵ Please see SLAB mailshot April 2011:
⁶ For a list of the non-passported benefits disregarded in disposable income calculations for ABWOR
and advice and assistance please see SLAB Keycard 2012 at
and also for the purposes of determining whether disposable income is at or is above the threshold for which a contribution might be payable. The Society is concerned at the potential for vulnerable clients becoming excluded from the legal aid system or finding themselves having to pay an unaffordable contribution towards the cost of their defence out of their benefit payments.

For example, a client who is due to appear in the Sheriff Court might be in receipt of a war pension, pension credits and a disability living allowance giving him or her an income of £135 with no outgoings. Currently, under the Sheriff Court ABWOR system, because non-passported benefits are disregarded for the purposes of disposable income calculation, he or she has a nil contribution. However, under the proposed system he or she would have to pay £252.50 which is almost double his or her weekly income.

We suggest that certain non-passported benefits are disregarded for the purposes of income calculation and we would welcome a dialogue with SLAB and the Scottish Government with a view to ensuring that such clients are not left unrepresented or left having to pay an unaffordable contribution.

Unforeseen Consequences
The ECHR ensures that the Government has a responsibility to those accused of crime without the funds to pay for a necessary defence. With the Summary Justice Reforms in 2007-2008, many cases were removed from the legal aid system entirely. As a result, cases which are taken to court are now more serious and increasingly likely to result in custodial sentences. Therefore, proper legal representation is more important now than ever before.

The Bill could give rise to an increase in unrepresented accused in summary criminal proceedings. As stated above, we do not believe that the level of disposable income from which contributions will be paid is reasonable. This is of considerable concern given the serious nature of criminal prosecutions. Unless the disposable income threshold is revised, it seems likely that contributions will be set at a higher level than many can afford, which could result in some clients having no option but to represent themselves in summary cases. This problem is likely to be exacerbated if SLAB is only permitted to pay the non-contributory element of the fee to solicitors in summary cases (paragraph 154 of the Financial Memorandum).

The Need for a Pilot
The Government should pilot the contributions system so that the numbers of unrepresented accused can be carefully monitored before this Bill is enacted. This will provide an indication as to whether the disposable income threshold has been set too low, whether the levels of contribution have been set too high and whether these figures might require revision.

2) The Collection of Contributions

Section 20 Contributions for criminal legal aid

Section 20 of the Bill inserts section 25AC into the 1986 Act. At section 25AC subsection (4) it states that:
“(a) in a case where criminal legal aid is being provided
(i) in relation to solemn proceedings, proceedings relating to an appeal
or proceedings relating to the Supreme Court,
(ii) by a solicitor employed by the Board by virtue of sections 26 and 27
or, as the case may be, section 28A, or
(iii) by counsel instructed by such a solicitor,
It is for the Board to collect any contribution payable by A under
subsection (3), and
(b) in any other case it is for the solicitor to collect any contribution
payable by A under subsection (3) “. (Our emphasis added)

The Society firmly believes that this section should be amended so that the collection
of contributions for both solemn and summary criminal legal aid should be
undertaken by SLAB. We believe that the proposed mixed collection system will be
impractical, unworkable and unsustainable.

Financial Burden on Solicitor Businesses
We believe that solicitors will experience difficulties in attempting to collect summary
contributions. It is clear from examining the collection rates of the Scottish Court
Service that at 11 April 2012 only 31% of Fiscal Direct Penalties registered in
2011/12 had been fully paid. If this holds true for legal aid contributions there will be
serious difficulties for solicitors.

The original Scottish Government consultation paper states that “Savings are
calculated on the basis of 70-90% collection rates”. As highlighted above and given
the proposed levels of contributions set out in paragraph 61 of the Policy
Memorandum this estimate seems high. However, even if this estimate is correct it
will still expose solicitors to non-payment in around 10-30% of summary cases
involving a contribution. We believe that it is not appropriate for the Scottish
Government to expect the solicitor profession to represent accused persons in cases
without proper remuneration.

The Bill must be seen in the context of recent cuts in criminal legal aid and the
decline in expenditure in criminal legal assistance in recent years. Andrew Otterburn
and John Pollock, authors of the Society’s annual “Cost of Time” survey have
reported in an article in the Journal of the law Society of Scotland that “life has
continued to be extremely difficult for smaller firms and in particular those that
undertake legal aid”. The Society believes that sole and rural practitioners will be
badly affected by this potential reduction in income.

Clear and Consistent Collection Approach Required
SLAB should be the only central collection body for legal aid contributions. This will
ensure that there is a clear and consistent system for the public, solicitors and other

---

7 (For the period 1 April 2011 to 31 December 2011). Please see Scottish Court Service, Quarterly
Fines Report No. 12 – Quarter 3 2011/12
8 Please see the Cost of Time survey at http://www.lawscot.org.uk/members/member-
services/publications;
9 Please see article at http://www.journalonline.co.uk/Magazine/57-2/1010805.aspx
justice system stakeholders. The system proposed will require that the accused persons pay contributions to SLAB in solemn cases but that they pay contributions to solicitors in summary cases. Even with clear guidance notes we firmly believe that a shared collection model risks bewildering clients, the public and other justice stakeholders. This will undermine the contributions system itself.

Other jurisdictions have the benefits of centralised collection systems and do not require solicitors to carry out collection. In England and Wales, for instance, the responsibility for collection resides with the Legal Services Commission, though the collection and enforcement of Contribution Orders has been outsourced to a third party, Rossendales Ltd. Contributions are also collected centrally in Ontario Province in Canada. Centralised collection therefore can work and we should learn from these legal systems and not adopt the approach in the Bill.

Mixed Model of Collection is Not a Shared Burden
With particular reference to paragraph 77 of the Policy Memorandum, the team does not share the view that the splitting of the responsibility for collecting contributions between solicitors and SLAB spreads the burden of collection. From a practical perspective, the burden is of a different nature for solicitors than it is for SLAB. There are clearly different consequences for SLAB and solicitors in being unable to collect contributions from clients. The consequences for solicitors will have a direct impact on the income of solicitor firms as well as potentially increasing their financial and regulatory business risks. The consequences for SLAB are clearly different and we do not agree that these risks are shared.

Advice and Assistance and ABWOR
Paragraph 76 of the Policy Memorandum states that solicitors currently collect contributions for ABWOR and that this will not change. However, the contribution levels for ABWOR will change. These changes will have an impact on existing collection procedures. At the moment, although solicitors collect contributions for ABWOR, the amounts involved are generally very low.

However, the proposed changes in contribution levels at paragraph 61 of the Policy Memorandum mean that these amounts will significantly increase and, as already noted, the contribution level could be the full cost of the defence. There is also likely to be a substantial increase in the number of cases which will require an ABWOR contribution. These additional risk factors could impair adversely on many solicitor practices.

SLAB already has necessary systems in place
SLAB currently collects contributions in civil legal aid cases and, as such, already has the apparatus and collection procedures required to carry out large-scale collection of contributions. Indeed, according to SLAB’s Board Minute of 12 December 2011, SLAB has a normal monthly collection rate of 95% in civil legal aid.

---

11 For example, please see Ontario legal system - http://www.legalaid.on.ca/en/getting/clientcontributions.asp
This shows that SLAB is effective and efficient at collecting contributions from civil legal aid recipients.

The collection of legal aid contributions has been integral to SLAB’s function. SLAB’s website states that its work includes “deciding if people have to pay towards the cost of legal assistance, then collecting these amounts”. The proposal that solicitors collect summary criminal legal aid contributions direct from clients will involve:

(a) Additional costs to solicitors in acquiring adequate computer and collection systems,
(b) Risk to solicitors in attempting to recover unpaid contributions and
(c) Increased business burdens for solicitors.

Practical Issues
There are a number of practical problems which are likely to be caused by the introduction of a shared collection model.

For example:

(a) In relation to situations where the grant of legal aid is transferred to another solicitor it is not clear how a solicitor will collect his portion of the contribution from the outgoing solicitor if the client has already paid the contribution and
(b) Solicitors will be entitled to write off non-payment of contributions as they see fit. However, there could be professional practice issues if solicitors represent clients without collecting contributions as this could be deemed to be a financial inducement under the Code of Conduct for Criminal Work.  

We welcome further discussion with the Scottish Government and SLAB to discuss methods of reducing the risks that these practical problems cause but none of these practical problems would exist at all if the Bill was amended to require SLAB to collect summary contributions.

Additional Administrative Work without Payment
Solicitors will not be paid for work done to collect contributions. There are already areas of routine practice for which solicitors are not paid, including the verification of a client’s eligibility for publicly funded legal advice, and the Society does not believe that the collection of contributions in criminal legal aid cases should become another such area.

Conclusion
We appreciate that these are challenging times. We acknowledge the seriousness of the economic background and the rationale behind economics in public expenditure. We are anxious to ensure that legal aid is not unduly limited because of the economic situation.

---


We see in our daily practice some of the other negative consequences of the problems in the economy and we are of the view that the legal aid system is essential to ensuring that the justice system is accessible to those who cannot afford to pay for legal advice or representation. We believe that access to justice through legal aid must be preserved as much as possible in the current financial climate.

Law Society of Scotland
27 July 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Supplementary written submission from the Law Society of Scotland

As you are aware, the Law Society of Scotland has taken an interest in the above legislation because of the potentially significant impact the provisions could have on our members who engage in this work, the system itself and those members of the public who require to access it.

We listened closely to the Committee sessions of 11 and 18 September during which representatives of the Scottish Legal Aid Board (SLAB) and the Cabinet Secretary for Justice gave evidence. In the course of his evidence, Dr Colin Lancaster of SLAB proposed that the “PDSO could act as a safety net”. This proposal which we assume relates to unrepresented accused lacks definition, has not been consulted upon and needs further detail regarding its practical application.

We have been discussing the proposed system of contributions with the Scottish Government and SLAB since last October. At no stage has the Government or SLAB ever suggested that the PDSO could act as a safety net. Indeed, the first invitation to the Law Society to discuss this issue came at the evidence sessions. Our representations to the Parliament were provided prior to these suggestions and could therefore only be based on the system as originally proposed.

We have immediate concerns regarding this suggestion. When the contributions system is introduced it is presumably the Government’s position that any contribution properly assessed will be commensurate with the applicant’s ability to pay and that any non-payment therefore would be a wilful refusal. That is the only situation where a solicitor may feel compelled to withdraw from acting. We have written to the Government to clarify its position on whether such persons, who have wilfully refused to make their required criminal legal aid contribution, should have a "safety net".

We also believe that the suggestion is impractical from a resources perspective. According to the Scottish Legal Aid Board Annual Report 2010-11, the PDSO dealt with 1,812 summary cases in that year at a cost of £1.5 million. For the private bar, there were 42,853 grants of ABWOR and 50,603 grants of summary in 2010-11, 93,456 grants in all. If contributions apply to 18% of these, this will involve 16,822 cases. If there is non-payment in 40% of cases, there will be around 6,728 cases which will see contributions not paid. This number of non-paid cases is 3.7 times the number currently being handled by the PDSO. Therefore the use of the PDSO in cases of non-collection of contributions could cost the legal aid fund more than the contributions system would save.

We would be very happy to assist further as the Bill is considered by the Justice Committee and progresses through Parliament. Please do contact Matthew Thomson at the Society if you require any further information.

Oliver Adair, Legal Aid Convener, Law Society of Scotland
28 September 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Second supplementary written submission from the Law Society of Scotland

I understand that the committee is seeking further clarification in relation to the current collection of ABWOR contributions. Unfortunately there is no central system for collection of this data.

From the Society’s consultations with members of the profession and local faculties it is our strong impression that the majority of practitioners do not collect such contributions at the present time. There are a number of interrelated reasons given for this. Most firms do not have formal collection procedures and systems in place and the number of cases involved and the level of such contributions mean that many view it as an uneconomic exercise to pursue them.

However, we are taking steps in the context of our Legal Aid Conference next week to ingather more empirical data in relation to ABWOR collection. We would be delighted to see members of the Justice Committee at the Legal Aid Conference and if Committee Members wish to attend please contact Matthew Thomson on 0131 476 8348 for more information.

We firmly believe that the terms of the Bill regarding eligibility threshold, contribution levels and income calculations involving benefits require amendment to ensure that access to justice is preserved.

Even if one leaves aside the question of possible levels of contributions which we appreciate is still being worked upon and remains a contentious issue it must be inevitable under any new system that many more cases will have assessed contributions. At the moment contributions apply only to ABWOR cases which constitute 28% of all grants. When the new system is introduced all applications will be assessed.

We hope this assists the committee’s deliberations.

Oliver Adair, Legal Aid Convener, Law Society of Scotland
28 September 2012
Background

The Children's Hearings System is Scotland’s distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system
- a preventative approach, involving early identification and diagnosis of problems, is essential
- the welfare of the child remains at the centre of all decision making and the child’s best interests are paramount throughout
- the child’s engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children’s Reporters who are located throughout Scotland, working in close partnership with other professionals such as social work, education, the police, the health service, the legal profession and the courts system.

SCRA’s vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard.
- Our hopes and dreams for the children of Scotland are what unite us.
- Children and young people’s experiences and opinions guide us.
- We are approachable and open.
- We bring the best of the past with us into the future to meet new challenges.

Response

Committee members will be aware that legal assistance for children in the Hearings System is being dealt with as part of the reform programme related to the implementation of the Children’s Hearings (Scotland) Act 2011. We will therefore be restricting our comments to Part One of this Bill.

Context - Children’s Hearings court proceedings

SCRA has a clear interest in this area of policy and in the effective and efficient operation of the civil courts system, as Children’s Hearings business accounts for a significant element of the work of the civil courts in Scotland.

In 2011/12, there were 3,795 proof hearings (where grounds for referral are sent to the Sheriff to be considered before a Hearing can dispose of the case, either
because the child or relevant persons do not accept the grounds or due to the child being too young to understand them). It is notable that, despite an overall pattern of decreasing referrals to the Reporter, it appears that proofs are becoming increasingly complex and lengthy, often requiring more court time and resources to conclude.

2011/12 also saw the courts consider 990 appeals of Children's Hearings decisions. We expect one of the impacts of the Children's Hearings (Scotland) Act 2011 to be a further rise in the number of appeals, due to a combination of factors, including the granting of appeal rights to a broader constituency of individuals. There were also 9 appeals to the Sheriff Principal in 2011/12 and a further 2 to the Court of Session.

Sheriffs may also grant Child Protection Orders (CPOs) and applications for these are also on the increase, with 781 being made in 2011/12. There has also been an increase in applications to recall or vary CPOs.

**Scottish Civil Justice Council**

We are fully supportive of the proposal to create a single Civil Justice Council for Scotland and of the range of activities that it is suggested that it should undertake.

We agree that the primary focus of the Council’s workload over the initial years of its operation should be the implementation of the reforms recommended by Lord Gill. A number of those reforms are of relevance to the effective operation of the Children’s Hearings System, in particular the proposal to create an office of “district judge” within whose remit the majority of Children’s Hearings Court proceedings would sit. There are significant challenges as well as opportunities opened up by the implementation of these recommendations and SCRA therefore has a clear interest in the Council’s work in this area.

We welcome the flexibility for the Lord President to ensure that a range of relevant interests are represented on the Council by providing for a number of limited term “Lord President’s members”. As we anticipate the Council’s work in the first few years may relate closely to the implementation of the Gill reforms, we may consider putting ourselves forward as a potential Lord President’s member of the Council for a single term of three years at its inception. In addition, we trust that provisions will be put in place to allow the Council to engage appropriately and effectively with other stakeholders who may not be Council members at any stage of its work plan.

We note the intention for the Civil Justice Council to take over the responsibilities of the Scottish Committee of the Administrative Justice and Tribunals Council when the Lord President becomes responsible for Tribunals in Scotland. One of the tribunals under the AJTC’s jurisdiction is the Children’s Hearings System. However, there is currently no proposal that we are aware of to incorporate the Children’s Hearings System within a unified tribunals structure. Indeed, we have stated very clearly in our response to the Scottish Government’s consultation on Tribunals Reform (see Annex) that we do not believe it would be appropriate for the Hearings System to be incorporated into any such structure. We are unclear therefore whether it is intended for the Civil Justice Council to have any kind of responsibility for the Hearings System, either in terms of reviewing its operation (currently one of the
AJTC’s functions) or producing its procedural rules (currently a responsibility of the Scottish Government). We would welcome some further clarification here.

Conclusion

We are supportive of the Bill and look forward to further discussions on the issues raised above as matters progress.

SCRA
27 July 2012

Annexe

SCRA response to the Scottish Government’s consultation

Response

This response is restricted to the proposal in paragraph 4.63 of the consultation paper which would grant Scottish Ministers the power, by secondary legislation, to incorporate the Children’s Hearings System into the unified Scottish Tribunals System at some future date. We are deeply concerned by this proposal, which we believe is based on a lack of understanding of the Children’s Hearings System and which, as a result, fails to meet four of the five key policy objectives as set out in the consultation paper, namely:

- effectiveness in securing just and speedy outcomes
- efficiency in the administration of justice
- distinctiveness of different tribunals, including continuing specialisation
- centrality of tribunal users

Some of the reasons for our concern are set out below.

We recognise that there are potentially efficiencies to be gained by reforming the tribunals sector, and are broadly supportive of the reform agenda and of the need for all public bodies to identify opportunities for savings and efficiencies. In fact, we note that significant efficiencies have already been realised by SCRA and CHS driving forward a shared services agenda and a shared focus on improving structures, decision making and outcomes for children. We consider that there is no bar to similar arrangements being made with the Scottish Tribunals Service where opportunities to make efficiencies can be identified. This provides an opportunity to make savings without requiring the disruptive structural reorganisation which would be required to incorporate the Hearings System into the new Tribunal Service.

SCRA continues to believe strongly that the unique strengths of individual tribunal systems should be fully considered on an individual basis before any decisions are made about integration into a broader tribunals structure. In particular, we have not seen any evidence that a unified structure would achieve benefits for the children and families within the System. As the Administrative Justice and Tribunals Council
(AJTC) said in its report\(^1\), which proposed the creation of a unified Scottish Tribunals Service “…the size and sophistication of the system, together with the substantial reforms to their governance currently progressing through the legislative process, are such that it is difficult to see what the Children’s Hearing system, or its users, would gain through being fully incorporated into our recommended governance structure”.

We agree with that assessment and note that some of the most important ways in which the Hearings System differs from the rest of the Scottish tribunals include:

- The Children’s Hearings System provides a forum for making decisions about the need for state intervention in the life of a child, it is not a system of administrative justice or of dispute resolution
- Unlike some other tribunals, Children’s Hearings are the key locus for decision making in the system. They do not exist to review decisions already made by other bodies
- Children and young people do not approach the Hearings System themselves, they are referred first to the Reporter by frontline services (mainly the police and social work), then by the Reporter to the Hearing itself based on a determination of the need for compulsory measures of supervision
- The Children’s Hearings System is a holistic and end-to-end system involving a number of organisations and individuals working closely in partnership, with a clear focus on producing better outcomes for vulnerable children
- This enables an on-going consideration and review of a child’s needs and circumstances over a period of time rather than simply providing for a one-off decision
- Unlike other tribunal members, the 2,600 Children’s Panel Members are unpaid, leading to significant and necessary differences in the way they are recruited, trained and supported
- The sheer volume of the case load dealt with by the Hearings System sets it apart from many other tribunals – in 2010/11 there were 41,825 Children’s Hearings in Scotland, involving 19,566 children
- Due to their specialist nature, both SCRA and CHS are able to take a very clear focus on the best interests of children and on children’s rights. There is a risk that this focus could be diluted if the Hearings System were to be subsumed within a larger structure.

It is important to recall that the Scottish Parliament has only recently passed the Children’s Hearings (Scotland) Act 2011. This legislation brings into being a number of structural reforms to the Hearings System, including the creation of a National Convenor (supported by an NDPB – Children’s Hearings Scotland) to take responsibility for recruitment, appointment, training, support and monitoring of Panel Members. We believe strongly that the 2011 Act and the structure it creates is the right vehicle for bringing forward the necessary reforms to the Hearings System and driving improvements in support, training, decision making and outcomes.

As previously noted Panel Members are unpaid, setting them apart from other tribunal members. It is important to note that they have strongly resisted any

\(^1\) *Tribunal Reform in Scotland: A Vision for the Future*
suggestions in the past that they should be remunerated. It is hard to see how a unified Tribunals Service would be able to incorporate Children’s Panel Members into a centralised support structure without having to make special arrangements for recruitment, training and support, which would obviate to a large degree any efficiencies which might otherwise be gained.

The structures put in place by the Children’s Hearings (Scotland) Act 2011 are specifically designed with the particular status of panel members in mind and therefore are likely to represent a much better option for providing the necessary supports and for driving a process of continuous improvement in the System. Those structures also reflect the particular need for panel members to be supported at a local level, a factor to which Ministers and parliamentarians gave great weight during the passage of the 2011 Act. There is no provision within the proposed unified system for this local and more specialised support structure to exist and it is hard to see how a central administrative structure could provide anything other than a lesser standard of service to the volunteers upon whom the Hearings system depends.

In addition to the unique status and particular needs of panel members, there are also specialist roles within the Hearings System that simply do not exist in other tribunals. During the extensive debates over the draft Children’s Hearings Bill, there was considerable discussion about the role of the Reporter and of SCRA’s support staff. At the conclusion of that process, Ministers recognised the value of the holistic role of the Reporter and of SCRA’s highly experienced and specialist support staff. It was agreed that these roles were especially important given the dynamic and non-linear nature of the Hearings System, which makes it unlike any other tribunal. Again, it is hard to see how such necessary specialist roles could be duplicated within a homogenous administrative structure, certainly without incurring significant additional costs and thereby removing any justification for making such an attempt.

Furthermore, we understand that policy responsibility for the unified tribunals system would rest with the Scottish Government’s Justice Directorate. However, we believe that there are sound reasons why sponsorship of the Children’s Hearings System sits with the Health and Social Care Directorate and within the specific portfolio of the Minister for Children and Young People. It is of particular note that the vast majority of cases dealt with in the Hearings System relate not to juvenile justice but to welfare concerns. As such, the Hearings System is an integral part of Scotland’s child protection system.

Responsibility for GIRFEC, early years, child protection and youth justice also rests within the Health and Social Care Directorate and it would be entirely inappropriate for specific policy responsibility for the Hearings System to be vested elsewhere or to be removed from the portfolio of the Children’s Minister.

**Use of secondary legislation**

We are therefore deeply concerned about the proposal for a power which would enable the use of secondary legislation to transfer the Children’s Hearings System into the scope of the proposed unified Tribunals system at some undefined future date. While we take some reassurance from the Scottish Government’s assertion that there is no intention at the current time to make use of this power, it does lead
us to wonder why it is considered to be required. Such powers should only be created where there is a reasonable expectation that they might be used at some point in the foreseeable future. We are not aware of any such expectation and therefore do not believe that the creation of this power is necessary or justifiable.

Furthermore, the simple existence of such a power will lead to further uncertainty and concern for panel members and others in the system, at a time when the focus needs to be on bedding down the reforms contained within the Children’s Hearings (Scotland) Act 2011. The existence of such a power would risk substantially undermining the credibility and authority of Children’s Hearings Scotland before that body has even fully taken up its responsibilities.

Perhaps more importantly, we also believe very strongly that the significant implications of such a move, should it ever be proposed, means that secondary legislation would be a completely inappropriate vehicle to utilise. There would be huge impacts for children, families, panel members, reporters and other Hearings System partners. As such, any proposal should be subject to the full scrutiny of the Scottish Parliament via primary legislation. The Children’s Hearings (Scotland) Act 2011 was the result of a wide-ranging and broad-based consultation before the legislation even reached the Parliament. It was then vastly improved by the extensive consideration it was given by Parliamentarians and stakeholders throughout its passage, and by the additional time for consultation, debate and discussion which the primary legislative route guarantees.

**Conclusion**

We cannot support the proposal for the inclusion of this power within any future Bill. We urge the Scottish Government to provide clear and unambiguous reassurance that the lengthy process of review to which the Hearings system has been subject over the last eight years has now been concluded and that the reforms will be given time to take effect. Such reassurances and understanding would allow all partners to move forward together and be appropriately focused on improving outcomes for children.

**SCRA**

**June 2012**
Scottish Parliament Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Scottish Committee of the Administrative Justice and Tribunals Council

Introduction

1. The Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) (‘the Committee’) welcomes the opportunity to respond to the call for written evidence regarding the Scottish Civil Justice Council and Criminal Legal Assistance Bill (‘the Bill’). The AJTC is a statutory body created by the Tribunals Courts and Enforcement Act 2007 (‘the 2007 Act’), and its remit requires it to scrutinise and comment on legislation, existing and proposed, relating to all aspects of administrative justice in Scotland.

General comment – the need for independent monitoring of administrative justice

2. The Committee’s interest in the Bill arises from the reference in the accompanying Policy Memorandum to the possibility that the functions of the Committee might at some point be transferred to the proposed Council. The UK Government currently proposes abolition of the AJTC and the Committee at the end of 2012 under powers conferred by the Public Bodies Act 2011. In its response to the Scottish Government’s consultation paper the Committee noted the need for a continuing and independent review function in the field of administrative justice. The Consultation had specifically raised the question of whether the remit of the Scottish Civil Justice Council should include administrative and tribunal justice. The Committee’s view was and remains that, in the event of its abolition, and in the absence of appropriate relocation of its functions, there would be a serious gap in the strategic overview of civil justice in Scotland. The Committee took the view in its response that inclusion of its functions in the remit of the Council might be appropriate in the absence of any body with a specific remit for administrative justice. The Committee’s preferred position however is and always has been that its functions are best discharged by such a body.

---

1 The Committee took the place of the Scottish Committee of the Council on Tribunals.
2 See para 13 Sch 7 to the 2007 Act: The Committee’s remit is
   • to keep the overall administrative justice system in Scotland under review;
   • to keep under review the constitution and working of those tribunals, under Scottish jurisdiction, which are designated as being under the AJTC’s oversight;
   • to keep under review the constitution and working of statutory inquiries relating to Scotland.
3 Policy memorandum - Para 29 - Respondents generally supported transferring the functions of the Scottish Committee of the Administrative Justice and Tribunal Council. The Scottish Committee itself was supportive in principle, but expressed concerns that the proposed focus of the Council was weighted too heavily towards issues of the civil courts and of rule-making. The judiciary generally took the opposite view, having concerns about conferring this responsibility on a body which will initially concentrate on civil rules revision. It is therefore proposed that the Council should take over functions in this regard, once judicial leadership for tribunals is transferred to the Lord President.11
4 Consultation on the Creation of a Scottish Civil Justice Council – 29 September 2011.
3. The Scottish Committee does not believe that the structure of the proposed Council as set out in the Bill would be suitable for the discharge of such functions, and it would be concerned if it were proposed to simply tack on those functions to the Council at some indeterminate point in the future. The administrative justice sector of the justice system, as exemplified by the tribunals sector, is distinct from other sections of the civil justice system. Thus for example the approach of tribunals is less formal and is more focused on the user's interests than is that of the ordinary courts. By far the greatest number of tribunals proceedings concern disputes between the citizen and the state, and the nature of administrative justice is that it concerns the relationship of the citizen with the state. The Franks Committee (1957) said that tribunals should be independent, accessible, prompt, expert, informal, and cheap. The Leggatt Report\(^5\) built the foundations of the modern tribunals system\(^6\) and its recommendations were the basis also for the tribunals reform programme currently being consulted on by the Scottish Government\(^7\). A key feature, found in Leggatt’s prescription for tribunals, related to the position of users. Thus Leggatt considered that no matter how good tribunals may be, they would not fulfill their function unless they were accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases. Leggatt also considered that tribunals were intended to provide a simple, accessible system of justice where users can represent themselves, and that every effort should be made to reduce the number of cases in which legal representation is needed.

4. If it was to be suggested that the Council should at some point discharge functions in relation to administrative justice as well as civil justice more generally, then the Committee believes that the structure and nature of the Council should from the outset be apt to accommodate that development. The Committee does not believe that at present the Council is so apt. Accordingly the Committee would suggest the following issues need to be considered, and that the Bill amended accordingly.

**Specific comments**

5. The following paragraphs assume that the Committee is to be abolished (and that no provision has been made by the UK Government for relocation of the Committee’s functions). In them the Committee suggests issues to be addressed and discusses possible changes to the Bill. There are three main issues which the Committee considers should be addressed:

a. **First**: the first issue is how the Committee’s functions might become the functions of the proposed Council and which functions should be included;

b. **Second**: the second question is whether the Council as proposed in the Bill should to any extent be modified to enable it to carry out such functions, and

---


\(^6\) as implemented for England and Wales and for UK tribunals in Scotland in the Tribunals Courts and Enforcement Act 2007

\(^7\) Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland - Friday, March 23, 2012.
c. **Third**: there may be transitional issues to be considered arising from the United Kingdom Government's proposal to abolish the Committee along with the AJTC in accordance with the provisions of the Public Bodies Act 2012.

**First issue – ensuring that the functions of the Committee can become the functions of the proposed Council**

6. Along with the AJTC, the Committee does not agree with the decision by the UK Ministry of Justice to promote its abolition. It has noted the conclusion of the Report of the House of Commons Public Administration Select Committee (PASC) that 'the Government’s rationale for winding up the AJTC was questionable, and that the Ministry of Justice may not have either the resources or the expertise to take on its functions.'

7. The Committee believes that it is appropriate and necessary that there should be a body, outside of government, charged with the functions with which the Committee has been charged for monitoring and keeping under review both administrative justice and tribunals.

8. The Committee believes that there should be explicit power on the face of the Bill for the transfer of the Committee’s functions to the proposed Council in the event that AJTC and the Committee were to be abolished. It recommends that s2 should include specific power for Scottish Ministers, by order, to add to the functions of the proposed Council. The Committee does not have a view on whether the power under s24 of the Bill is sufficient for that purpose.

9. Separately, the Committee believes that in any exercise of such power, the functions transferred should include functions in relation to both administrative justice and tribunals and in particular must not be restricted to tribunals alone.

**Second issue – Would the proposed Council as provided for in the Bill be apt to discharge the Committee’s functions if transferred?**

10. The proposed Council should so far as possible be capable of taking on the Committee’s functions from the outset; alternatively there must be a clear process by which the structure, composition or other aspects of the Council can be adjusted in order to allow it to take on such functions. The Committee believes that the Bill should include specific power for Scottish Ministers to amend s4 of the Bill where s2 is to be amended.

11. **Administrative justice perspective** - The proposed Council must include an administrative justice as well as a tribunals perspective. The Committee does not believe that the structure for the proposed Council as set out in the Bill would be suited to dealing with the Committee’s functions should they be taken over at some point in the future. In particular, the Committee believes that the proposed structure does not sufficiently reflect the interests of users in the areas of administrative justice and tribunals. The interests of the users of tribunals should be central in the

---

8 fn 2 above;
arrangements which apply in relation to a modern Tribunals system, including in any successor to the AJTC.

12. **Experience of administrative justice** - The Committee considers that a significant proportion of the Lord President and consumer representative members should have experience of administrative justice and tribunals. The proposed Council includes two consumer representative members along with up to six other members determined by the Lord President as being fit. There is no specification of the qualifications of those six. Criteria for appointment of those six should be set out and should include a requirement, in the case at least 3 of those persons, to have experience of administrative justice and/or tribunals.

13. **Lay membership** - The proposed Council would comprise at least 9 lawyers and judges, as against a maximum of 8 non-lawyers, discounting government related appointees. The Committee believes that, if the Council is to have the functions of the present Committee then it is preferable that the majority of the membership should be comprised of non-lawyers.

14. **Representation of tribunals judiciary** - The Committee believes that the proposed Council should include representatives of the tribunals judiciary, and in particular, that the President of Scottish Tribunals should be a member of the proposed Council. In addition, of the judicial appointments to the proposed Council at least one other should be of a member of the tribunals judiciary.

15. **Public appointments** - The Committee agrees that appointment to posts listed in s7(2)(c) and (d) should be the responsibility of the Lord President, but considers that the Lord President’s power in that regard should only be exercised in accordance with the advice of the Public Appointments Commissioner for Scotland.

16. **Committees** - There should be an Administrative Justice Committee of the Council to deal with the functions of the Committee to be transferred. Formation of such a Committee should be a statutory requirement. The membership of such an Administrative Justice Committee should include representatives of users as well as members of the Tribunals Judiciary and academics. This could be achieved by the power to amend s2 including power to amend s13 also.

17. **Chairing the Council** - The Committee is not aware of the thinking behind s11(2) and (4) which restricts chairing of the Council to judicial members. The Committee considers that a more flexible and responsive structure could be achieved by removing such a restriction.

**Third issue – transitional matters**

18. While no date for abolition of AJTC and the Committee has yet been settled the Committee understands that it may be intended for a date later in 2012. There is at present no stated intention on the part of UK Government to transfer the functions

---

9 s 6

of the AJTC, or of the Committee, to any other body\textsuperscript{11}. In the event of abolition the Committee’s functions under the 2007 Act will, accordingly, disappear. Arguably this creates the possibility of a transitional issue if the intention of the Scottish Government were to be that there should be a ‘seamless’ transfer of functions from the Committee with coverage of those functions being substantially unbroken.

19. The Committee does not have a recipe for addressing the transitional matters. Such matters, which arise from the abolition of the Committee, at present arise only, so far as tribunals are concerned, in relation to devolved tribunals since the Committee would understand that the Parliament does not yet have competence in relation to tribunals whose jurisdiction concerns reserved areas of law.

20. As a further issue, if the AJTC and the Committee are abolished in advance of the coming into force of the Bill then the Committee’s records and archives might, as the property of the UK Government, be returned to the Ministry of Justice notwithstanding that they might relate to devolved tribunals and administrative justice generally in Scotland. The Parliament may wish to consider what options there may be to avoid that situation arising.

Conclusions

21. The Committee considers that the optimum solution for addressing the requirement for an independent body to monitor and keep administrative justice and tribunals under review, would, under current circumstances, be to retain the AJTC and the Committee. However it recognizes that this may not be possible given the current position of the UK government in seeking the abolition of both the AJTC and the Committee.

22. In those circumstances the Committee believes that the proposed Council may be the best vehicle that can be achieved for the monitoring and review of administrative justice and tribunals, subject to the proposals advanced by the Committee in this paper. Accordingly the Committee’s welcome for the Bill is qualified.

Scottish Committee, AJTC
19 July 2012

The Scottish Human Rights Commission (Commission) is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Group of NHRIs and it is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

PART 2 OF THE BILL: CRIMINAL LEGAL ASSISTANCE

1. Introduction

The Commission welcomes the opportunity to provide written comments on the general principles of the Scottish Justice Council and Criminal Legal Assistance Bill. The Commission would like to highlight the relevant human rights standards in this context and express its views in relation to a number of provisions of the Bill. The Commission will focus on Part 2 of the Bill: Criminal Legal Assistance.

2. Relevant human rights standards

Article 6 (3) of the European Convention on Human Rights.

3. Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Article 6 provides that “in the determination of ... any criminal charge against him, [sic] everyone is entitled to a fair and public hearing”. Article 6 incorporates many aspects of the due process of the law, including the right to free legal assistance where needed and the right to access to court.

In Quaranta v. Switzerland, the Court reiterated that:

“while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to ‘defend himself in person or through legal assistance ...’; it does

---

1 The Commission has highlighted the importance of criminal legal aid in the context of access to justice in number of cases. See for example, Commission’s response to Carloway Review and Victims and Witnesses Bill at www.shrc.com

2 24 May 1991, § 30, Series A no. 20
not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.”

However, the Court also pointed out that Convention is intended to:

"guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

It is clear that the right to free legal assistance is not an absolute right under the Convention. The right to free legal aid for an accused depends on two circumstances; a) that the accused lacks sufficient means to pay for legal assistance and b) that the provision of legal aid is required by the interests of justice. In relation to the first the level of proof required for an accused that he or she lacks resources should not be set too high. In relation to the second, the Court found that in determining what is required in the interests of justice consideration should be given to a number of factors such as the gravity of the offence, the likely penalty if convicted, the complexity of the case, the principle of equal treatment of the parties and the personal situation of the accused (e.g. his or her mental health or the existence of a mental disability, linguistic skills, etc).

Article 47 of the EU Charter of Fundamental Rights.

…Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The guarantee under Article 47 restates the core protection offered by Article 6(1) of the ECHR. The Charter reaffirms the indivisible, universal values of human dignity, freedom, equality and solidarity within Europe and it is based on the principles of democracy and the rule of law.

Article 14. 3 (d) of the International Covenant on Civil and Political Rights.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:…

(d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

In this respect the UN Human Rights Committee has expressed its view that:

---

3 Lloyd and others v United Kingdom, 1 March 2005, para 134, “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation."
4 Benham v United Kingdom, (19380/92) 23 January 1995
5 See also Arts. 10 and 11 of the UDHR
6 The UN Human Rights Committee is the body of independent experts charge with monitoring compliance with the International Covenant on Civil and Political Rights.
“The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so…”.

While Article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.

3. Criminal Legal Assistance

The Commission has significant concerns about this part of the Bill. The Commission notes that in particular sections 17, 19, 20 and 21 would have a considerable impact on access to justice. The Commission observes that any change to the rules on criminal legal aid need to be objectively and reasonably justified by the Scottish Government.

The right to access to a court is one of the most basic prerequisites of an effective system of justice. In order for access to be effective it is sometimes required that a person receives legal representation. The Commission would like to emphasise the obligation on States to provide effective legal assistance in terms of Article 6 of the ECHR. Article 6 sets out a number of constituent rights. These are designed to guarantee the fulfilment of the overall right to a fair trial. The issues being considered by Bill principally arise from Article 6(3)(c), the right to legal assistance.

The right to legal assistance fulfils a number of functions. It is designed to ensure adequate representation in the case, to prevent abusive coercion by the authorities, to ensure equality of arms to the accused, to provide vigilance by the defence over procedural regularity on behalf of the client and in the interest of justice. It is important to note that the general rules and standards of international human rights law, including the principle of non-discrimination, apply to the provision of legal aid.

The Commission notes that many of those in the criminal justice system are the most marginalised and vulnerable in society in terms of poverty, educational disadvantage, mental health problems, etc. In light of this, the Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms of affordability and the interest of justice.

---

7 General Comment No. 32, CCPR/C/GC/32, 23 August 2007
8 Access to justice is a broad concept which involves substantive and procedural guarantees that ensure effective and fair remedies for people including effective legal assistance, adjudication, enforcement and public accountability.
9 Golder v United Kingdom, 4451/70) [1975] ECHR 1
10 Airey v Ireland, (6289/73) [1979] ECHR 3
11 Salduz v Turkey para 54.
While it is important to maximise the value of legal aid expenditure, in a time of austerity, it is essential to maintain a fair, high quality and equitable system which maintains public confidence and guarantees access to justice. The Commission notes that the overall cost of criminal legal assistance has remained roughly the same over recent years.\textsuperscript{12} Furthermore, initial applications for legal assistance have dropped from 234,472 in 2006 to 131,469 in 2011 and the number of cases paid to solicitors has also dropped from 262,983 to 142,690 during the same period.\textsuperscript{13} Given these facts the Commission questions whether the introduction of a wider scheme of contributions can be reasonably and objectively justified as it may impact on the right to a fair trial.

The Commission would welcome clarification of the Governments’ intention in section 17 of the Bill. The Commission is concerned that the effect of section 17, which allows for the introduction of contributions in circumstances where advice and assistance is automatically available, may limit the individual rights of people in legal proceedings. For example, should individuals be expected to pay contributions when they ask for legal assistance in police stations this may increase the likelihood that they would waive their right for purely economic reasons. This may not be a valid waiver in terms of ECHR given the recognised vulnerability of people in detention and the duty of the state to provide effective legal assistance.\textsuperscript{14}

While sections 19 and 20 seem to ensure that an applicant in receipt of ‘passported’ benefits will be eligible for criminal ABWOR or criminal legal aid with no contribution from income, they might still be required to contribute from any disposable capital. The Commission is concerned that marginalised people could become excluded from the legal aid system or find themselves having to pay an unaffordable contribution towards the cost of their defence out of their benefit payments (such as disability living allowance and personal independence payments).

The term “disposable income”\textsuperscript{15} in this section presents definitional challenges. People living in poverty are more likely to have a variable rate of outlays, depending on levels of income week by week and are less likely to have to bank accounts with regular direct debits.\textsuperscript{16} There is of course a difference between the impact of a contribution on a single man with a disposable income of £68 and a family of seven with the same disposable income. The Commission believes that the threshold for disposable income at or above which a contribution is payable of £68 per week is relatively low. Unavoidable expenses, which will be subtracted from eligible income, should also include household repairs, transport costs and clothing. In order to

\textsuperscript{14} Keenan v The UK ( 27229/95)
\textsuperscript{15} The term “disposable income” is defined in Section 42(1) of the Legal Aid (Scotland) Act 1986 as a person’s income after making such deductions and allowances as regulations may prescribe.
\textsuperscript{16} EHRC (2010) How Fair is Britain, Chapter 12; Standard of living. Available at http://www.equalityhumanrights.com. Disabled people in all age categories are more likely than non-disabled people to have no bank account. Some ethnic minorities are particularly likely to lack access to standard financial products, especially Pakistani and Bangladeshi women who are three times as likely as White men and women not to have a bank account.
preserve access to justice adequately, the figure selected should be justifiable in terms of what is considered a necessary disposable income for a decent standard of living in Scotland.

There are significant differences between the civil and criminal systems in Scotland which render them incomparable. For example, in criminal cases the accused does not have control over the case as the Procurator Fiscal decides what action is appropriate (including whether to prosecute, offer a direct measure or to take no action in the case). In addition, there is no provision for an acquitted person to seek recovery of the cost of their contribution. These factors alongside with the obligation to provide legal assistance in criminal proceedings should be taken in consideration by the Committee in view of the Bill.

Section 21 provides for contributions for appeals where the appellant is deceased. This provision would allow the board to determine that the full cost of such an appeal be paid by the estate or relatives. The Commission is concerned that this may have the potential to discourage the family of a deceased appellant continuing to attempt to clear his name. This provision also seems to suggest the authorised person may also have to take on a contribution that may not have been payable by the deceased if he survived (and was eligible for criminal ABWOR or criminal legal aid). This is unclear in the absence of regulations.

The Commission would like to draw the Committee’s attention to the difficulty of assessing the full human rights implications and impact of the changes, until regulations are made setting out the scale of contributions. In this respect, the Commission suggests that a sunset provision be incorporated into the Bill in order to review the impact of any contributions system on access to justice.

4. Conclusion

The Commission considers that assessing financial eligibility for criminal legal assistance and the level of any contribution requires further analysis and clarity. It is imperative that any changes to the rules on criminal legal aid do not create the risk that access to justice will be impaired, particularly for people on low incomes and other marginalised groups. The Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms particularly of affordability and the interests of justice.

The Commission would be pleased to answer any queries that the Justice Committee may have in relation to this submission.

Professor Alan Miller
Chair
Scottish Human Rights Commission
4 September 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Scottish Legal Aid Board

Part 1 – Scottish Civil Justice Council

1. The Scottish Legal Aid Board supports the creation of a Scottish Civil Justice Council. It is important that any such body be able to take a broad view of the civil justice system and not be confined, or unduly focused, on the operation of the civil courts. The courts are one part – albeit a hugely significant part – of what might loosely be called our civil justice system, which in the Board’s view should also be taken to encompasses tribunals, a broad range of other forms of dispute resolution (such as mediation and arbitration) and a variety of information, advice and representation services that support people in resolving their civil justice problems. While the SCJC will have a clear role in formulating rules of court, it is also important that it be established and operate in a way that enables it to keep this wider ‘system’ under review. It would be helpful for the Bill to contain a definition of the civil justice system to clarify the breadth of the SCJC’s role and that it extends beyond the civil courts.

Functions

2. In its response to the Scottish Government’s consultation on the creation of a SCJC, the Board supported the proposal that the SCJC should have a policy function, but that this function should be advisory and be seen in the context of the Scottish Government’s overarching responsibility for developing and setting civil justice policy. Such an advisory function is reflected in the Bill, but the provisions make a distinction between the role of the SCJC in relation to the Lord President on the one hand and the Scottish Ministers on the other. We are unclear why the SCJC should have a function of advising the former, but a power to advise the latter. The Board consider that the SCJC should have the same role in relation to both i.e. the SCJC should either have the function of advising both the Lord President and Scottish Ministers or the power to advise both. The Board considers that a dual function would be more appropriate.

3. The Board notes that the Bill is silent as regards the SCJC’s role in relation to tribunals, except perhaps to the extent that the reference in section 2(3)(d) to other methods of resolving disputes might be interpreted as relating to tribunals. In its response to the consultation, the Board argued that the SCJC should have functions in respect of tribunals. We note also that the Policy Memorandum suggests that the SCJC will at some future point take on those functions in respect of tribunals currently discharged by the Scottish Committee of the Administrative Justice and Tribunal Council. It is proposed that this be done when judicial leadership for tribunals is transferred to the Lord President. While this appears to be a sound proposal in respect of any rule-making function for tribunals, we are unclear why this should preclude the SCJC from taking on a policy advisory function in the interim, or alternatively why this Bill could not include relevant provisions to be commenced at a later date. As matters stand, the Act would need to be amended to extend the functions of the SCJC in a way that can be anticipated now.
Membership

4. The Board is concerned that the proposed membership of the SCJC is weighted too heavily towards legally qualified members, either judicial or in practice. Given the broad definition of the civil justice system suggested above, we think it appropriate that more explicit provision be made for ensuring a more proportionate balance between professionals operating within the court system and users of the civil justice system as a whole i.e. not just of the courts. If the SCJC’s functions were to extend to tribunals (now or in the future), it would be important to allocate at least one place on the SCJC specifically to a member of the tribunal judiciary and also perhaps a tribunal user representative. We consider that a tribunal representative on the SCJC could make a useful contribution to its work in any event, as lessons from the operation of tribunals could be helpful in the development of policy recommendations or implementation plans for other areas of civil justice, including the courts.

5. We also have some concern about the responsibility for the majority of appointments lying wholly with the Lord President. As we said in our consultation response, we think it appropriate that there should be a number of discretionary places on the SCJC as this will enable the composition of the SCJC to change over time in light of experience and possible changes in the emphasis of its work. However, we suggested that responsibility for making such discretionary appointments should be exercised by the Lord President and Scottish Ministers in consultation with each other, rather than either or both acting unilaterally. The Bill as drafted places this responsibility solely on the Lord President, albeit that he must consult with Ministers before making a consumer or LP appointment. In addition, while it is appropriate for the Lord President to appoint judicial members, we believe that the process of appointment of discretionary members should be open and transparent to enable an appropriate range of individuals to apply. We are not convinced that these principles are adequately assured by the Bill as introduced.

Part 2 – Criminal Legal Assistance

6. This part of the Bill changes the basis of assessment of financial eligibility for assistance by way of representation (ABWOR) and provides for the payment of contributions by those in receipt of most types of criminal legal assistance.

Assessment of financial eligibility

7. The Bill seeks to replace the current fixed income and capital limits for ABWOR with an ‘undue hardship’ test, thus bringing the assessment of financial eligibility for ABWOR more closely into line with that for criminal legal aid. This means that an applicant’s actual outgoings can be taken into account, rather than the fixed and narrow dependents’ allowances available at present under the ABWOR test.

8. The Bill also provides for the application of discretion by the Board should a solicitor’s assessment of the client’s financial circumstances suggest that, even though their disposable income or capital may be above the limits set out in either the Bill or the eligibility scheme to be published by the Board, it would cause them undue hardship to meet the cost of the case. This discretionary power provides an
important degree of flexibility should the specifics of a person’s financial circumstances require it. This flexibility is absent in the current arrangements for ABWOR, although it is allowed for in the undue hardship test currently applied by the Board for other forms of criminal legal aid.

9. The current inconsistency in the tests as between ABWOR and summary criminal legal aid means that some applicants may be eligible for summary criminal legal aid, but not for ABWOR. Their only means of obtaining publicly funded assistance is therefore to plead not guilty, even where they would otherwise intend to plead guilty at pleading diet. A similar incentive to plead not guilty exists at present where an accused is eligible for ABWOR with a contribution to pay, but would have no contribution under summary criminal legal aid.

10. A number of other barriers to early pleas were removed in 2008 as part of the summary justice reform programme, leading to an immediate increase in the number of early guilty pleas and fewer late changes of plea. This is clearly beneficial to the taxpayer and the justice system, but also enables the accused to take full advantage of any sentence discount on offer. It is therefore important that this remaining barrier to appropriate early pleas is removed.

11. The alignment of financial eligibility provided for in the Bill - including both the move to an ‘undue hardship’ test for ABWOR and the introduction of contributions in criminal legal aid – will therefore both directly (through contributions) and indirectly (through changes in pleading behaviour) reduce the cost to the public purse of criminal legal assistance and bring increased efficiency to the wider criminal justice system.

12. Even without these wider benefits, it is 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 enable them to make some financial contribution.

13. The introduction of contributions for legal aid in summary, solemn and appeal cases therefore removes an anomaly, both within criminal legal assistance and between civil and criminal legal assistance. By reducing the cost of criminal legal assistance to the taxpayer, the Bill will help make the legal aid system as a whole more affordable and enable the broad scope and coverage of legal aid in Scotland to be maintained (in contrast to the position in England and Wales where many employment, welfare, family and housing actions are being taken out of scope).

14. The move to an undue hardship test for ABWOR requires changes to the applicable limits. The Bill sets out a lower disposable income limit of £68. As noted in the Policy Memorandum, this amount is slightly higher than the equivalent figure in England and Wales. It is important to recognise that this is a disposable income figure i.e. it is the figure arrived at after the deduction of essential outgoings. Our analysis suggests that this figure – the weekly equivalent of the lower income limit for civil legal aid – is on average broadly in line with the existing non-disposable income limit of £105. In other words, once outgoings are taken into account, the amount of disposable income available to the average applicant will remain broadly the same.
At the upper end of the income scale, the new disposable upper income limit is expected to extend eligibility to some applicants who would currently qualify for summary criminal legal aid but not for ABWOR. Again, this is because the new arrangements will enable outgoings to be taken into account.

15. Clearly, some applicants will have more unavoidable outgoings – such as housing costs, childcare costs, costs associated with travel to work etc - than others. Those with no outgoings at all might reasonably be regarded as having more flexibility than those whose weekly income is largely accounted for before any additional demands can be met. Were the two existing tests to be aligned in the opposite direction i.e. were the summary criminal legal aid test to move towards fixed limits rather than disposable income, some applicants would be assessed as having more disposable income, meaning either that they would move into or higher up the contributory band, or out of eligibility altogether. This would be most likely to affect those with the highest unavoidable outgoings and therefore the least ability to meet unexpected additional costs. While the change proposed in the Bill will slightly widen eligibility for ABWOR overall, some applicants will be assessed as having less disposable income than under present assessment arrangements while others will be assessed as having more. The latter are likely to be those whose circumstances give them more flexibility to respond to unanticipated additional demands on their resources. It is also worth pointing out that those just above the lower disposable income limit will be asked to pay a contribution in the order of as little as £5 in total.

16. The realignment of the tests will also result in some types of benefit income being included in the assessment of total resources for ABWOR where they are currently excluded. The ABWOR test will therefore take into account the same sources of income as that for civil legal aid at present. While it might at first glance seem anomalous that benefits should be counted, this is another consequence of the move to a disposable income calculation. Some additional benefit payments are made to a person in respect of additional costs it is anticipated that they will incur, for example as a result of a disability. This is the case for Disability Living Allowance, which comprises two elements, one associated with care needs and the other on assistance with mobility. Where a person is in receipt of DLA, this will in future be counted as income for ABWOR assessment purposes. However, any care costs, or costs associated with impaired mobility, would qualify as essential outgoings and so would be deducted in calculating disposable income.

17. At present, a person in receipt of DLA will have this disregarded, whether or not the additional income they receive is actually used to meet additional costs associated with their disability. If no such costs are incurred, it seems only fair that these additional resources be taken into account in considering someone’s ability to meet some or all of the costs of their defence. Conversely, if a person in receipt of DLA currently incurs costs associated with their disability that exceed the amount they receive in DLA, the assessment for ABWOR cannot take this into account. In other words, the fixed limits assume that they have no additional income on the one hand, but also that they have no additional costs on the other. The undue hardship test would take into account the full costs incurred. In this way, those most disadvantaged financially and otherwise by their disability would arguably be treated more fairly in an assessment based on undue hardship. Conversely, those with additional disregarded benefit income but incurring no additional costs are currently...
treated more favourably than those with lower overall incomes or higher disability-related costs.

Collection of contributions
18. The Board, along with the Scottish Government, has had constructive discussions with the Law Society of Scotland in the development of the contribution proposals. One key issue has centred on responsibility for collection of contributions.

19. Defence solicitors currently collect fees from private clients and contributions in advice and assistance and ABWOR cases. Many will already have systems and processes set up to enable them to do this efficiently and cost-effectively, particularly perhaps those firms that undertake both civil and criminal work. Solicitors have a direct and often ongoing relationship and contact with clients. Unlike applicants for civil legal aid, who are responsible for completing the financial part of their legal aid application, ABWOR recipients have no direct contact with the Board: all contact is via their solicitor. Similarly, applicants for criminal legal aid will only deal with the Board if financial information is missing or has to be clarified. It is more consistent with the direct relationship between solicitor and client that contributions be paid direct to the solicitor in the small minority (around 18%) of relatively low cost and shorter-running cases where these are assessed as due.

20. This will also create a stronger link for the client between the payment being made and the service being provided to them. In some cases, particularly perhaps those that are low cost and where a higher contribution is assessed, the directness of the link between payment and service may result in the solicitor and client agreeing an alternative – possibly lower – private fee and dispensing with the need for legal aid altogether.

21. Our discussions with the Society also suggested that directly collecting contributions from clients could assist solicitors’ cash flow as they would not have to wait until the end of the case to receive payment. The Bill accordingly makes specific provision for solicitors to be able to treat contributions as fees, rather than client funds.

22. We recognise however that it would be harder for solicitors to collect the larger sums due in longer running solemn cases, so it is more appropriate for the Board to do so. In part, this is because it would be reasonable for payment of these larger contributions to be spread over a longer period. The Board already operates regular extended instalment collection procedures in civil cases, where the average contribution levels are higher than the maximum solemn and appeal contributions proposed. It is in these longer running, higher value cases that the Board’s collection, monitoring and enforcement processes and systems are of greatest benefit. Such systems are unlikely to be needed and may be disproportionate for day to day collection of the smaller contributions envisaged in summary cases.

23. While the solicitor might be expected to be able to bring some influence to bear over the client – for example by advising the client that they will cease acting should payment not be forthcoming – the Bill also provides solicitors with the ability to request that the Board suspend or terminate a grant of legal aid where the assisted person does not pay their contribution. No equivalent power is provided to
the Board in respect of solemn and appeal cases, meaning that the task faced by the Board in collecting a contribution from an intransigent assisted person is likely to be more difficult on a variety of levels.

24. The Board would be particularly concerned were there to be any distinction in collection responsibilities as between summary criminal legal aid and ABWOR. Under the current proposal, the solicitor will be responsible for collecting the contribution and, as the fee payable will assume collection (as is the case under ABWOR at present), has a direct interest in ensuring that the contribution is collected. If the onus of collection were to shift to the Board for summary criminal legal aid but remain with the solicitor for ABWOR, the latter could become a less attractive form of criminal legal assistance from the solicitor’s point of view. Given the shift towards guilty pleas seen when ABWOR payments were increased in 2008, there is a risk that any difference in collection responsibilities could lead to a reversal of those advances. Such a change would therefore run the risk not only of reducing the savings generated by contributions but also of increasing significantly the direct costs to Board and the indirect costs to the wider justice system of an increase in initial not guilty pleas.

Scottish Legal Aid Board
6 August 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Supplementary written submission from the Scottish Legal Aid Board

Following our appearance at the Justice Committee on 11 September 2012, we indicated that we would provide copies of the additional information we referred to on the impact of criminal contributions on both solicitors and applicants.

Impact of the weekly disposable income threshold of £68 on applicants for legal aid/ABWOR

Under Scottish Government’s proposals, a contribution will be payable if the applicant’s weekly disposable income (i.e. after deduction of rent and other essential costs) exceeds £68. This figure is the weekly equivalent of the current annual figure of £3,521 which is used in civil legal aid, above which contributions are payable. In England and Wales, contributions are payable on disposable incomes above an annual figure of £3,398 which equates to £65 per week, slightly lower that the proposed figure for Scotland.

Currently, individuals who are granted ABWOR are due to pay contributions if their income is more than £105 per week. However, this is not their disposable income but rather their income after tax before outgoings such as rent (which cannot be taken into account). The only deductions which are made from this in assessing their eligibility for ABWOR are set allowances for dependants. These are: partner = £40.45 and child = £64.99.

Under the proposed arrangements, applicants for ABWOR who have high outgoings will benefit and may well have no contribution to pay. This is because the proposed arrangements for ABWOR take account of actual outgoings in the same way as will be done for summary criminal legal aid. The new arrangements will also mean that around 2% of people who currently do not qualify for ABWOR will in fact do so under the new system. This will also provide a much more consistent financial eligibility system between criminal ABWOR and summary criminal legal aid than is currently the position.

For criminal legal aid or ABWOR, applicants will be able to tell the Board or their solicitor that they have had a change in circumstances. If their circumstances change for the worse (or even improve) during the case, their eligibility can be reviewed and the contribution re-assessed.

Our analysis has shown that, where a contribution is assessed under the new arrangements for ABWOR and summary criminal legal aid, nearly half of these cases (44%) will have a contribution to pay of less than £142, which is the current maximum contribution in criminal advice and assistance/ABWOR cases.
Appendix 1 gives examples of real-life applicants for summary criminal legal aid. We have described their financial circumstances and what would happen to them under the new system and what would happen under the current processes for criminal legal aid and ABWOR.

In cases 1 - 6, the applicants qualify for summary criminal legal aid and ABWOR with a contribution under proposed new scheme, but they would not have been eligible for criminal ABWOR had they chosen to plead guilty under the current scheme.

They would be eligible for summary criminal legal aid which uses the undue hardship test, if they pled not guilty. In these six cases, the applicants’ only option to get legal aid would be to plead not guilty thereby losing any opportunity for any sentence discounts for earlier pleas, and placing further strains on the justice system.

In case 7, the applicant would be eligible under the proposed system for summary criminal legal aid and ABWOR with a contribution of £25.35 or 24.38. Under the current system they would also have been eligible for summary criminal legal aid and ABWOR - with a higher contribution of £126.

In cases 8 & 9, the applicants would be eligible with no contribution under the proposed system for summary criminal legal aid and ABWOR. Under the current system, they would have been eligible for summary criminal legal aid and ABWOR - with contributions of £56 and £63 respectively.

How much will applicants’ contributions be?

Our estimates have shown that the range of the contributions assessed for summary criminal legal aid and ABWOR are likely to be:

- Under £50 – 21.2% of all applicants with a contribution
- Under £100 – 41.1% of all applicants with a contribution
- Under £142* - 44.0% of all applicants with a contribution
- Under £200 – 54.3% of all applicants with a contribution
- Under £300 – 65.4% of all applicants with a contribution
- Under £400 – 73.3% of all applicants with a contribution
- Under £500 – 80.4% of all applicants with a contribution
- £500 or more – 19.6% of all applicants with a contribution

*£142 is the current maximum contribution in criminal advice and assistance/ABWOR cases. Therefore, 44% of applicants who are assessed with a contribution would have a contribution at or less than the current maximum criminal advice and assistance/ABWOR contribution which solicitors decide to collect or not.

It is important to note that the assessed contributions would be maximum contributions payable. The actual contribution paid will be restricted to the actual cost of the case. The contribution will be different depending on the court the case is raised in. The cost of a case is not only the solicitor’s fee. VAT and outlays are also paid. The average costs of cases in 2010-11:
- Summary cases: Justice of the Peace Court = £404, Sheriff Court = £697
- Solemn cases: Sheriff Court = £2061, High Court = £18,429.

An example was given to the Committee by the Law Society of an individual on minimum wage of £196.02 with no outgoings having a contribution of £800.20 under ABWOR or £847.80 under summary criminal legal aid. This would be the maximum contribution and the actual amount paid would be restricted to the cost of the case. As we mentioned at the Committee, in our experience it would be highly unusual for clients to have no household outgoings. Even a young adult still living at home will be likely to be paying board payments to their parents and have other loan repayments, which are both expenditure items which can be taken into account in the undue hardship test. Someone with disposable income of £196 would currently be eligible with a contribution of £2,200 were they to apply for civil legal aid.

The collection of contributions

Many solicitors will already have systems in place for collecting client contributions. Solicitors are currently responsible for collecting contributions of up to £135 (or £142 for police station interviews) under criminal advice and assistance and criminal ABWOR cases and there is a mixture in practice over whether these are collected or not. In addition, most solicitors will also have private fee paying clients so will have fee payment arrangements and debt recovery procedures already in place for these clients.

Potential impact on 4 real firms

We conducted some further analysis on four medium sized firms (3/4 solicitors) in Glasgow, Aberdeen, Edinburgh and Lanarkshire. The details are shown at Appendix 2. Over the year December 2010 to November 2011, these firms dealt with between 396 and 1,731 criminal legal aid cases and had earnings from criminal legal aid in this period between £305,000 and £1.1 million.

Our analysis showed that under the proposed new procedures, the firms would have between 29 and 167 cases with contributions to collect, and the total value of the contribution payments as a percentage of their overall criminal earnings in the period range between 2.6% and 6%. This indicates that the impact on the solicitors in collecting these relatively small amounts of contribution payments ought to be very small.

Impact on the Board

The Scottish Government recognised that it may be harder for solicitors to collect the larger sums due in longer running solemn cases and that it would be more appropriate for the Board to handle the risk on these cases. In the Bill’s Financial Memorandum we estimated that there would be somewhere in the region of 1,800 solemn cases for the Board to collect contributions. We expect that the extra resources required to do this can be absorbed within the Board’s running costs.

However, should the Board be required to collect contributions in all criminal cases, as proposed by some commentators, then significantly more staff would be required
to collect the total estimated contribution cases of around **18,500** per year. This has been estimated at 16 extra collection officers, a team leader and a deputy team leader. The total extra cost of the staff, both in terms of salaries and employer’s costs, would be around **£600,000** per annum. These resources could not be absorbed within the Board’s current running costs which have already been substantially reduced at a rate greater than the Legal Aid Fund. The Board’s Administrative budget was frozen at the 2007/08 level for four years, before being reduced, in 2011-2012 by £1.1m. The Scottish Government’s spending plans for the period 2012-2013 to 2014-2015 set out further reductions in the Board’s administration budget over the next three years, totalling £1.3m. This challenge is heightened by inflationary pressure, additional responsibilities (notably around changes to the children’s hearings system) and by the need to utilise staff resource to deliver on our commitment to a wide range of developments associated with delivery of legal aid savings.

**Unrepresented accused**

Fears were expressed at the Committee that the introduction of client contributions would lead to an increase in the number of unrepresented accused at court. We have seen no evidence to suggest that this happens in jurisdictions where contributions were introduced. In England and Wales where contributions in Crown Court cases were introduced in 2010, this did not lead to such an increase.

- In 2009, 0.7% of cases were unrepresented in Crown Court cases.
- In 2011, a year after the introduction of contributions the figure was also 0.7%.

However, what did change was the number of cases where clients were privately funding their own defence.

- In 2009, 3.6% were privately funded, compared to 13% in 2011.
- For the period January to June 2012, 0.7% of cases were unrepresented and 14.7% of cases were privately funded.

**Applicants appearing from custody and urgent situations**

Justice Committee members expressed some concerns about the ability of the Board and solicitors to assess eligibility for criminal applications in custody cases. Solicitors already assess financial eligibility for criminal ABWOR in custody cases and determine what levels of contributions are required under the current financial test. We will produce clear guidelines for solicitors to use when applying the new financial test for eligibility and contributions and as ever, staff will be available to deal with any queries or provide any further guidance needed to solicitors by telephone. Eligibility calculators will be available online, for easy access from iPads, mobile devices or PCs.

Board staff will continue to assess financial eligibility for summary and solemn criminal applications. We will continue to maintain our quick decisions times. Our current average processing times are 1.1 days for summary applications, and 1.0 days for solemn applications. We will also continue to prioritise cases which are received within 4 weeks of the next court appearance.
We also have the facility to make legal aid available in situations of special urgency under Regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996. This allows us to make limited legal aid available, even where we have not been fully satisfied on all the eligibility criteria to allow urgent work to be carried out, including appearances at court hearings.

Scottish Legal Aid Board
14 September 2012

Appendix 1

The Scottish Legal Aid Board

Details of the likely impact of the Undue Hardship test on a sample of applicants for criminal legal aid

These cases are based on real life examples where applications for summary criminal legal aid were granted by the Board following the tendering of a not guilty plea. In these cases, the proposed undue hardship financial test was applied, taking into account the applicant’s incoming and essential household outgoings to determine eligibility. The examples will overstate levels of contributions because we do not currently require full details of all outgoings to show they are eligible for summary criminal legal aid under the current regulations.

In cases 1 - 6, the applicants qualify for summary criminal legal aid and ABWOR with a contribution under proposed new scheme, but they would not have been eligible for criminal ABWOR had they chosen to plead guilty under the current scheme. To qualify for criminal ABWOR, disposable income must be below £245. However, standard allowances for any dependants can only be subtracted from net weekly income to determine disposable income. No account can be taken of any essential household outgoings such as rent/mortgage payments, council tax, maintenance or childcare payments or any loan payments.

In case 7, the applicant would have been eligible under the proposed system for summary criminal legal aid and ABWOR with a contribution. Under the current system they would also have been eligible for summary criminal legal aid and ABWOR (with a contribution).

In cases 8 & 9, the applicants would be eligible with no contribution under the proposed system for summary criminal legal aid and ABWOR. Under the current system, they would have been eligible for summary criminal legal aid and ABWOR (with a contribution).

Case 1: Security guard charged with Road Traffic (Sc) Act offence (Sheriff court)

Earns £255.12 per week.

Outgoings of £174.79 including: rent, council tax, car loan, car insurance, debt repayment.
No dependants.

Assessed disposable income of £80.33.

Under proposed system for ABWOR and summary criminal legal aid: **Eligible with contribution** of £32.06 for summary criminal legal aid or £30.83 for ABWOR.

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under the current criminal legal aid system: they would have been eligible for legal aid.

**Case 2: Gas engineer charged with assault and Criminal Justice Licensing (Sc) Act offence (Sheriff court)**

Earnings £350 per week.

Outgoings of £225 including: rent and a loan.

No dependants.

Assessed disposable income: £125.

Under proposed system: **Eligible with contribution** of £213.20 for summary criminal legal aid (not guilty plea) or £192.50 for ABWOR (guilty plea).

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: they were granted legal aid.

**Case 3: Assistant Manager charged with assault and breach of the peace (Sheriff Court)**

Earnings £453 per week.

Outgoings of £291, including: mortgage, council tax, car loan and CSA payments.

No dependants.

Assessed disposable income: £162.05.

Under proposed system: **Eligible with contribution** of £494.52 for summary criminal legal aid (not guilty plea) or £460.50 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: they were eligible after review when extra outgoings were taken into account.
Case 4: Dump truck driver charged with dangerous driving (Sheriff court)

Ears £482 per week.

Outgoings of £260: mortgage, council tax (plus arrears), loan, house insurance and car insurance.

One dependent child.

Assessed disposable income: £160.

**Under proposed system:** ELIGIBLE WITH CONTRIBUTION of £470 for summary criminal legal aid (just less than 3 weeks disposable income, or 11% of the disposable income over the 26 week assessment period) or £437 for ABWOR (guilty plea)

**Under current ABWOR system, if pleading guilty:** they would not have been eligible.

**Under current summary criminal legal aid system:** currently qualifies for summary criminal legal aid.

Case 5: NHS worker charged with assault (Sheriff court)

Ears £547 per week, plus £28 industrial injuries payment.

Outgoings of £272 including mortgage, council tax, loans and insurance payments.

Two dependent children.

Initially refused, but Board agreed to take additional outgoings into account on review, so qualified with disposable income of £177 per week.

**Under proposed system:** ELIGIBLE WITH CONTRIBUTION of £651 for summary criminal legal aid (14% of the disposable income over the 26 week assessment period) or £611 for ABWOR (guilty plea)

**Under current ABWOR system, if pleading guilty:** they would not have been eligible.

**Under current summary criminal legal aid system:** currently qualifies for summary criminal legal aid.

Case 6: Cleaner charged with drink driving (Stipendiary magistrates’ court)

Ears £321 per week.

Outgoings of £231: rent, council tax, car loan, car insurance. No dependents.

Assessed disposable income of £90,
Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £56 for summary criminal legal aid (3% of the disposable income over the 20 week assessment period) or £44 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.


**Case 7: Painter charged with assault (Sheriff court)**

Earns £290 per week.

Outgoings of £150 for rent.

Allowance deducted for one dependent child.

Assessed disposable income of £78.

Under proposed system for ABWOR and summary criminal legal aid: **ELIGIBLE WITH CONTRIBUTION** of £25.35 summary criminal legal aid or £24.38 for ABWOR.

Under current ABWOR system, if pleading guilty: they would pay a contribution of £126.

Under the current criminal legal aid system: they would have been eligible.

**Case 8: Cleaner charged with Criminal Justice Licensing (Sc) Act offence and vandalism (Sheriff court)**

Earns £189.67 per week.

Outgoings of £130 per week, including: rent, loan, maintenance.

Allowance deducted for partner.

Assessed disposable income: £59.67.

Under proposed system: **ELIGIBLE WITH NO CONTRIBUTION**.

Under current ABWOR system, if pleading guilty: they would pay a contribution of £56.

Under current criminal legal aid system: they would have been eligible for legal aid.

**Case 9: Receptionist charged with assault (Sheriff court)**

Earns £203 per week.

Outgoings of £109 per week, including: rent, council tax and loan.

Allowance deducted for partner.
Assessed disposable income: £55.42.

Under proposed system: **ELIGIBLE WITH NO CONTRIBUTION.**

Under current ABWOR system, if pleading guilty: they would pay a contribution of £63.

Under the current criminal legal aid system: they would have been eligible.

Appendix 2

The Scottish Legal Aid Board

Details of the likely impact on four medium sized firms (3/4 solicitors)

We have estimated the likely impact on a small number of case study firms, of applying the proposed eligibility and contributions regime to their legally aided summary criminal business over a recent 12 month period.

We did this by applying the proposed scheme for eligibility and contributions to the recorded information on income and outgoings for their summary clients. This may slightly overstate the number of clients who are estimated to have a contribution and the size of these contributions. This is because under the current system, detailed outgoings are not required to be stated if an applicant’s income is below the income eligibility threshold for summary criminal legal aid. We have also controlled for the current different eligibility arrangements for ABWOR.

The total amounts earned in solicitors fees for criminal legal assistance for these firms was £2.1m. The total estimated value of contributions under the new system for summary criminal legal aid and ABWOR is estimated to be £90,572 for 322 contributions (4.3%). It should be noted that around 7% of ABWOR clients have a contribution under the current system.

**Glasgow: firm earned £320k from a total of 396 cases criminal legal assistance cases**
- 256 summary grants; 93% assessed with no contribution.
- 84 ABWOR grants; 86% assessed with no contribution.
- Total cases with contributions for firm to collect: 29.
- Cases with contributions to collect as % of cases paid in period: 7.3%
- Total maximum value of contributions assessed = £8381.
- Value of maximum total contributions assessed as % of firm’s criminal earnings in period: 2.6%

**Aberdeen: firm earned £440k from 661 criminal legal assistance cases**
- 264 summary grants; 80% assessed with no contribution.
- 246 ABWOR grants; 85% assessed with no contribution.
- Total cases with contributions for firm to collect: 90.
- Cases with contributions to collect as % of cases paid in period: 13.6%
- Total maximum value of contributions assessed = £26,312.
• Value of maximum total contributions assessed as % of firm’s criminal earnings in period: 6%

Edinburgh: firm earned £305k from 461 criminal legal assistance cases
• 143 summary grants; 85% assessed with no contribution.
• 108 ABWOR grants; 86% assessed with no contribution.
• Total cases with contributions for firm to collect: 36.
• Cases with contributions to collect as % of cases paid in period: 7.8%
• Total maximum value of contributions assessed = £7598.
• Value of maximum total contributions assessed as % of firm’s criminal earnings in period: 2.5%

Lanarkshire: firm earned £1.1m from 1731 criminal legal assistance cases
• 739 summary grants; 87% assessed with no contribution.
• 577 ABWOR grants; 88% assessed with no contribution.
• Total cases with contributions for firm to collect: 167.
• Cases with contributions to collect as % of cases paid in period: 9.6%
• Total maximum value of contributions assessed = £48,281.
• Value of maximum total contributions assessed as % of firm’s criminal earnings in period: 4.2%
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Second supplementary written submission from the Scottish Legal Aid Board

Clerk’s note: this information was provided in response to a request from SPICe in the following terms:

“I’d be grateful if you could let me know the value of payments which fall to be collected by solicitors for summary criminal ABWOR – ie. the amount which would be assessed as payable from the client to the solicitor and therefore deducted from the final payment made by SLAB. The figures for the past 3 years would be useful. I’d be particularly keen to have the figure for 2011/12 if this is available.”

SLAB replied as follows:

Firstly, I’d just like to confirm that the Bill applies to all proceedings in which criminal ABWOR is used, not just guilty pleas. There will be a couple of very minor exemptions to ABWOR that will be included in the regulations.

Below I’ve given the ‘Total – All ABWOR’ figure and also broken it down by the two broad ABWOR types. However, if the Committee is looking at the Bill as a whole, it would appear to me that the appropriate figure is the Total ABWOR figure.

If you need anything else, please let me know.

<table>
<thead>
<tr>
<th></th>
<th>2009-10</th>
<th>2010-11</th>
<th>2011-12</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABWOR - Breach</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>proceedings etc</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total contributions</td>
<td>£23,389</td>
<td>£23,546</td>
<td>£19,545</td>
</tr>
<tr>
<td>assessed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ABWOR - Summary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>complaint – guilty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>plea</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total contributions</td>
<td>£188,976</td>
<td>£156,506</td>
<td>£134,841</td>
</tr>
<tr>
<td>assessed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL – ALL ABWOR</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total contributions</td>
<td>£212,365</td>
<td>£180,052</td>
<td>£154,386</td>
</tr>
<tr>
<td>assessed</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Marie-Louise Fox
Scottish Legal Aid Board
28 September 2012
Justice Committee
Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Scottish Women’s Aid

Foreword

Scottish Women’s Aid (“SWA”) is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women’s Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women’s Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

Introduction

We support the proposals to introduce contributions to the criminal legal aid scheme. For a long time, women have complained of the injustice, a position supported by SWA, 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 contribution to her legal aid costs, a situation recently acknowledged by the Cabinet Secretary for Justice.

However, the focus of our response is Part 1 of the Bill which sets up the Scottish Civil Justice Council (“SCJC”) and we are restricting our comments to this.

The proposed functions of the SCJC in the Bill go far beyond the existing remit of the existing Sheriff Court and Court of Session Rules, through the SCJC being given additional powers to:

- keep the civil justice system under review;
- provide advice and make recommendations to the Lord President on the development of and changes to the civil justice system; and
- provide advice on any matter relating to the civil justice system as the Lord President may request.
In carrying out its remit, the SCJC must keep the needs of those who use the civil justice system to the fore. To achieve this, it must ensure that the needs of all relevant parties, meaning litigants, potential litigants or users of other justice services, not simply lawyers, judges or court staff, are taken into account and that they are actively consulted and involved in this process. However, we believe, that in its current form, the Bill does not accomplish this.

In view of this, we believe that the following areas of the Bill require attention:

- The proposed duty on the SCJC to promote methods of resolving disputes which do not involve the courts is inappropriate – **section 2**
- The deficiencies in the proposed make-up of the SCJC membership in relation to a lack of court-user representation and a lack of transparency and clarity on how appointments to the SCJC and its subcommittees—**sections 2 and 6**
- The lack of any duty or requirement placed on the SCJC to undertake meaningful and public consultation with court users and bodies having an interest in the civil justice system - **section 3**
- A lack of transparency and clarity in how the Court of Session will exercise their powers and process in relation to accepting, rejecting and modifying rules proposed by the SCJC - **section 4**
- The need for clarity and transparency on the role of the Lord President - **sections 4 and 11**

SWA welcomes the opportunity to provide written comment on these important proposals. We wish to be considered to provide oral evidence to the Justice Committee on the matters we have raised in relation to Part 1 of the Bill setting up the SCJC.

**Section 2 - Functions of the SCJC**

The Bill states that the SCJC’s functions are to not only to review the practice and procedure followed in civil proceedings in the Court of Session and Sheriff Courts, and to draft rules governing their procedure, but also to provide advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system. This is a considerable widening of the remit and responsibility of the existing Rules Council.

We have two main concerns in relation to the principles which will govern the functions of the SCJC, namely the promotion of ADR and the lack of any statement to the effect that in carrying out its functions, the SCJC must keep the needs of those who use the civil justice system to the fore and that the needs of all relevant parties using the courts, as detailed above, will be taken into account, actively consulted and involved in this process.
Principle that the SCJC should have the need to improve the operation of the civil justice system for all users

Simply giving the SCJC the power to “consult such persons as it considers appropriate “ and “co-operate with, and seek the assistance and advice of, such persons as it considers appropriate” does not meet this obligation. The SCJC is obliged to ensure that it proactively takes the needs of all interested parties, particularly court users, into account and this should be stated as a founding principle and one of the functions at its core.

Promotion of dispute resolution as a founding principle of the SCJC

Of equal concern for us, is the statement in the Bill that in carrying out its functions, the SCJC “must have regard to” certain principles which include that “methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.”

In our view, this particular duty is beyond the acceptable remit of a body originally tasked with making governing rules of court and recommendations on practice and procedure followed in civil proceedings in the Court of Session and Sheriff Court.

It is not for the SCJC to “promote” any procedure over another as this immediately creates a bias in favour of that procedure and an expectation that this procedure will be used as a first step in every case, despite the caveat of “where appropriate.”

The Scottish Government, for cost-cutting reasons and to decrease the amount of business going before the courts, is looking to promote alternative dispute resolution, including arbitration, conciliation and mediation across all civil court “disputes” as the first option in “dispute resolution.” There is no indication as to how the SCJC will identify which disputes are “appropriate” for non-court involvement and we are very apprehensive that family law cases involving domestic abuse will be swept into the “appropriate category.”

Firstly, domestic abuse not a “dispute” and it must be recognised that the woman and the abuser are not simply having a “disagreement “, have not “fallen out” and have not become “entrenched in their positions”. A clear distinction must be made between persons litigating because of a dispute and women, children and young people experiencing domestic abuse who are seeking protective orders, or an order regulating an abuser’s opportunity for contact and residence of the children. Quite simply, they are certainly not involved in what could be lightly referred to as a “dispute” or have a “problem” which can be “sorted out” or “easily resolved” by negotiation; the issue is much more serious and determines their right to live in safety and their protection from abuse.

The accepted position across many jurisdictions is that mediation is wholly incompatible with protecting the interests of women, children and young people experiencing
domestic abuse\textsuperscript{1}. Despite this, we are aware that inappropriate referrals occur already; advisers with no understanding of domestic abuse have directed them towards the process and women have engaged in mediation at the behest of their lawyer because it has been suggested that if they do not do so, the courts will regard them as unreasonable, obstructive or hostile should they refuse to attend and that this may have implications for the eventual outcome of child related actions.

Domestic abuse is not a matter which can be solved by the parties discussing their respective positions, allowing the other to consider the other’s position and reaching an agreed settlement. It is reprehensible to even expect that a woman experiencing domestic abuse should be asked to consider the abuser’s position. The very nature of domestic abuse and the abuse of power makes it unsuitable as a practice which involves the parties having to, and sometimes being ordered to, reach an agreement. The abuser may have spent many years ensuring that his partner does not have a voice, and is punished for expressing any opinion contrary to his wishes. Therefore it is extremely unlikely, and unreasonable to expect, that the woman will be able to overcome years of fear to be able to voice what she wants in the best interests of her own and her child’s safety and welfare, in the presence of a man who has silenced, intimidated and coerced her.

This inherent power balance means that women may be manoeuvred into a position which is not in her best interests and may prejudice both her safety and that of the child and there is also nothing to stop an abuser forcing/persuading the woman to enter into mediation, simply to continue to perpetrate the abuse and wield power over her.

Women’s experiences, and the research, show that women have been assaulted after attending mediation and that the mediation process has had to be halted because of the aggression of the abuser.

Further, it should be understood that cases where domestic abuse is present are not going to be “resolved” by Alternative Dispute Resolution (“ADR”), mediation, referral to counselling, parenting classes or anger management. Domestic abuse is not a matter for “resolution” as it not due to the behaviour of all of the parties concerned, but of the determined and persistent behaviour of one of the parties. Consequently, in this situation, the authority and presence of the court and a Sheriff or judge is the only way to convey to abusers that their behaviour will not be tolerated and that women, children and young people are fully entitled to the intervention of the full weight of the law to protect them and bring about their safety.

Regrettably, it is the experience of women using our services, a position reflected in both domestic and international research, that neither the courts nor mediation have served women experiencing domestic abuse well, as a consequence of judiciary and mediators lacking an awareness and understanding of the dynamics and effects of domestic abuse on women and particularly on children relating to contact and residence.

It is therefore important that a distinction is kept to the fore between what the Bill and other discussion and consultation papers refer to as civil “disputes” and cases involving domestic abuse when considering how best the law and the courts can protect women, children and young people.

**SCJC rule-making process**

Our final issue relates to the rule-making process itself and the need for clarity on the development of rules and a radical rethinking of how they are constructed. Since the rules relating to practice and procedure are intended not only for the use of the court service, lawyers and the bench but also litigants, they must be clear and easily understood.

The Bill should clarify this because a balance needs to be struck to avoid rules either being couched in oversimplified language, so that they are ambiguous and ineffective, or being too technical and full of jargon. A balance is therefore needed and the functions of the SCJC should extend to the production of an equivalent of an explanatory note which might be required for particularly technical matters.

**Section 3- Powers of the SCJC**

This section states that, in pursuance of its functions, the SCJC “may consult other persons as it considers appropriate and may co-operate with, and seek the assistance and advice of, such persons as it considers appropriate.”

Given that the SCJC’s remit is to be considerably expanded beyond simply producing amendments to rules and procedure, as is does now, consultation is a vital and key element, if not the cornerstone, of its foundation. The fact that the power to consult, and who to consult with, is discretionary and not mandatory will result in the work of the SCJC being neither suitably informed by relevant interests nor subject to appropriate scrutiny by court users and those who represent their interests.

Women, children and young people experiencing domestic abuse are often overlooked in reforms to civil law, mainly because civil cases are regarded as “disputes” between the parties and the focus is, therefore, on “dispute resolution” which, as we have explained above, does not, in any way, take the dynamics and impact of domestic abuse into account.
To ensure that their voices are heard, the Bill must, therefore, contain a general obligation on the SCJC to consult and work with other organisations and individuals, including court users, with an interest in the civil justice system.

Such engagement will be necessary to ensure the work of the SCJC, particularly the function of keeping the system under review, is suitably informed by all relevant interests, including court users, through the opportunity to comment on proposals and their annual plan. The SCJC must be transparent, accountable and subject to appropriate scrutiny and this also involves placing a duty on the SCJC that their work, including the introduction of new court rules, is appropriately communicated to the public and relevant parties.

This is particularly important given the imbalance in the proposed membership; of the proposed 20 members of the SCJC, only 2 are specified as representing court users. In this situation, there is little opportunity for the recommendations of the SCJC to be subjected to an appropriate degree of the scrutiny by those who use the courts and are subject to any changes to the civil justice system.

If there is no obligation on the SCJC to consult the public and external organisations who have experience and understanding of these matters, then the SCJC will not be able to consider all the positive, negative and, perhaps, unforeseen, consequences of any proposals, and, thus, court users will not have confidence in these decisions.

Section 4 - Court of Session to consider rules

This section states that the Court of Session must consider any draft civil procedure rules submitted to it by the SCJC and may approve the rules, with such modifications as it considers appropriate, or reject the rules.

However, the Bill does not set out any criteria governing these decisions and setting out the basis when and why the Court of Session would or would not accept a rule. This must be clarified on the face of the Bill, possibly by stating that the Court or the Lord President will produce criteria, reasons and guidance for this matter.

We would suggest that there may be a potential conflict of interest regarding the role of the Lord President in relation to this duty since the SCJC must have regard to guidance issued by the Lord President, who also has overall control of the Court of Session, and the judicial members of the SJCJ are also members of the Court of Session.

Section 6 – Composition of the SCJC

We note that the SCJC is to have not more than 20 members and is to be comprised of the Lord President, the Chief Executive of the Scottish Court Service, the principal officer of the Scottish Legal Aid Board, a member of the Scottish Government, at least 4 judges, at least 2 practising advocates, at least 2 practising solicitors, at least 2
“consumer representative members” and “up to 6 other persons considered by the Lord President to be suitable to be members of the SCJC.”

Non-lawyer members

Our first concern relates to the composition of the SCJC; the proposals are such that the SCJC only has two “non-lawyer” members, the “consumer representative members,” representing the interests of the general public and court users. This is completely insufficient, given the wide-ranging powers of the SCJC and is far from appropriate in terms of representing the needs and views of the varied and broad spectrum of court-users.

Two non-lawyer members afford little opportunity for the recommendations of the SCJC to be subjected to an appropriate degree of the scrutiny by those who use and are subject to any changes to the civil justice system. These “consumer representative members” are in an absolute minority in terms of the constituency they represent and it is debatable as to whether they will at all be in a position to meaningfully influence the work of the SCJC. These members will carry little or no weight and, unfortunately, appear nothing more than a token gesture to demonstrate public representation on the SCJC.

We would also add that this matter is not addressed by the fact that the Lord President has the power to appoint up to 6 other persons considered by the Lord President to be suitable to be members of the SCJC, as there is no guarantee that any of these would be consumer representatives. Even if 6 were to be appointed, this would still leave representation of court users at 8 out of 20.

To ensure transparency, accountability and public confidence in the decisions and proposals of the SCJC, we suggest that a least half should be individuals or members of organisations representing court users. It is not in the interests of justice that the SCJC be dominated by those who are not using the system and non-lawyer members will provide much-needed understanding of the issues that are important to those involved in the system who are neither lawyers nor judiciary.

In terms of the how the proposed reforms to civil law and procedure will be dealt with by the SCJC, having equal representation from non-lawyers on the SCJC will be vitally important in ensuring that the position of women, children and young people experiencing domestic abuse is, as we have highlighted above, not ignored. Further, given the issues raised by the B v G [2012] UKSC 21 case and the debate this has provoked on the need for reform to the system, this non-lawyer involvement will be particularly relevant in terms representing the experiences, views and needs of children involved in civil procedures, insight which is often unheeded in the development of law and process.
“Consumer representatives” as the sole non-lawyer members

Secondly, we are concerned about the intention to specifically appoint “consumer representative members” and the fact that the Bill specifically identifies these people as “requiring experience and knowledge of consumer affairs and knowledge of the non-commercial legal advice sector. This clearly suggests that the preferred persons will have a background in consumer affairs, thus effectively excluding membership of the SCJC to anyone other than the Citizens’ Advice Bureau or generalist advice providers, and completely ignoring the issue of family law.

The SCJC must have members representing family court users. There have been significant changes to child and family law over the last few years and any future discussions within the SCJC on reforms to family law and procedure must be carried out with appropriate representation and input from those using the family courts, which will include these SCJC representatives actively ensuring that women, children and young people experiencing domestic abuse, and children generally, have a voice. We would like to discuss this matter further with the Scottish Government as these proposals develop.

Appointments process

Finally, while the Bill provides that the Lord President will set up an appointments process for the non-judicial members that the Lord President appoints, there is no statement that a similar process will be set up by the Lord President for the judicial members.

This represents 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.

It also does not follow accepted good practice in public appointments and the membership should be decided by an independent panel, following the process for other public appointments.

Section 11- Chairing of Meetings

In addition to having the power to appoint the majority of the SCJC members, including the judicial members, the Bill proposes that the Lord President also chairs the SCJC.

Again, we do not consider that this is appropriate, given, firstly, that the judicial members are accountable to the Lord President as head of the judiciary in Scotland. Further, the SCJC will be providing a public function, looking at both rules and policy and is a body tasked with keeping the system under review. The Lord President is responsible for implementing these decisions, which raises a conflict of interest.
The Chairmanship of the SCJC would not be problematic were it to solely have responsibility for reviewing the rules of practice and procedure; however, it is not workable for the SCJC’s wider application.

Therefore, while the SCJC should, and must, be accountable to the Lord President there should be flexibility in this role and that it should be chaired by an independent, lay person.

Section 13- Committees

We support the proposal that the SCJC has the power to establish committees to assist them in their functions and decision-making but would emphasise that this is not a substitute for our recommendation above that least half of SCJC’s members should be individuals or members of organisations representing court users.

Such committees would benefit from having non-SCJC members and the Bill should make provision for their appointment, particularly for the involvement of non-lawyers, since such persons with expertise relevant to the specific topics will be of great assistance to the SCJC and its committees.

Again, the Bill does not address the process by which committee members will be appointed. Therefore, an obligation should be placed on the SCJC, in the legislation, that they produce and publish a publicly accessible process.

Scottish Women’s Aid
27 July 2012
Scottish Parliament Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from senior public law professors in Scotland

Introduction

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

Observations

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

Remit

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

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

\(^1\) Scottish Civil Courts Review, 2009 ( Chapter 15 para. 26 )
\(^2\) In chapter 15 para. 51
the Bill a duty to provide advice and make recommendations on any matter relating to the civil justice system as may be requested by the Scottish Ministers.

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

Composition

6. Second, we have concerns as to the proposed composition of the SCJC as contained in section 6 of the Bill which is too heavily weighted towards judges and legal practitioners. The development of civil justice policy should take account of the interests of all users of the system and of the public interest. Appointing an advisory body dominated by a particular set of stakeholders risks undervaluing the interests of others and the expertise and perspectives they can bring to the subject which may well be different from those of practitioners and judges. This point is reflected in the report of the Spencer Review3 of the operation of the English and Welsh CJC in 2008. This independent review, which is referred to in the SPICE briefing4 in relation to the Bill, broadly supported the work of the English and Welsh CJC but concluded that the CJC needed to pay more heed to the interests of users and consumers and that the then membership of the CJC was too heavily balanced towards the judiciary and legal practitioners (the ratio of legal to other stakeholders was about 3:1). Accordingly the Spencer Review5 recommended that the balance between judges and lawyers and other stakeholders (including the user and consumer communities) should be nearer to 50:50 with approximately half the members of the Council to be drawn from “user, consumer and advice interests and from academia”. This balance has now largely been achieved in England and Wales.

7. In contrast, section 6 of the Bill stipulates that the SCJC should contain at least 9 judges and legal practitioners, but only two from the consumer community and none for the user community. This imbalance is out of keeping with the Spencer Review and now the practice in England and Wales. Nor does it sit well with the UK and Scottish Governments’ pursuit of “full cost recovery” - the policy that the users of courts should generally pay for the full costs of the court proceedings including the cost of staff and judicial salaries and of the maintenance of the buildings.6 Such a policy would argue for a greater involvement of users and consumers in relation to the body charged with advising on the development of, and changes to, the civil justice system. Accordingly we recommend that the Bill’s provisions on the composition of the SCJC should contain a more equal balance between judges and practitioners on the one hand and other stakeholders on the other, with latter category including the breadth of members (business and non-business users, consumers, advisers, insurers, and academics) seen on the CJC today. For the avoidance of doubt, we should state that the category of ‘other stakeholders’ would

---

4 At p.9
5 In Chapter 8.
6 See Hazel Genn, Judging Civil Justice (CUP, 2010) at p.47.
not exclude all those with a legal qualification or legal training. The distinction is between, on the one hand, judges and those practising as solicitors or advocates and, on the other, all remaining categories of stakeholder. It would be valuable to have on the council, for example, persons with a legal training currently working as academics and in the consumer and advice community.

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

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

Appointment Process

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

7 In Chapter 9.
Status of the body

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

27 July 2012

Professor Chris Himsworth, Edinburgh University School of Law
Professor Tom Mullen, Glasgow University School of Law
Professor Alan Page, Dundee University School of Law
Professor Alan Paterson, Strathclyde University School of Law
Professor Adam Tomkins, Glasgow University School of Law
Professor Neil Walker, Edinburgh University School of Law

---

8 See Chapter 15 para 54.
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Simpson and Marwick

This letter represents a response on behalf of Simpson and Marwick to the terms of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Our practice area links us with the Scottish Civil Justice Council and we make no comment on the criminal legal assistance part of the Bill.

1. We welcome the terms of the Bill as relates to the Scottish Civil Justice Council and believe that the proposed functions and powers of the Council are adequate.

2. Clause 6 of the Bill deals with the composition of the Council. It is here that we believe an omission has been made. We consider that the Council should include at least one member of the insurance industry. A representative could be drawn from the membership of the Forum of Scottish Claims Managers based in Glasgow and/or a representative of the Association of British Insurers.

Our argument in support of this position involves recognising that in over 50% of Court of Session claims, and a lesser but still material percentage of Sheriff Court claims, an insurer is involved behind one or other of the parties. As a group the insurance industry represents the largest body of Court users in the country. As a consequence it seems only fair to offer two places on the Council to the insurance industry. This could be seen as providing a natural balance to the “Consumer representative members” who appear to predominate from the pursuer’s side of the bar.

Furthermore, having representatives from such a significant proportion of Court users will add emphasis and credibility to the decisions of the Council and perhaps avoid any issues which could arise on implementation of new Court rules in an area that causes the insurance industry reasonable concern.

The Forum of Scottish Claims Managers, whilst not a long standing body, has nevertheless developed a considerable credibility and responded in helpful terms to the Scottish Civil Courts Review. Members drawn from this body would be our preference.

We would be happy to provide any additional information in support of this response to the consultation if requested.

Simpson and Marwick
29 May 2012
Justice Committee
Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Dr Cyrus Tata, Director of Centre for Law, Crime & Justice and Reader in Law, Strathclyde University Law School

Statement of expertise in the area
Over the last twenty years I have conducted research into criminal legal assistance in Scotland, as well as other nations, and its relationship with other dynamics in the system. This includes four separate substantial field-based studies and I have written widely on the policy and practice issues arising from that research. In addition, I have conducted several studies into allied areas of the justice system including: plea decision-making, sentencing, pre-sentence reports, executive release from custody.

I have been asked by the Justice Committee to give oral and written evidence focusing mainly on Part 2 of the Bill. The Bill and its accompanying give rise to some concerns.

1. A matter of ‘alignment’ or a distinct change of principle?

Should it become mandatory for a person who is prosecuted and who maintains his/her innocence to have to pay for the cost of professional legal assistance? The Bill proposes that not only should people who decide to plead guilty (‘ABWOR’) be required to pay, but also those who maintain their innocence. The proposal to change the law in this way is being presented as a matter of ‘alignment’. However, it is also crosses a line of principle.

A. The Bill relies on a false ‘them and us’ dichotomy

A logic underlying the extension of payments in cases where a citizen does not accept the allegation against her is that it has be ‘balanced against’ the interests of the general public as payers of indirect and direct taxation. This has been described as primary ‘governing principle’:

“Fairness to the accused and the taxpayer – the interests of the taxpayer and the accused must be balanced to provide value for money and access to justice. Applicants who are able to pay a contribution should do so ...” (emphasis added)

On closer inspection, the claim of ‘balance’ between two distinct and opposing interests is, however, somewhat insidious. It implies that a person who does not accept an accusation against her is somehow not a ‘taxpayer’.

---

1 These are: 1. the comparison of spending between different European nations (including Scotland), and their practices; 2. the independent and controlled study of the Public Defence Solicitor’s Office; 3. the independent study of the impact of the introduction of Fixed Payments (or Fixed Fees) into Summary Legal Aid; 4. the study evaluating the reforms to summary legal aid (especially ‘front-loading’) and the introduction of the disclosure of prosecution evidence.


3
B. Why should the individual citizen who denies guilt (and possibly acquitted) be held responsible for the cost of legal assistance?

Justifications put forwarded for the extension of the principle of payment invite us to believe that paying towards the cost of legal assistance where a citizen states she is not guilty is analogous to contributions towards ABWOR where the person has already pled guilty? In ABWOR cases, one can make a plausible argument that the person has accepted his/her guilt and should take responsibility for the behaviour by paying towards the cost of legal assistance. S/he is required to take responsibility for the criminal actions s/he has chosen. However, 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 charge and prosecute herself, remand herself in custody, and chooses to try herself in court.

The only way in which this argument can make any sense is if one presumes that everyone prosecuted is guilty and that if a person denies s/he is so guilty, (and is even acquitted by a court of law), should nevertheless bear responsibility for the cost of defence.

2. No refund even if you are acquitted: can two wrongs make a right?

Under this Bill, if you are acquitted there will be no refund for the cost you had to pay to defend yourself. Where a person has been charged, possibly remanded in prison, prosecuted and tried, but is then acquitted by the court it is proposed that s/he should not receive any refund for the cost of legal assistance. This may come as something of a nasty surprise to a citizen who has already endured the harrowing experience of being an accused person. The Policy Memorandum attempts to justify this position, (which is contra-distinction to that south of the border), by suggesting that a refund from public money to such a person would be unfair to those, (extremely rare and usually extremely wealthy), privately-paying individuals. (Policy Memo para 73). It may well be that it feels unfair to, say, a millionaire who is able to pay privately and is acquitted but does not to get a refund from his lawyer. But to apply the same unfairness to every other citizen as act of fairness to the millionaire suggests rather odd priorities. It seems tantamount to saying ‘two wrongs make a right’.

3 This is particularly disappointing when in instances discussing persons convicted of criminal offences the current Justice Secretary has argued against for a more inclusive approach for instance: “They are us”
4 The Policy Memorandum claims that one of the reason for denying a citizen any refund of legal assistance where the citizen was acquitted is that “it is felt to be fair to those who can afford to pay a contribution to their legal assistance costs do so” (para 73)
3. Should Criminal Legal Assistance be brought into line with Civil Legal Aid?

It has been frequently stated by proponents of the Bill that legal assistance in criminal cases is ‘out of line’ with the standards of civil cases. While accepting the major problems facing many civil legal aid clients, there is the central distinguishing principle between civil and criminal cases – namely state coercion. While the outcomes of civil cases can and do have huge consequences for individuals and communities, the citizen cannot be denied his/her liberty as s/he can be when the state brings forward a criminal accusation. The stakes are simply much higher and fundamentally distinct.

4. Problems of operation

**Level of financial payment (‘contribution’)**
Like others who have given evidence I am concerned about the threshold and its impact on certain populations. There may well be problems of indirect discrimination (eg especially disabled groups and women) and also the impact on families.

**Contribution creep?**
Currently it is estimated that nearly 1 in 5 will be required to pay towards the cost of legal help. With the figure being set in legislation it is possible inflation will mean that more people will have to pay. It is unclear how the Bill ensure that there will not in the future be ever-more people being required to pay ever-higher fees.

**Increase in unrepresented individuals**
There appears to be a quiet recognition that where, on the basis of the evidence alone, a person would plead not guilty the introduction of payments will lead to an increase in guilty pleas. Unless one holds to a presumption of guilt, this should be troubling.

Furthermore, it is acknowledged that there may also be an increase in unrepresented cases. It seems likely that solicitors will, as SLAB officials have already acknowledged, have to make a commercial judgement as to whether the client is sufficiently financially valuable to take the financial ‘hit’ of non-payment. This means that certain clients (e.g. non-regular clients) felt not to be of financial value may be unable to get legal assistance.

**Impact on the quality of defence work**
It would unsurprising if Solicitors end up spending more time collecting payments and less time in contact with clients. This is likely to slow cases down as there will be less time to discuss the case and persuade the client that a guilty plea is in his/her interests.

---

5 "If financial contributions were introduced for summary criminal legal aid, it is possible that some applicants, faced with having to pay a contribution following a plea of not guilty, may make a decision on how to plead based on financial considerations rather than the strength of the case against them.” (Scottish Government (2011) Consultation)
Will the Bill really save the money envisaged?
The logic behind the Bill appears to make little or no account of adaptive behaviour (e.g. unrepresented cases and delays in getting contributions). The hope seems to be that it will encourage an increase in guilty pleas, though it may just as easily end up slowing the justice process down. Unrepresented cases will be a headache for the courts.

Dr Cyrus Tata
September 2012
This Bill is welcome for seeking to rationalise the making of Rules within the civil justice system in Scotland, and in providing in the Council a body capable of taking an overview of the entire civil justice system. The comments below are by way of clarification and should not be taken as objecting to the overall approach in the Bill.

Please note that we have not commented on the Criminal Legal Assistance elements of the bill, as we have not particular expertise in this field.

The particular points on which we would like to comment concerning the draft Bill, are as follows:

2(3)(b) This approach is welcome, but it is suggested that the Council could also be encouraged to have rules written in accessible language. Much of the terminology within the Scottish civil justice system is difficult to understand for people for whom English is their first language, much less for foreigners who may be wanting to utilise the system for dispute resolution. By taking the opportunity to clarify the language, the justice system will become more accessible and more attractive to users.

2(3)(d) This approach is also to be welcomed, but it is suggested that the wording of (d) implies that such alternative dispute resolution methods should be entirely separate from the courts. The existing pilots in the Sheriff Courts (notably that of Edinburgh with which the writer was involved) have shown that mediation services can provide a useful function within the existing civil justice system. It is accepted that this could still be brought within the strict wording of (d) but the phrase “do not involve the courts” could be taken to mean that the two processes are to be dealt with exclusively which is felt not to be helpful.

3(2)(b) It is understood that the intention is that the Court of Session will make rules by act of Sederunt, covering both that court and the civil jurisdiction of the Sheriff Court. Assuming our understanding is correct, the intention to combine the two functions is welcome, and should prevent any conflict in approach. This is also consistent with the directions given to the Council in 2(3)(c)

4(1)(b)/(c) Given the requirement of the Council to publish its recommendations, under 3(2)(g) it would seem appropriate that the Court of Session should be required to publish the reason why it has made any modifications under 4(1)(b) or rejected any proposals under 4(1)(c) so that the process is fully transparent. This would also assist the Council in understanding why these proposals had not been accepted in whole or in part.

4(3) While it is understood that this power must be retained, it is suggested that in such cases, the Court of Session could exercise its powers in consultation with the Council, not least to prevent the two bodies working at the same time on identical issues.
6(1) If all of the numbers in paragraphs (a) through to (i) are added together they come to 20 which is the maximum number allowed under 6(1). In these circumstances the various statements of “at least” seem otiose, since if more than the number prescribed in any paragraph were to be appointed, this would automatically lead to the 20 being exceeded. It is suggested that from a drafting point of view it would be sensible just to state, for example, 4 judges at (e) rather than “at least”. Having said that, the spread of people appears to be satisfactory, although it is to be hoped that the six persons to be appointed by the Lord President would include a number of those who are active users of the court system, other than the consumer interests covered by (h). There is a preponderance of the legal profession within the Council which is understandable but may lose sight of the fact that the users of the system are in fact the litigants not the lawyers. The writer has practised as a lawyer in another jurisdiction and been a litigant in a corporate capacity in Scotland and elsewhere. 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, and the only way in which there is going to be representation from the people who would, with respect, actually pay the bills, appears to be through the six LP members appointed under (i).

8(3)/(4) We wonder whether three years is a long enough period for an appointment. It is likely that the consultation process on any substantive change to the civil justice system is going to take some time and it would obviously be helpful if the same people were involved throughout the process. We would suggest that a period of five years might be more appropriate but accept that this is a matter of judgment, and have no very strong views on this point.

9(1) We are unsure why election to any of the posts mentioned should automatically exclude somebody from being a member of the Council. In particular it is difficult to see why being a member of a local authority is problematic in the respect. It may exclude a number of competent and useful members of the legal profession, and those from outside (consumer and LP members) and it is not understood why this part of the legislation is felt to be necessary.

11(2) While again this is perhaps not a major point, it is difficult to see why the person chairing the meeting who presumably will have no second or casting vote and is merely there to ensure the efficient process of the meeting itself, has to automatically be a member of the judiciary.

In summary, this seems a positive move, and we welcome the proposed legislation, and look forward to seeing the Council in action in due course.

Peter Foreman
Chief Executive
Traprain Consultants Ltd
21 June 2012
Introduction

Which? welcomes the introduction of the Scottish Civil Justice Council as a key part of the delivery of a better and more modern civil justice system for Scotland. The overarching scope of its remit, the principles by which it operates and a determination that it exists, as the legal system does, to serve the people of Scotland, will be the drivers for important changes and improvements.

Any changes to the Scottish civil justice system should be made with the general public – not the Government or the legal profession – at its core. Legal processes must be transparent, understandable without legal training as far as is possible, as inexpensive as possible and updated to make sense to citizens and to have relevance and meaning to them. Without an accessible and relevant system, the public will not be able to properly enforce their legal rights.

We are hopeful that the SCJC will be set up in this spirit and will have the consumer and public interest at its core, and will constantly seek to inform and communicate with court users and potential court users at every opportunity.

We are commenting only on Part 1 of the Bill, regarding the setting up of the Scottish Civil Justice Council.

Remit of the SCJC

1. The Council should be able to advise Government on policy issues for the development of the civil justice system, as currently happens with the English and Welsh CJC. This is a key function, along with that of pro-actively reviewing the system so that it remains fit for purpose and able to deal with the likely issues of the future.

The SCJC must be independent from Government and its recommendations not subject to political influence.

2. We support the Bill’s intention that the SCJC should promote methods of dispute resolution not involving the courts. Similarly the Council should be charged with making civil justice more accessible and fair.

3. As the intention is now to include administrative justice and tribunals, we hope that no gap will be allowed in service provision as the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) is abolished and before the SCJC is set up.

Engagement and communication with the public
4. We would like to see the SCJC’s proposed powers to consult and co-operate strengthened. They should have a duty to consult the public and communicate legal issues so that the voice of the court user and the public is at the heart of their work and every new system and improvement being considered.

5. We therefore suggest that Clause 3 should read ‘Council should consult’, instead of ‘Council may consult’ on proposed rules changes and on the annual plan.

6. For the same reasons, we believe SCJC must be able to commission research, as currently happens in England and Wales, and that ability should be underlined in the Bill.

Oversight

7. We have some concerns about the Court of Session’s right to reject or amend draft rules. It must be made explicit within the Bill that such rejections should be properly explained. There should be transparent criteria set out around how this right to reject or amend is to be used.

8. Similarly the Council’s annual report should go before the Scottish Parliament, as should an annual plan, if there is to be one.

Composition of the SCJC

9. In order to change the focus of the civil justice system from provider to user, we believe that half of the Council members must be non-lawyers. The focus must come from the perspective of those seeking to use legal services. If only a minority are lay members, as is suggested, it will be difficult for them to maintain the Council’s focus on issues from the public’s perspective.

10. We question whether it is necessary to have five judges on the Council. And additional lawyers could be on the committee which leads on rule drafting, for instance, so that there is sufficient technical skill available.

11. Lay members will bring outside skills, questions, knowledge and determination that will benefit the Council and legal services in Scotland. They are more likely to challenge existing systems and ideas.

12. We agree with Consumer Focus Scotland that at least the Deputy Chair should be a lay member, and that there is no reason a lay Deputy Chair should not chair meetings in the absence of the Chairperson.

13. The upper limit of 20 on the Council seems sensible in order to aid productivity, with the proviso that a wealth of other expertise can be called upon through the use of committees.

Establishment of committees

14. We support the idea of the Council establishing committees and co-opting non-Council members. It is important to bring in breadth and depth of experience from
wider society. We envisage much of the ‘heavy lifting’ of the new Council will be carried out in these committees. We would like more detail on how this would happen and see no reason why this process should not also be transparent.

**Appointments process**

15. Appointments to the SCJC should be in accordance with the public appointments procedures and the Public Appointments Commissioner for Scotland.

**Resources**

16. The proposal to have between five and 11 members of staff on the Council leads to concerns over whether the Council will have enough resource, particularly if taking on responsibility for administrative justice.

**Status of SCJC**

17. The Bill proposes a statutory advisory body rather than an advisory non-departmental public body (NPDB), which was the original proposal in the Scottish Civil Courts Review. We have no particular view on the status, provided that the Council is subject to the public appointments procedures.

Julia Clarke
Principal Advocate
Which?
21 August 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Scottish Government to the Scottish Committee of the Administrative Justice and Tribunals Council

Firstly, may I note my thanks for the work of the Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) in supporting the reform of the tribunals’ landscape in Scotland. Reports and the contribution by the Committee to this debate have been valuable. I am also interested in the work the Committee has been taking forward on administrative justice more generally.

With this in mind, I wish to consider what we may put in place in Scotland following the abolition by the UK Government of the AJTC. I have asked my officials to consider options for the long-term. Until I have received this advice, I am conscious that I do not want work to falter under the uncertainty of timing around when the abolition may take place. Therefore, I would like to confirm that my intention is to continue many of the functions of the Committee post abolition by setting up a non-statutory advisory committee.

This will see a small shift in responsibilities as the advisory committee can only at this stage be non-statutory. I believe that this will allow us some certainty and continuity whilst we consider long-term options for the work of tribunals and administrative justice in Scotland.

I have asked Norman Egan, Chief Executive of the Scottish Tribunals Service, to discuss this proposal with you in more detail.

I am copying this letter to the Justice Committee for their information.

Roseanna Cunningham
Minister for Community Safety and Legal Affairs
4 September 2012
Thank you for your letter of 18 September 2012 [see Annex]. The use of committees and any committee structure is essentially a matter for the Council. Having said this, I am keen that a committee structure is formed by the Council. This approach will ensure that detailed work can be carried out by those with the requisite skills and experience which will assist the Council to undertake its statutory functions. It would be my intention to appoint committee members with the relevant experience or specialisms onto the committees. For continuity there will be some Council members who are also committee members but, I expect that the majority of the committee members will not be members of the Council. It is hoped that the committee structure will provide the opportunity for those with particular areas of specialism or interests to contribute to the work of the Council and that this forum will ensure that their views are represented.

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. Beyond that, one approach to undertaking the statutory functions of the Council could be to have committees on policy and rule making. Alternatively, subject committees could be adopted along similar lines to the Civil Justice Council for England and Wales. The approach taken will be a matter for the Council.

Finally, I note that there have been a number of comparisons made between the Scottish Civil Justice Council and the Civil Justice Council for England and Wales in the written and oral evidence before the committee. I would like to take this opportunity to advise the committee that the proposed remit of the Scottish Civil Justice Council combines that of the Civil Justice Council and the Civil Procedure Rule Committee for England and Wales. The remit and membership of the Scottish Civil Justice Council requires to be considered in this context and not just by comparison with the Civil Justice Council for England and Wales in isolation.

The Rt Hon Lord Gill
Lord President and Lord Justice General
24 September 2012
Annexe

Letter from the Convener to the Lord President and Lord Justice General

The Justice Committee today took evidence from the Cabinet Secretary for Justice in our concluding evidence session on the Bill. During the session, the Committee questioned the Cabinet Secretary for his views on the Council establishing committees to undertake specific work. Mr MacAskill was supportive of the use of committees and said that they might provide additional flexibility to the Council.

I note that this was not an issue that the Committee explored with you during the evidence session, and Members agreed today that it would be helpful to hear your views. My colleagues requested that I should write to you and ask whether you might be able to comment on how you envisage committees being used by the Council. For example, some witnesses have suggested that committees might perform specialist functions such as drafting rules of court while others believed they might provide a route for those who are not members of the Council to contribute to its work.

As the Committee will shortly be considering its draft report on the Bill, I would be grateful if you were able to respond by no later than Friday 28 September, as the report must be agreed by the Tuesday of the following week.

With many thanks in anticipation for your help.

Christine Grahame MSP
Convener, Justice Committee
18 September 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Clerk to the Scottish Human Rights Commission

The Justice Committee is currently considering the general principles of the above Bill. As you will be aware, Part 2 of the Bill changes the rules on criminal legal aid so that some individuals will have to make a financial contribution, depending on their circumstances.

The Committee issued a call for written evidence on the Bill (of which you were notified). The deadline for providing submissions recently passed, with 18 submissions received from various organisations:


The Convener had hoped to receive evidence in relation to the human rights aspects (if any) of requiring individuals to fund their own criminal defence, but this issue was not touched upon in written submissions. The Convener was disappointed that no evidence was provided by the Commission, given its remit.

The Convener has therefore asked me to write to you to give the Commission a further opportunity to provide written views on the Bill. If you are able to respond, I would be grateful if you could provide a submission by no later than Wednesday 5 September 2012.

Peter McGrath
Clerk to the Committee
10 August 2012
Dear Ms Grahame,

Thank you for your letter of 10 August 2012 and for the opportunity to provide written comments on the general principles of the Scottish Justice Council and Criminal Legal Assistance Bill. Please find attached the Commission’s views in relation to Part 2 of the Bill: Criminal Legal Assistance.

The Commission would be pleased to answer any queries that the Justice Committee may have in relation to this submission.

Yours sincerely,

Prof. Alan Miller
Chair
Scottish Human Rights Commission
Submission to the Justice Committee on the Scottish Justice Council and Criminal Legal Assistance Bill

The Scottish Human Rights Commission

September 2012

The Scottish Human Rights Commission (Commission) is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-ordinating Committee of NRHIs at the United Nations. The Commission is the Chair of the European Group of NRHIs and it is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

1. Introduction

The Commission welcomes the opportunity to provide written comments on the general principles of the Scottish Justice Council and Criminal Legal Assistance Bill. The Commission would like to highlight the relevant human rights standards in this context and express its views in relation to a number of provisions of the Bill. The Commission will focus on Part 2 of the Bill: Criminal Legal Assistance.¹

2. Relevant human rights standards

- Article 6 (3) of the European Convention on Human Rights.

3. Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Article 6 provides that “in the determination of ... any criminal charge against him, [sic] everyone is entitled to a fair and public hearing”. Article 6

¹ The Commission has highlighted the importance of criminal legal aid in the context of access to justice in number of cases. See for example, Commission’s response to Carloway Review and Victims and Witnesses Bill at www.shrc.com
incorporates many aspects of the due process of the law, including the right to free legal assistance where needed and the right to access to court.

In Quaranta v. Switzerland, the Court reiterated that:

“while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to ‘defend himself in person or through legal assistance ...’, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.”

However, the Court also pointed out that Convention is intended to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

It is clear that the right to free legal assistance is not an absolute right under the Convention. The right to free legal aid for an accused depends on two circumstances; a) that the accused lacks sufficient means to pay for legal assistance and b) that the provision of legal aid is required by the interests of justice. In relation to the first the level of proof required for an accused that he or she lacks resources should not be set too high. In relation to the second, the Court found that in determining what is required in the interests of justice consideration should be given to a number of factors such as the gravity of the offence, the likely penalty if convicted, the complexity of the case, the principle of equal treatment of the parties and the personal situation of the accused (e.g. his or her mental health or the existence of a mental disability, linguistic skills, etc).

- Article 47 of the EU Charter of Fundamental Rights.

…Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The guarantee under Article 47 restates the core protection offered by Article 6(1) of the ECHR. The Charter reaffirms the indivisible, universal values of human dignity, freedom, equality and solidarity within Europe and it is based on the principles of democracy and the rule of law.

- Article 14. 3 (d) of the International Covenant on Civil and Political Rights.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:…

---

2 24 May 1991, § 30, Series A no. 20
3 Lloyd and others v United Kingdom, 1 March 2005, para 134, “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.”
4 Benham v United Kingdom, (19380/92) 23 January 1995
5 See also Arts. 10 and 11 of the UDHR
(d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

In this respect the UN Human Rights Committee\(^6\) has expressed its view that: “The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so…”\(^7\)

While Article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.

### 3. Criminal Legal Assistance

The Commission has significant concerns about this part of the Bill. The Commission notes that in particular sections 17, 19, 20 and 21 would have a considerable impact on access to justice.\(^8\) The Commission observes that any change to the rules on criminal legal aid need to be objectively and reasonably justified by the Scottish Government.

The right to access to a court is one of the most basic prerequisites of an effective system of justice.\(^9\) In order for access to be effective it is sometimes required that a person receives legal representation.\(^10\) The Commission would like to emphasise the obligation on States to provide effective legal assistance in terms of Article 6 of the ECHR. Article 6 sets out a number of constituent rights. These are designed to guarantee the fulfilment of the overall right to a fair trial. The issues being considered by Bill principally arise from Article 6(3)(c), the right to legal assistance.

The right to legal assistance fulfils a number of functions. It is designed to ensure adequate representation in the case, to prevent abusive coercion by the authorities,\(^11\) to ensure equality of arms to the accused, to provide vigilance by the defence over procedural regularity on behalf of the client and in the interest of justice. It is important to note that the general rules and

---

\(^6\) The UN Human Rights Committee is the body of independent experts charge with monitoring compliance with the International Covenant on Civil and Political Rights.

\(^7\) General Comment No. 32, CCPR/C/GC/32, 23 August 2007

\(^8\) Access to justice is a broad concept which involves substantive and procedural guarantees that ensure effective and fair remedies for people including effective legal assistance, adjudication, enforcement and public accountability.

\(^9\) Golder v United Kingdom, 4451/70) [1975] ECHR 1

\(^10\) Airey v Ireland, (6289/73) [1979] ECHR 3

\(^11\) Salduz v Turkey para 54.
standards of international human rights law, including the principle of non-discrimination, apply to the provision of legal aid.

The Commission notes that many of those in the criminal justice system are the most marginalised and vulnerable in society in terms of poverty, educational disadvantage, mental health problems, etc. In light of this, the Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms of affordability and the interest of justice.

While it is important to maximise the value of legal aid expenditure, in a time of austerity, it is essential to maintain a fair, high quality and equitable system which maintains public confidence and guarantees access to justice. The Commission notes that the overall cost of criminal legal assistance has remained roughly the same over recent years. Furthermore, initial applications for legal assistance have dropped from 234,472 in 2006 to 131,469 in 2011 and the number of cases paid to solicitors has also dropped from 262,983 to 142,690 during the same period. Given these facts the Commission questions whether the introduction of a wider scheme of contributions can be reasonably and objectively justified as it may impact on the right to a fair trial.

The Commission would welcome clarification of the Governments’ intention in section 17 of the Bill. The Commission is concerned that the effect of section 17, which allows for the introduction of contributions in circumstances where advice and assistance is automatically available, may limit the individual rights of people in legal proceedings. For example, should individuals be expected to pay contributions when they ask for legal assistance in police stations this may increase the likelihood that they would waive their right for purely economic reasons. This may not be a valid waiver in terms of ECHR given the recognised vulnerability of people in detention and the duty of the state to provide effective legal assistance.

While sections 19 and 20 seem to ensure that an applicant in receipt of ‘passported’ benefits will be eligible for criminal ABWOR or criminal legal aid with no contribution from income, they might still be required to contribute from any disposable capital. The Commission is concerned that marginalised people could become excluded from the legal aid system or find themselves having to pay an unaffordable contribution towards the cost of their defence out of their benefit payments (such as disability living allowance and personal independence payments).

---

14 Keenan v The UK (27229/95)
The term “disposable income” in this section presents definitional challenges. People living in poverty are more likely to have a variable rate of outlays, depending on levels of income week by week and are less likely to have to bank accounts with regular direct debits. There is of course a difference between the impact of a contribution on a single man with a disposable income of £68 and a family of seven with the same disposable income. The Commission believes that the threshold for disposable income at or above which a contribution is payable of £68 per week is relatively low. Unavoidable expenses, which will be subtracted from eligible income, should also include household repairs, transport costs and clothing. In order to preserve access to justice adequately, the figure selected should be justifiable in terms of what is considered a necessary disposable income for a decent standard of living in Scotland.

There are significant differences between the civil and criminal systems in Scotland which render them incomparable. For example, in criminal cases the accused does not have control over the case as the Procurator Fiscal decides what action is appropriate (including whether to prosecute, offer a direct measure or to take no action in the case). In addition, there is no provision for an acquitted person to seek recovery of the cost of their contribution. These factors alongside with the obligation to provide legal assistance in criminal proceedings should be taken in consideration by the Committee in view of the Bill.

Section 21 provides for contributions for appeals where the appellant is deceased. This provision would allow the board to determine that the full cost of such an appeal be paid by the estate or relatives. The Commission is concerned that this may have the potential to discourage the family of a deceased appellant continuing to attempt to clear his name. This provision also seems to suggest the authorised person may also have to take on a contribution that may not have been payable by the deceased if he survived (and was eligible for criminal ABWOR or criminal legal aid). This is unclear in the absence of regulations.

The Commission would like to draw the Committee’s attention to the difficulty of assessing the full human rights implications and impact of the changes, until regulations are made setting out the scale of contributions. In this respect, the Commission suggests that a sunset provision be incorporated into the Bill in order to review the impact of any contributions system on access to justice.

4. Conclusion

The term “disposable income” is defined in Section 42(1) of the Legal Aid (Scotland) Act 1986 as a person’s income after making such deductions and allowances as regulations may prescribe. EHRC (2010) How Fair is Britain, Chapter 12; Standard of living. Available at http://www.equalityhumanrights.com. Disabled people in all age categories are more likely than non-disabled people to have no bank account. Some ethnic minorities are particularly likely to lack access to standard financial products, especially Pakistani and Bangladeshi women who are three times as likely as White men and women not to have a bank account.
The Commission considers that assessing financial eligibility for criminal legal assistance and the level of any contribution requires further analysis and clarity. It is imperative that any changes to the rules on criminal legal aid do not create the risk that access to justice will be impaired, particularly for people on low incomes and other marginalised groups. The Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms particularly of affordability and the interests of justice.

The Commission would be pleased to answer any queries that the Justice Committee may have in relation to this submission.

SHRC

September 2012
Firstly, may I note my thanks for the work of the Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) in supporting the reform of the tribunals’ landscape in Scotland. Reports and the contribution by the Committee to this debate have been valuable. I am also interested in the work the Committee has been taking forward on administrative justice more generally.

With this in mind, I wish to consider what we may put in place in Scotland following the abolition by the UK Government of the AJTC. I have asked my officials to consider options for the long-term. Until I have received this advice, I am conscious that I do not want work to falter under the uncertainty of timing around when the abolition may take place. Therefore, I would like to confirm that my intention is to continue many of the functions of the Committee post abolition by setting up a non-statutory advisory committee.

This will see a small shift in responsibilities as the advisory committee can only at this stage be non-statutory. I believe that this will allow us some certainty and continuity whilst we consider long-term options for the work of tribunals and administrative justice in Scotland.

I have asked Norman Egan, Chief Executive of the Scottish Tribunals Service, to discuss this proposal with you in more detail.

I am copying this letter to the Justice Committee for their information.

Roseanna Cunningham
Minister for Community Safety and Legal Affairs
4 September 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Lord President and Lord Justice General to the Convener

Thank you for your letter of 18 September 2012 [see Annexe]. The use of committees and any committee structure is essentially a matter for the Council. Having said this, I am keen that a committee structure is formed by the Council. This approach will ensure that detailed work can be carried out by those with the requisite skills and experience which will assist the Council to undertake its statutory functions. It would be my intention to appoint committee members with the relevant experience or specialisms onto the committees. For continuity there will be some Council members who are also committee members but, I expect that the majority of the committee members will not be members of the Council. It is hoped that the committee structure will provide the opportunity for those with particular areas of specialism or interests to contribute to the work of the Council and that this forum will ensure that their views are represented.

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. Beyond that, one approach to undertaking the statutory functions of the Council could be to have committees on policy and rule making. Alternatively, subject committees could be adopted along similar lines to the Civil Justice Council for England and Wales. The approach taken will be a matter for the Council.

Finally, I note that there have been a number of comparisons made between the Scottish Civil Justice Council and the Civil Justice Council for England and Wales in the written and oral evidence before the committee. I would like to take this opportunity to advise the committee that the proposed remit of the Scottish Civil Justice Council combines that of the Civil Justice Council and the Civil Procedure Rule Committee for England and Wales. The remit and membership of the Scottish Civil Justice Council requires to be considered in this context and not just by comparison with the Civil Justice Council for England and Wales in isolation.

The Rt Hon Lord Gill
Lord President and Lord Justice General
24 September 2012
Annexe

Letter from the Convener to the Lord President and Lord Justice General

The Justice Committee today took evidence from the Cabinet Secretary for Justice in our concluding evidence session on the Bill. During the session, the Committee questioned the Cabinet Secretary for his views on the Council establishing committees to undertake specific work. Mr MacAskill was supportive of the use of committees and said that they might provide additional flexibility to the Council.

I note that this was not an issue that the Committee explored with you during the evidence session, and Members agreed today that it would be helpful to hear your views. My colleagues requested that I should write to you and ask whether you might be able to comment on how you envisage committees being used by the Council. For example, some witnesses have suggested that committees might perform specialist functions such as drafting rules of court while others believed they might provide a route for those who are not members of the Council to contribute to its work.

As the Committee will shortly be considering its draft report on the Bill, I would be grateful if you were able to respond by no later than Friday 28 September, as the report must be agreed by the Tuesday of the following week.

With many thanks in anticipation for your help.

Christine Grahame MSP
Convener, Justice Committee
18 September 2012
Thank you for your letter of 21 September 2012 [see Annexe].

In your letter you indicate some surprise when Colin Lancaster “proposed that the PDSO could act as a safety net”, if a solicitor withdraws from acting due to non-payment of the contributions and no other solicitor is willing to take the case on. You were further surprised when the Cabinet Secretary for Justice made the same suggestion in similar terms a week later.

I would like to clarify that Mr Lancaster did not “propose” such a move. It was in fact the Committee Convener who, during the evidence session with the Law Society and Edinburgh Bar Association, specifically raised the question of a possible role for PDSO. According to the official report, in response to a question from the Convener as to whether you saw a possibility of PDSO acting for those whose solicitor had withdrawn due to non-payment, you advised that the Society had been assured that PDSO would collect contributions, as with private solicitors, and observed “That will provide a safety net in that situation”. Mr Harrower of the EBA also commented on the idea of PDSO being a safety net.

When the Convener subsequently raised the same issue (withdrawal from acting) with Mr Lancaster and Mr Thomas, Mr Lancaster specifically referred back to the previous evidence and the discussion with that panel of the possibility of PDSO acting as a safety net. Mr Lancaster simply responded to the suggestion that had already been made by the Convener, and indeed the reference by you to a safety net, and referred to a previous occasion on which such a safety net had been put in place. Given the discussion that had gone before, it would in my view have been rather more surprising had Mr Lancaster not offered some observations on the Convener’s proposal.

It should be clear from reading the official report that this was not a proposal that had been pre-conceived by the Board: indeed, the Convener clearly recognised that this was an emerging idea and would have to be given further thought.

I understand that you have written to the Scottish Government in similar terms and that they will be responding to you. My understanding of Mr MacAskill’s opening statement is that he too was responding to points raised in the previous week’s evidence. His statement suggests that, while he did not think it likely to be an
extensive problem, he accepted that in some cases a solicitor may withdraw, that a safety net may be needed in some such cases and that such a safety net could be provided by PDSO if no other agent were able to act. He gave the undertaking that the Government would work closely with the Board and the Law Society to ensure that practical arrangements could be put in place. Later in his evidence, he stressed that he would wish the safety net idea to be discussed with the Society and that there might be other ways of dealing with the issue.

On reading both relevant extracts from the official report, I'm not sure why the Society would be surprised that a proposal put to them by the Committee would also be discussed with the Board, or that the Cabinet Secretary would have picked up on this when he came to give his own evidence.

As you and your colleagues will recall, much of our discussion between the Board and the Criminal Legal Aid Negotiating Team since last October has focussed on the technicalities of the contributions regime, such as transfers, or how to manage concurrent cases. Two main risks were identified by the Society during these discussions. First, the Society was concerned about the impact of the proposed assessment arrangements on vulnerable clients, such as those in receipt of Disability Living Allowance. This point was also made to the Justice Committee and the Cabinet Secretary responded to it in his evidence.

The second risk – as the Society perceived it – was that some firms would systematically forego the collection of contributions as a way of gaining a commercial advantage over other firms. Much of our discussions were therefore about what, if anything, the Board and/or the Society could or should do to mitigate that risk. I do not recall during these discussions the Society suggesting that there was a significant risk of there being a widespread problem of unrepresented accused such that that a safety net of any kind would actually be required.

Clearly, if the Society perceives that the risk is two-fold - that there will be some firms who will always be willing to act for those who do not wish to pay, but that there may also be some accused who do not pay and will be unable to find a firm willing to act, leading to a risk of them appearing unrepresented - we can have further discussions with you about how these risks might be mitigated. The Cabinet Secretary has given a clear indication that he would like such discussions now to take place and we are happy to do so. This can be part of our on-going discussions with the Society about how the scheme could operate.

I note that you say that initial analysis of the figures would suggest that the use of the PDSO in cases of non-collection would cost the Legal Aid Fund more than the contribution system would save. I would be interested to see how you have arrived at such a conclusion and what figures you have used as an estimate of the number of cases where solicitors would withdraw from acting for non-payment.

Although this is a situation which appears somewhat difficult to predict, we would share the Cabinet Secretary’s view that this is not likely to be a significant risk.
We would very much hope that if in the event Ministers decide that a safety net of some kind is to be put in place – whether by PDSO or otherwise – it would only very rarely be required.

As this is not a proposal that had been identified prior to the recent evidence sessions, no work had been carried out by the Board to assess the cost per case or other details of a PDSO-based solution. However, we would be happy to work with you and Scottish Government colleagues as proposed by the Cabinet Secretary to urgently look at this issue, including whether a safety net is required and if so, how it might operate with a minimum of cost.

I am copying this letter to Colin McKay of the Scottish Government.

Lindsay Montgomery
Chief Executive
Scottish Legal Aid Board
27 September 2012

Annexe

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

**Letter from the Law Society of Scotland to the Scottish Legal Aid Board**

**Contributions in Criminal Legal Assistance**

It came as a surprise to the criminal legal aid negotiating team when, in the course of his evidence to the Justice Committee last week, Dr Colin Lancaster proposed that the “PDSO could act as a safety net”. We were surprised further when the Cabinet Secretary for Justice also made the suggestion to the Committee this week, in similar terms.

We have been discussing the proposed contributions system with the Scottish Government and the Board since last October. At no stage has the government or SLAB every suggested that the PDSO could act as a safety net. Indeed, the first invitation to the Law Society to discuss this issue came from the Cabinet Secretary in the course of his oral evidence on Tuesday.

On an initial analysis of the figures it would seem that the use of the PDSO in cases of non-collection of contributions would cost the legal aid fund more than the contributions system would save. We assume that SLAB has carried out some work in relation to this proposal at least in terms of preparing a financial breakdown on a cost per case basis. We would be grateful if you could provide us with these details as soon as possible.

Oliver Adair
Legal Aid Convener
Law Society of Scotland
21 September 2012
Civil Justice Council

I have been asked by the Council of the Sheriffs’ Association to raise a matter about the shrieval membership of the Civil Justice Council proposed in the Civil Justice Council and Criminal Legal Assistance Bill.

In paragraph 64 of the report of the Justice Committee on the Bill, it is stated that the Bill proposes “four judges including a minimum of one Court of Session judge and one sheriff” on the Civil Justice Council. In fact, clause 6(1)(e)(ii) of the Civil Justice Council and Criminal Legal Assistance Bill provides for the inclusion of “1 sheriff principal or sheriff”.

The Sheriffs’ Association would be very concerned if the Council contained no sheriff among its members and is of the view that there should be at least two sheriffs on the Council. The current membership of the Sheriff Court Rules Council includes, by statute, three sheriffs: see section 33(1)(a) of the Sheriff Courts (Scotland) Act 1971. The bulk of civil litigation is conducted in the sheriff court. On implementation of the reforms proposed in the Gill Report on the Civil Courts Review, more work will be given to the sheriff court. In these circumstances, it is of concern to the Sheriffs’ Association that the shrieval membership of the Civil Justice Council could be reduced to one or none at all. Furthermore, inevitably there are differences of approach between rural and urban courts, and it is difficult to harness diverse experience with a singular or non-existent shrieval representation.

We hope, therefore, that serious consideration will be given to ensuring that the Bill provides for at least two sheriffs to be members of the Council.

Sheriff Nigel Morrison
Sheriffs’ Association
22 October 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Response from the Scottish Government to the Justice Committee
Stage 1 Report

I write in response to the Justice Committee’s Stage 1 Report on the Scottish Civil Justice Council and Criminal Legal Assistance. I would like to take this opportunity to thank the Committee for its careful consideration of the Bill and all those who contributed to that consideration by giving evidence.

I am pleased that the Committee supports the general principles of the Bill. A number of important issues have been raised during Stage 1 proceedings and a detailed response to each of these is attached in the Annex to this letter.

I hope the Committee finds this information helpful in its further consideration of the Bill.

Kenny MacAskill MSP
Cabinet Secretary for Justice
18 October 2012
Scottish Civil Justice Council and Criminal Legal Assistance Bill
Response to the Justice Committee Stage 1 Report

PART 1: SCOTTISH CIVIL JUSTICE COUNCIL

Status of the Council

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.

I note the Committee’s views regarding the status of the Council. I believe the Bill provisions ensure a sufficient level of scrutiny of the Council’s activity. These include requirements for the Council to publish its recommendations, lay an annual report and business programme before Parliament, and for the Lord President to publish a statement of appointment practice. On the issue of appointments, and as I stated to the Committee when giving evidence on the Bill, I am pleased that the Lord President has confirmed his commitment to set out a process that will draw on the principles set out by the Office of the Commissioner for Public Appointments in Scotland.

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

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.

I note and welcome the Committee’s view.

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.

In relation to the functions of the Council in relation to policy matters and what overlap there might be with the functions of the Scottish Government and the Scottish Parliament, I hope it is helpful if I provide some clarification.

Under the Bill provisions, the Council has explicit functions to make recommendations to the Lord President “on the development of, and changes to, the civil justice system” and to “provide such advice on any matter relating to the civil justice system as may be requested by the Lord President” (under sections 2(1)(d) and (e), respectively).
Under section 2 of the Judiciary and Courts (Scotland) Act 2008 (“the 2008 Act”) the Lord President has a duty “for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts.” It is in this context that the Council’s duties to advise the Lord President should be viewed. The Council’s advisory functions are intended to assist the Lord President in fulfilling his duties under the 2008 Act.

The power of the Council to “provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system” (under section 3(2)(f)) is included to make it clear that the Council may advise or make recommendations to Ministers, for example, in relation to matters which might require primary legislation. The inclusion of a member of Scottish Government staff on the Council’s membership will help to ensure that the Council is aware of and can take into account potential links to wider Scottish Government policy initiatives, and vice versa.

I hope the Committee will be reassured that the Council’s role will be essentially advisory, and that its functions under the Bill will not affect the capacity of the executive, the legislature and the judiciary to continue to make those decisions which appropriately rest with them.

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.

I note the Committee’s view. I believe it essential that the Council and the Lord President are afforded sufficient autonomy – within certain parameters, as the Committee has pointed out - to focus on implementation of the forthcoming programme of civil courts reform.

Consideration of rules by Court of Session (section 4)

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.

I note the Committee’s view and would like to take this opportunity to mention that this was a key consideration when developing policy for the new Council. The composition of the Council and its role in drafting and considering rules is intended to ensure the appropriate and most efficacious rules can be put in place. In addition, replacing the two existing civil rules councils with a single body which has an overview of the civil justice system should assist in mitigating the risk of rules being rejected by the Court of Session.

Appointment of Council members by the Lord President

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...to help ensure that individuals from a wide spectrum of backgrounds and interests have input into the Council’s work.

I note the Committee has some concerns about the representation of end users on the Council. I would like to provide some reassurance in this regard.

The Bill provisions allow a majority of ‘non-legal’ members – up to 12 of the maximum 20 Council members need not be judges or members of the profession. Across 29 members of the existing civil rules councils, the legislation provides that only 2 (both Sheriff Court Rules Council appointments) are to be ‘lay’ members.

I understand that the Committee has heard evidence pointing to the conclusion of the Spencer Review in 2008 that the membership of the Civil Justice Council in England and Wales was weighted too heavily towards the judiciary and the profession and that it is now comprised of a more even balance of lay and legal members. I would like to point out that the Civil Justice Council in England and Wales is a body primarily concerned with matters of policy. Its functions under section 6 of the Civil Procedure Act 1997 (“the 1997 Act”) are as follows:

(3) The functions of the Council are to include—

(a) keeping the civil justice system under review,
(b) considering how to make the civil justice system more accessible, fair and efficient,
(c) advising the Lord Chancellor and the judiciary on the development of the civil justice system,
(d) referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and
(e) making proposals for research.

The balance of the Civil Justice Council’s membership is not specified in the establishing legislation, which leaves the matter to the Lord Chancellor’s discretion. The 1997 Act provides that the Council must include members from certain specified categories but that the overall number of members and the number of members to be drawn from each category is to be decided by the Lord Chancellor, after consulting the Lord Chief Justice. Further, and importantly, the Civil Justice Council does not have responsibility for drafting rules of court. That responsibility lies with
the Civil Procedure Rule Committee. The Civil Procedure Rule Committee has between 14 and 17 members, 2 of which are lay and the remainder either judges or practitioners.

In addition, and as the Justice Committee has noted, much of the work to be taken forward by the Council will be carried out at committee level, where I expect there to be ample opportunity for persons and organisations representing the perspective and experience of end users to become involved.

The Committee has also noted that the Scottish Ministers will have a power under the Bill to amend the balance of the Council’s membership if that were deemed appropriate. Once the Council has carried out its immediate task of civil courts reform implementation that may prove an appropriate time to consider whether the membership needs any alteration. As the Lord President identified in his evidence before the Justice Committee, after the proposed programme of civil courts reform has been implemented, the membership composition of the Council may require to be amended to reflect changing priorities.

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.

I understand some witnesses have expressed concerns around a perceived lack of transparency around the appointments process under the Bill provisions. I hope the following is of assistance in explaining why such provision was not included on the face of the Bill.

The publication of the statement of appointment practice will be a new requirement. And under the new arrangements, the Lord President must consult Ministers before appointing or removing consumer representative members or any discretionary appointments and must consult the Law Society and Faculty when appointing solicitors or advocates.

As I stated in evidence to the Committee the Public Appointments Commissioner for Scotland regulates Ministerial appointments. The Commissioner will therefore have no role in respect of the Lord President’s appointments to the Council. The principles set out by the Office of the Commissioner for Public Appointments are specifically designed for Ministerial appointments to public bodies. Furthermore, they are non-statutory, and may change from time to time. It would not seem appropriate to bind the Lord President in primary legislation to a set of principles which are not themselves in primary legislation, are designed for a different purpose, and are susceptible to change.

The Lord President has nevertheless set out his intention to draw on the principles set by the Commission for Ethical Standards in Public Life in Scotland in setting out the appointments process. I welcome that, and I trust that appointments will be made fairly, and in an open and transparent manner. However, I consider it
appropriate to leave the detail of appointments to the Lord President and the Council itself (which I would expect to take a view on such matters). I anticipate that different appointments procedures will apply depending on the nature of the appointment. For example, the Lord President and the Council may consider it appropriate that an expert in a particular area of law, or a person holding a certain office (such as Principal Clerk), should be appointed to the Council; it may not be appropriate in such a case for the OCPAS procedures to be followed in respect of these appointments.

I consider that the arrangements for making appointments, and the new requirement to publish the statement of appointment practice in particular, provide for a sufficiently fair, open and transparent process, while affording the Lord President and the Council the degree of flexibility necessary. Having considered the matter carefully, I am not minded to propose any further provision in the Bill in this regard.

Disqualification and removal from office (section 9)

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.

I note the Committee’s view and the Lord President’s comments.

Chairing of meetings (section 11)

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.

Having considered the views expressed in evidence regarding the role of lay members on the Council, I agree that lay members should not be precluded from the position of deputy chair. I consider it appropriate that the selection of the deputy chair should be left to the Council. I therefore propose to amend the Bill so as to remove the requirement at section 11(4) that the deputy chair must be elected from the judicial members of the Council.

Committees (section 13)

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.

I note the Committee’s views.
Accountability and transparency

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 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.

I note the Committee’s views. I would also like to take this opportunity to inform the Committee that, subject to Parliamentary approval of this Bill, it is intended to bring an order under the Freedom of Information (Scotland) Act 2002 (FOISA) to Parliament next year to extend FOISA coverage to the Scottish Civil Justice Council and to the Criminal Court Rules Council.

Administrative justice

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.

I note the Committee’s view. I and the Minister for Community Safety and Legal Affairs will keep the Committee informed of developments in this regard.

Resources

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.

The Committee will wish to be aware that the Scottish Government’s consultation on court fees concluded in July of this year. We are currently considering the responses received and intend to publish a consultation report along with our final proposals by early November.

PART 2: CRIMINAL LEGAL ASSISTANCE

Contributions from persons detained by the police

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.
I am pleased to see that while the Committee notes this provision could be seen to run counter to the overall aim of this part of the Bill, it understands that it is important to have scope to accommodate emerging situations within our overall policy intention of introducing contributions to criminal legal aid. I am sympathetic to the argument that solicitors find it difficult to assess likely contribution when a client is in police custody. I therefore intend to discuss potential to use this provision with the Law Society at the earliest opportunity.

Scheme of eligibility

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.

It may be helpful to describe the content and purpose of the scheme of eligibility, which is intended to supplement/provide direction for the use of the provisions that will be contained in subordinate regulations.

The scheme will provide direction to solicitors granting ABWOR on how to apply the undue hardship test. Separate guidance will encourage solicitors to refer applications to the Board for applicants where the solicitor believes that the applicant might suffer undue hardship as a result of the contribution the applicant would be due to pay. In those cases the Board can then consider the application afresh.

It is not considered that once the scheme is initially approved and published that it would be a static document. As the scheme is concerned with what constitutes undue hardship for a client, or the dependents of a client, it is important that the scheme can be flexible and responsive to emerging needs. I therefore envisage that the scheme would be a “living document” and one which the Board would keep under constant review. For example, the Board produces guidance on how it applies the legal aid legislation. This is shared with the Law Society of Scotland and other professional groups such as the Family Law Association before publication in the Legal Aid Handbooks which are published on the Board’s website. This enables the Board to respond to emerging concerns or to analysis which identifies the need for guidance.

The Board anticipates that the scheme would be reviewed in a similar way. I expect that Scottish Ministers’ clearance of any revisals to the scheme could be obtained in most cases in just a few days. If the scheme were contained in a statutory instrument we could find ourselves in a situation where necessary, and perhaps urgent, changes are required but a Parliamentary process must be followed which prevents quick dissemination of the change. This could have a detrimental impact on those seeking criminal legal assistance in the interim and those providing it. If the instrument were subject to affirmative process, the process of obtaining Parliamentary approval would be longer still. It is vital that where we are concerned with undue hardship we are able to adjust and adapt quickly. I therefore support the current provisions in the Bill.
A commitment has been made to provide a draft scheme to the Committee alongside draft regulations before Stage 2 and I would suggest that the SLC may wish to consider this issue again at that point.

Contributions in appeals on behalf of deceased persons

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.

Section 21 could indeed be applied in this way and it could also be applied to require a smaller contribution than would be required of the deceased person. What this provision is intended to achieve is flexibility for the Board to determine the appropriate level of contribution for the circumstances of the case. The circumstances of each case will be the key factor in determining whether it is better for the Board to seek a contribution from the deceased’s estate or from the authorised person. Because of that, it is impossible to lay down a hard and fast rule in legislation without creating inflexibility.

Refunds

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.

I note the Committee’s invitation to consider further the issue of recovery of contributions to criminal legal aid in certain circumstances of an acquittal. I know this was raised in evidence and that I also commented on the issue.

Firstly, in my view this Bill does not have the necessary scope to make provision about refunds in privately-funded cases. Even if I were persuaded of the case for recovery of contributions, I consider it would be wholly inequitable to proceed with refunds in partially publicly-funded cases without the ability to make similar provision for those accused who have paid for their own representation in full.

Recovery of costs in defending criminal proceedings has never been a feature of the Scottish criminal system, whatever is the case in other jurisdictions.
Secondly, some comparison on this issue has been made with the English system and I consider that this comparison may not be a fully rounded one. In England & Wales, recovery of costs applications are made to the Crown. The process applies to legal aided and non-legal aided accused. The recovery of costs is recovery of all the defence costs, not just a legal aid contribution. Even more importantly, the provision cuts both ways in England. It is possible for the Crown to recover costs from a convicted defendant. There is no system of costs in the first instance criminal courts in Scotland and this is not proposed.

In our proposals for developing the legal aid system in Scotland we have paid attention to the approaches of our English legal aid colleagues in for example, the level of contributions expected and in the scope of legal aid. Our proposals for collecting appropriate contributions to criminal legal aid are much more generous than the contribution levels used in England and Wales. We have not followed suit on these aspects of legal aid as they do not fit with our commitment to providing access to justice for as many people as possible and I would not wish to follow the approach taken in England on the question of recovery of costs.

Finally, unlike civil proceedings, prosecution is undertaken in the public interest, on the basis of the test outlined in the prosecution code, that there is sufficient admissible evidence and that it is in the public interest to take action. An acquittal does not equate to a finding that it was not in the public interest to take proceedings. The burden of proof on the Crown is rightly a high one of proof beyond reasonable doubt.

It is not my intention to undermine the intentions of either the witnesses or the committee but I have considered the wider implications of this proposal. For example, if a person was not to be awarded a refund on acquittal, as was suggested during the evidence session, a refusal to refund may be regarded as a weakening of the not guilty verdict. This is not what I think the Committee intends in suggesting that refunds should be available for some acquittals but I think this is likely how refusals to refund would be perceived. I also expect that any decision about whether a refund should be granted would have to have an appeal mechanism, potentially further prolonging a person’s involvement with the criminal justice system.

This demonstrates the complexity and sensitivity of the suggestion, the difficulty that would be encountered if it were to be put in place, and finally the potential to increase the legal aid bill – setting it against the point made by the committee in paragraph 232.

Overall, then, and on balance, I am not persuaded that it would be right to make provision for the recovery of contributions on acquittal, either as a general rule or in some cases.

**Level of contributions**

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

I fully understand the Committee’s concerns that the impact of any changes on legal aid contributions should be reviewed regularly. I will repeat the assurance given in my evidence to the Committee that the regulations will be subject to regular review particularly with regard on their impact on access to justice, and that any amendments that need to be made to regulations to address areas of concern will be made.

Following regulatory or legislative changes to the operation of legal aid, the Board and the Scottish Government monitor and review the changes to ensure that they are achieving the intended aims. The provisions in this Bill will be closely monitored by the Board and the Scottish Government, working closely with the Law Society of Scotland.

I can also reassure the Committee that these proposals will not lead to an incremental increase in contributions. It is, and will remain to be, our intention that contributions will be reasonable in light of the financial circumstances of the applicant. As confirmed by Scottish Government officials during Stage 1 evidence, the Bill specifies disposable income of £68 a week as the level below which contributions cannot be levied, however that figure can be amended upwards by regulations.

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.

One of the principles we applied is to have consistency in contribution thresholds between the different aid types used in criminal cases (essentially, ABWOR when pleading guilty, and criminal legal aid when pleading not guilty). The disposable income “free threshold” has been set at £68 per week on the face of the Bill, which is the weekly equivalent figure of the free threshold figure for civil legal aid and ABWOR. It is more generous that the threshold used in England and Wales, which is £65 per week.

Another guiding principle is to set levels which are broadly consistent with wider public provision – in other words, not to require any contribution from people whose income would be regarded as below the level at which state support is essential. The starting level for contributions has historically been aligned to Income Support levels, and £68 is just over the personal allowance level for a single person over 25 at 2011-12 rates.
The third principle we have adopted is to avoid sharp thresholds, leading to a large difference in contribution based on a small difference in income or capital. The details of this are set out below.

The graduated approach is in marked contrast to the approach in England and Wales, where a person over the financial threshold is required to pay their full costs (in the lower courts) or 90% of their monthly disposable income (in the Crown Court). (In other words, a defendant in the Magistrates Court with an annual household disposable income of £3,400 (the threshold equates to £283.17 per month) receives no legal aid at all.)

For disposable capital, the threshold has been set at £750 on the face of the Bill which is higher than the average case costs for all criminal ABWOR and summary criminal cases. Excess capital above £750 will also lead to graduated contributions namely 50% contribution from the range £750 to £1,000, 75% from £1,000 to £1,250, and 100% over £1,250. In civil legal aid, the full contribution of capital is required where disposable capital exceeds the threshold.

The new undue hardship test means that more people will qualify for criminal ABWOR than at present as household outgoings cannot be taken into account in the present ABWOR assessment. This means that there are currently accused who cannot get representation if they want to plead guilty at the start of the case. As a result, there is currently a perverse incentive of having to plead not guilty to obtain summary criminal legal aid. Doing so may not always be in the accused’s best interests, and is certainly not in the best interests of the justice system.

I agree that the regulations and income and capital thresholds must be kept under regular review. The Scottish Government and the Board will do this alongside the annual uprating of the A&A Keycard.

How a contribution will be calculated will be set out fully in regulations. It is difficult to summarise what is a fairly complicated equation, but put broadly the contribution is the result of multiplying the length of the case by part of the accused’s income and by a multiplier.

Where a person’s disposable income exceeds £68 per week, there are graduated contribution rates: higher rates of contribution apply to higher disposable income levels. Using graduated rates in this way, as opposed to setting a fixed percentage of disposable income on the excess over £68 is fairer to applicants on lower incomes as a lower proportion of their income is taken into account in calculating the amount of contribution payable. For civil legal aid, weekly disposable income between the £68 and £222 threshold results in a fixed contribution rate of 33% applied to all income in that range. The proposals here range from 20% to 70% for the 8 week period of a JP ABWOR case to 5% to 30% for the 52 week solemn and criminal appeals cases.

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.

Administrative delays led to the publication of the Equality Impact Assessment for the Bill later than intended and I would like to apologise for the Committee for the information contained in it not having been provided at an earlier stage in the Bill proceedings.

Careful consideration has been given to any potential impact on different equality groups arising from the Bill provisions in respect of both the Scottish Civil Justice Council and criminal legal assistance.

No negative impacts were identified in relation to the proposals for the creation of the Council. The Council will aim for the development of a fairer, more efficient and accessible civil justice system and it is therefore expected there will be positive benefits for all types of person, including equalities groups, across Scotland.

No negative impacts were identified in relation to the proposals for contributions in criminal legal assistance. The Scottish Government and the Scottish Legal Aid Board will continue to consider equalities issues in implementing the Bill provisions and engage with a range of stakeholders to ensure no negative impacts occur.

I have asked my officials to look into the Committee’s query about household income and will provide this when sending the draft regulations to the Committee prior to Stage 2.

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.

I fully endorse the points made by the Committee on the need to minimise the impact of these proposals on those with disabilities who access legal aid. I am also conscious of the uncertainty surrounding the impending welfare reforms. I can reassure the Committee and witnesses that we are working very closely with colleagues across Scottish Government and DWP to assess the proposals as they develop. This close working also includes the Board who are seen as a key partner in discussions on the potential impact of welfare reforms.

In relation to people with disabilities, my initial view was that it was appropriate to take disability related benefits into account in the assessment of disposable income, but that this should be counterbalanced by deducting any additional disability related expenditure. However, I have been persuaded by the strong case put forward by Capability Scotland and others that it would be difficult in many cases to accurately quantify these additional costs, meaning that some people might be asked to pay a contribution from income that was not in fact disposable.

To remove this issue in as many cases as possible, I have therefore agreed with Capability Scotland and the Board that any payment of Disability Living Allowance or its successor the Personal Independence Allowance should be disregarded in
assessing the applicant’s disposable income. I note that a number of those in receipt of DLA will also receive a passported benefit such as income support. Those people would not be asked to pay a contribution based on their income, regardless of the treatment of their DLA. A further group may have no or very little income in addition to their DLA. But for their receipt of DLA, it is likely that many such people would also qualify without a contribution as their disposable income would fall below the £68 threshold, particularly once general allowable outgoings and dependent allowances were taken into account. Those people will benefit directly from my decision to disregard DLA as no assessment of their additional disability related expenditure will be required.

However, there is a further group that may both receive DLA and have further income that would take them above the £68 threshold, even after regular outgoings are taken into account. For this group, I believe it is right that account be taken of costs that arise from their disability but which exceed the level of DLA payment they receive. While I appreciate that this may bring some additional complexity to the calculation of disposable income, this is likely to impact a relatively small number of cases. In any event, I think that this is necessary to ensure that the circumstances of potentially vulnerable clients are properly taken into account. That is not the case under the current ABWOR rules, which make no allowance for additional expenditure at all.

This position has been agreed in discussion with Capability Scotland, and I am grateful to them for raising these issues and working with us to get to this point. Of course, further work is required to develop effective means by which this principle can be put into practice, to minimise the burden on disabled applicants, solicitors and the Board. We want to find as straightforward and proportionate a mechanism as possible to enable identification, quantification and verification of disability-related expenditure and it will be important for us and the Board to work with Capability Scotland and other relevant colleagues as we face this considerable but important challenge.

Collection of contributions

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 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.

I note the point the Committee makes about contributions being classed as fees. I take the view that these are the fees payable from the client to the solicitor in question. I resist the perception that in collecting a client’s contribution to their legal fees, solicitors are acting as collection agents for the Scottish Legal Aid Board or the legal aid fund. They will collect the fee for their services in same way as they might do for private or ABWOR clients. The Scottish Legal Aid Board will pay its contribution to that fee directly to the solicitor and so should the client.

There is also a business gain in solicitors collecting contributions directly from a client; a decision to divert collection responsibility to the Board would not of itself change the level of fee that the Board would pay to a solicitor. The Board would continue to pay the correct level of legal aid fee to the solicitor and the balance of client contribution could only be paid once that contribution had been collected. That could lead to a delay in a solicitor receiving the client contribution and being able to bank it. Therefore, collecting directly from a client would, in most cases, result in quicker payment of their contribution to their legal fees.

I would respectfully disagree with the Committee that SLAB is likely to be better placed to collect summary contributions from clients than the solicitors with whom the client has a relationship.

It may be appropriate to reflect that the collection of fees is already standard practice for solicitors dealing with criminal and civil cases in which ABWOR is available. I would suggest therefore that in terms of business practice what we are proposing does not constitute unchartered territory for solicitors. There are few solicitors whose work comprises solely criminal practice who would not already have processes in place to collect contributions from clients in respect of ABWOR. Similarly, many solicitors will also have arrangements in place to collect private fees. The Board has advised that of the 596 firms registered with them to provide criminal legal assistance (excluding PDSO and the Solicitor Contact Line), 399 are also registered to provide civil legal assistance – that is 67%. Firms who do civil work have to have a client account and means of collecting client’s money.

Therefore, I would expect that most solicitors are already either collecting contributions for ABWOR or private fees.

It has been suggested that solicitors will suffer a loss of income as a result of collecting contributions, some of which is based on the decision of some solicitors not to collect ABWOR contributions. As was pointed out by Justice Scotland in their written evidence to the Committee, that is a decision for individual solicitors. I would suggest that this should not be a driver for making decisions on public policy.
We have seen that SLAB modelling tells us that the majority of clients will not have to make a contribution. Of those that do, the vast majority of those will be very low. The Board’s modelling of the financial circumstances of existing applicants for criminal legal aid has shown that only about 18% of all applicants will have a contribution to pay.

In summary criminal cases (summary criminal legal aid and ABWOR), the modelling has shown that of that 18%:

- 36% of those assessed with a contribution will pay below £100 and
- 44% will pay below the current ABWOR maximum contribution of £142.
- 60% will pay less than £250.

The Board also looked at the likely impact of collecting contributions on a number of medium sized firms around the country. They looked at the likely numbers of cases with a contribution and the values of these contributions, based on the firms’ actual number of criminal cases and the payments they received for criminal legal aid cases over a year. (December 2010 to November 2011.)

These firms would be likely to have to deal with between 29 and 167 summary criminal and ABWOR cases with a contribution over the year, which ranged between 7% and 10% of their total criminal legal assistance cases. The value of the contributions in these cases as a % of their total earnings from criminal legal assistance in the year ranged from 2.6% to 6%. Therefore, in these firms, the Board will continue to pay these firms between 94% and 97.4% of their current earnings in full.

I remain of the view that the value of contributions is likely to be very low and the applicant will have been assessed fairly and transparently as being able to afford the contribution. For ABWOR cases, the solicitor will have assessed the eligibility of the client for legal aid, will have the power to refer to the Board on undue hardship grounds and will have built a relationship with the client around the details of the case. The collection of assessed contributions falls in line with that range of responsibilities of a firm of solicitors, including the collection of clients’ fees.

I think it also worth noting that moving to the proposal of SLAB collection of all contributions will have a significant and negative impact on the savings that can be achieved by this Bill.

In terms of the points made in paragraphs 219 and 220, I wonder if this is based on an assumption that if solicitors collect then they will only be able to collect over the 8,10,13,20, 26 week periods. That is not the case. These are the periods the solicitor or Board will use to assess how much the applicant can afford to pay. Solicitors will be able to agree with the applicant how payment of the contribution should be made. At present, we know that some solicitors ask for their fees to be paid upfront. Arrangements for payments of contributions would be a matter for individual solicitors and their clients.

Evidence presented makes reference to some situations where the trial diet is set very shortly after the first appearance - e.g. An Edinburgh Sheriff Court Domestic
Abuse Court where the trial is set to take place in 8 weeks. We can look at scenarios like this which fall outwith the norm to see whether particular arrangements need to be made. They also make reference to people appearing from custody who plead guilty and the difficulty in recovering a contribution from them. However, if there is any on-going procedure, for example, a deferred sentence, then there will be on-going contact between the agent and the client.

The Committee acknowledges that just now it may be more attractive to plead not guilty and apply for criminal legal aid to avoid paying a contribution under ABWOR if they plead guilty. and appear to be suggesting that actually this might show an inherent problem in that the system was designed that way because it is too difficult for solicitors too collect. The existence of this perverse incentive does not mean that. The legal aid system has grown in complexity over the decades. The different types of legal aid were designed during a time when the justice system was very different. ABWOR is now used in far more cases that was ever initially envisaged.

I hope this is helpful clarification for the Committee.

Potential impacts on the operation of the criminal justice system

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.

I agree entirely with the Committee on this point that underlines some of the difficult decisions that have been made in developing the Bill. It is a point that will remain with me as we move through the passage of the Bill.

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.

It is unlikely that the courts would be willing to adjourn a case so that a solicitor could have more time to collect a contribution from an accused; the court do not adjourn at present where a privately paying client has not paid his fees. In legal aid cases, solicitors are always paid at the end of the case – because the Bill provides that contribution payments are treated as fees this means that a firm will have the opportunity to be paid earlier than at present. It is therefore unclear why the non payment of a contribution at the start of a case would cause difficulties for the firm.
It was suggested that solicitors would withdraw from acting for a client where they had not paid their contribution. Recent research conducted by the Board showed that 85% of clients would want to use the same solicitor if charged again. The relationships that solicitors build up with their clients is an important feature of the justice system, and indeed was reflected in the significant changes in criminal legal aid in 2008 when specific provisions were made for “appointed solicitors”. These changes reflected the trust that clients have in the advice given to them by their own solicitors. For these reasons, we believe that it will be in the interests of both clients and solicitors to avoid the situation where solicitors feel that they have to withdraw from acting.

We think it will be rare for a person to be unable to find representation. However, the Scottish Government and the Board will be discussing with the Law Society suitable alternative arrangements to ensure alternative provision is available in that small number of cases. I understand that the Law Society has written to its members to advise that the Committee’s suggestion for a safety net provision through the PDSO would be impractical and unnecessary, and I would want to discuss that view with them.

In any safety net provision, people who do not pay their contributions should not be in a better position than those who do pay their contributions. If the PDSO were to take on these cases the fact that representation is being provided by the PDSO would not remove the requirement on the person to pay a contribution, and payment would be sought.

In relation to arguments that there might be an increase in the number of unrepresented accused at court, this was not the experience in England and Wales. In Crown Court cases, the percentage of unrepresented accused remained the same, 0.7%, before and after the introduction of contributions. However, what did increase was the percentage of privately funded clients which rose from 3.6% in 2009 to 13% in 2011. Whilst the system in England & Wales does allow for recovery of costs, this would not account for the movement between legal aid and private funding, which applies to both types of client.

I am happy to make a commitment to report back to Parliament on the impact of these proposals. As I have stated in my evidence session and earlier in this paper, the legal aid system is constantly reviewed to ensure that the principles of access to justice are being met. This allows for mitigating action to be taken promptly. The impact of these provisions will fall within the scope of that approach to regular review. I have noted the point of impact on rural areas in particular. I am not aware of any issues around the availability of legal aid solicitors in rural areas but I will ask the Board to monitor that.

**ECHR compliance**

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.
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.

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.

The Committee has reflected on the range of evidence given on this issue. The compliance of any Bill must be assured before it is introduced to Parliament and this Bill is no different. That said, I do appreciate the concerns that much of the detail of this Bill will be in regulations to be made under the Bill rather than on the face of it. I would expect that sight of the draft regulations will reassure that what is proposed as regards computation of income and capital is not different to the rules which already apply, and that the contributions due are set at realistic amounts which an accused can afford without hardship.

One of the suggestions made by the Human Rights Commission is a review of human rights impact on Part 2 of the Bill. I have made a commitment to regularly review impact and report to Parliament and I would intend that a review of human rights impact would be included in that report.

On the potential for an accused being left unrepresented this is an issue on which I have commented on above and have been having, and continue to have, discussions with the Board and the Law Society.

Kenny MacAskill
Cabinet Secretary for Justice
Scottish Civil Justice Council and Criminal Legal Assistance Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-04534—That the Parliament agrees to the general principles of the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

After debate, the motion was agreed to (DT).
On resuming—

Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

The Presiding Officer (Tricia Marwick): Good afternoon. The business this afternoon is a debate on motion S4M-04534, in the name of Kenny MacAskill, on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

The Cabinet Secretary for Justice (Kenny MacAskill): The bill implements two separate objectives that were identified as priorities under the Scottish Government’s four-year making justice work programme: the creation of a Scottish civil justice council and the introduction of contributions in criminal legal aid from those who can afford them.

I am pleased that the Justice Committee has broadly welcomed the proposals for a Scottish civil justice council under part 1 of the bill and that there is almost unanimous support for the creation of the council. Its creation is a key recommendation of Lord Gill’s landmark review of the Scottish civil courts because the council will be central to implementing many of the review’s other recommendations and will become an agent of change, giving the civil justice system a far greater capacity to continue to improve.

As Lord Gill’s review made clear, the civil justice system is very much in need of improvement and modernisation. That change is vital to ensure the quality of justice that individuals, families and businesses in Scotland expect and, more importantly, to which they are entitled. It is also vital to the Scottish economy, as effective and efficient resolution of disputes is good for business, helps to cut costs and helps to free up reserves that are tied up in litigation funds.

Therefore, I am committed to implementing a far-reaching programme of civil courts reform that is founded on Lord Gill’s recommendations for change. It will be the most significant reform of Scotland’s civil justice system in more than a century. We are well on our way: following constructive dialogue with justice stakeholders over the summer, we are now finalising a draft courts reform bill, which will be put out to public consultation in the coming months.

The changes on which we will consult will improve the judiciary’s handling of cases and reduce delays to cases that are proceeding through the courts. Ultimately, they will ensure that the people of Scotland have access to a high-quality system that secures just outcomes without unnecessary delay.

Making those changes will require a combination of primary legislation and procedural changes to court rules. Therefore, the council’s immediate—and significant—task will be to help to deliver those reforms. Establishing the body now will speed up the pace of change by ensuring that the council is able to advance its work alongside the structural reforms rather than after them.

The council’s work will not end when it has carried out that task. As I said, the council will also serve as an agent of change: it will be responsible for keeping the civil justice system under review. That will put an end to the piecemeal approach to reform that has contributed to the need for such fundamental change. It will also help to ensure that it is not another 100 years or more—or even 25 or 10 years—before the civil justice system catches up with society. The system will be capable of adjusting to change as and when it becomes necessary.

Some comments have been made on the composition of the council. I believe that the bill, with its provision for flexible appointments, strikes the right balance in allowing the council to take account of the range of interests in civil justice and to have the technical expertise for its detailed work without creating an unduly large and unwieldy body.

Jenny Marra (North East Scotland) (Lab): Does the cabinet secretary agree that, given the evidence that the Justice Committee heard, there might be scope to strengthen lay membership of the council? Although the ability to do that already exists, should the Government not look to ensure that more lay members are represented on it?

Kenny MacAskill: We are happy to enter into discussions with the Lord President on that. We must recognise that there is a balance to be struck. I understand that, even today, representations have been made by the Association of British Insurers and the Sheriffs Association. It is a question of getting the right balance.

The council will have statutory members, but the Lord President will have flexibility to take such matters into account. I am happy to reflect on the issue as the bill progresses through the Parliament and to enter into discussions with the Lord President. I give Ms Marra an assurance that it is the intention that as many lay members as possible will be brought on board, although, as in any organisation, there are limits.

Equally, it is clear that it is the Lord President’s intention that matters will be dealt with in subcommittees, which will enable people who have particular expertise in a particular area to
contribute to the council’s work without having to be on the general council.

I have reflected on the stage 1 evidence and the Justice Committee’s remarks on those points, and I consider it appropriate to widen the provisions to allow lay members to be elected as deputy chair.

There has also been discussion about the most appropriate procedure for appointments. I believe that it is correct that the Lord President, who will have responsibility for oversight and direction of the body, should have a key role in determining its composition. I agree that the appointments process must be transparent and robust. It must also be proportionate. I consider that the bill, which contains a duty to publish a statement of appointment practice, provides for a fair, open and transparent process. Furthermore, the Lord President has stated to Parliament his intention to draw on the principles set by the Commission for Ethical Standards in Public Life in making appointments. I welcome that commitment.

On transparency, I hope that members will be pleased to note the intention to extend freedom of information coverage to the new council and to the Criminal Court Rules Council through subordinate legislation that is to be brought to Parliament in the new year.

When he opened the legal year in September, the Lord President said that the creation of the council under the bill signalled the first stage in a “remarkable enterprise in legislative reform”.

Given the significance of the task ahead, many have emphasised the importance of getting the proposals for the council right from the outset. I believe that we have got them right, and I hope that the Parliament agrees.

I turn to part 2—

Margaret Mitchell (Central Scotland) (Con): I have a question before the cabinet secretary turns to part 2. As the council will be a statutory advisory body, will it have the right to be a statutory consultee in many different areas?

Kenny MacAskill: That is a matter that I am happy to clarify. My understanding is that, given the council’s role, it will interact with me and the Justice Committee, but I will check that and get back to the member. We do not want the council to be stuck in splendid isolation. It will be a body that will oversee the rule changes that we seek to make. I will get back to the member on what is a technical but highly important matter.

Part 2 of the bill sets out proposals to introduce contributions to solicitors’ fees in criminal legal aid. I am pleased that the Justice Committee and many in the justice system, including the Law Society of Scotland, support the principle that it is right that those who can afford to pay towards the costs of their defence should do so. In a climate of financial constraint and pressure on public finances, that principle rings true. If we are to protect access to justice as much as possible—both in relation to civil and criminal cases—we must target legal assistance at those who need it most. Doing so is the only way to preserve the overall integrity of the legal aid scheme.

For those in the chamber who may be less familiar with the details of legal aid, I would like to make it clear that what the bill proposes is evolution, not revolution. Criminal legal aid has always been subject to a means test. People whose income and savings are above a certain level have been ineligible for legal aid unless they can prove undue hardship, and people who plead guilty to a criminal charge have been liable to pay a contribution to their costs if they can afford one, just as happens in civil legal aid.

The expansion of contributions will bring criminal legal aid into line with civil legal aid and correct a manifest injustice of the current system. How can it be right that a victim of domestic violence who must go to court to protect herself should be liable for a contribution to her civil legal aid, while the perpetrator, with substantially greater resources, could receive full criminal legal aid without a contribution?

Lewis Macdonald (North East Scotland) (Lab): Having said what he just said, will the cabinet secretary acknowledge that the position of the woman to whom he referred—the victim of domestic violence—will be unchanged by the bill?

Kenny MacAskill: Yes—absolutely. The bill’s whole purpose is to preserve the system’s integrity in tight financial times. We have no intention of going down the route that has been taken south of the border, where huge aspects of the law are no longer eligible for legal aid. To protect victims, whom I know everyone in Parliament wants to protect, we must make tough choices. In this world, perhaps those who can afford to make a contribution when they are charged with a criminal offence should do so.

I accept that the Justice Committee has asked important and valid questions about the detail of implementation. In particular, it asked whether the income thresholds are appropriate, whether collecting contributions will create difficulties for law firms, whether accused persons’ human rights might be affected and whether there will be impacts on the administration of justice. I hope that I can reassure Parliament on each of those issues, which I have no doubt will be discussed in more detail at stage 2.

On the level of contributions, I will make three points clear. First, £68 a week is the threshold
below which contributions cannot be levied. The £68 figure can be amended upwards in regulations, but the bill specifies the starting point. The regulations will deal with such important matters and, accordingly, I have promised to provide draft regulations to Parliament before stage 2 begins.

Secondly, the £68 threshold is not gross income or even take-home income: it is the disposable income that a person has once a long list of costs has been deducted. On top of that, a contribution could be waived if undue hardship could be caused. The figure is the absolute level of weekly disposable income that will be protected under the scheme. Contributions will be assessed on the level of disposable income that is above £68 so, if someone has £69 in disposable income, their contribution will be based on the £1 that is over the benchmark and not on £69.

Margaret Mitchell: Will the cabinet secretary supply a definition of disposable income?

Kenny MacAskill: The definition of disposable income will be set down in regulations. It is currently dealt with under the civil legal aid scheme. It takes into account deductions for a spouse and children. Deductions will take place for welfare benefits that Capability Scotland has raised with us, which the Scottish Legal Aid Board will address.

I cannot provide the precise text that will be in the regulations, but the definition of disposable income will take into account deductions as it does under the civil legal aid scheme, which the criminal legal aid scheme will mirror. The definition will also take into account points that have correctly been made by people who represent those who have difficulties—which I appreciate—with mental health matters.

Finally on this issue, I point out that contribution levels will be graduated and will in many cases be small—the lower a person’s income, the lower the contribution payable, in proportion to his or her income. That is fairer to applicants who have lower incomes.

I know that there are concerns about ensuring that people with disabilities are not adversely affected—not least because of the uncertainty about welfare reform. The Scottish Government and SLAB have listened to those concerns and have agreed that disability living allowance should be fully discounted from income calculations in assessing contributions. I will continue to engage with organisations such as Capability Scotland to ensure that no negative impacts occur.

I appreciate the anxiety that some criminal law firms feel about collecting summary fee contributions. Of course, collecting fees from clients is a routine part of business for most law firms, so I suggest that the responsibility is not new.

We are trying to ease as far as is reasonable the burden of collection, while maintaining as generous a legal aid scheme as is possible. The bill therefore provides that the board will be responsible for collecting contributions for solemn cases. I am pleased that the Justice Committee has welcomed the proposal that summary contributions be treated as fees. That will assist firms’ cash flows in a difficult financial climate. However, I will continue to consider further measures and enter into on-going discussions with the Law Society of Scotland.

It has been suggested that those who fail to pay their contribution may lose their representation, which could cause problems for them and the courts, but I do not believe that that is a serious risk. Most people will have no contribution. Most people who have a contribution will have only a small one, and most of them will pay it—evidence from England and Wales confirms that. There has been no increase in unrepresented litigants since the introduction of a contributions scheme there, and their scheme is less generous than our proposals.

I appreciate that we may need to put in place arrangements to ensure that the justice system is not affected when people refuse to pay. I am in no doubt that we can achieve that, and I will enter into discussion with the Law Society about it.

In conclusion, the bill will improve our civil justice system and help to maintain a fair, consistent and generous legal aid scheme.

I move,

That the Parliament agrees to the general principles of the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

The Presiding Officer: We have a bit of time in hand, so if interventions are taken, the Presiding Officers will ensure that time is added to members’ speeches.

I call on Christine Grahame to speak on behalf of the Justice Committee. Ms Grahame, you have around 10 minutes.

14:46

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I thank the Presiding Officer for that. When I rise to speak, I am usually told that speeches are being kept short.

I welcome the opportunity to open the debate on behalf of the Justice Committee. I will try not to duplicate matters—I have used the word “matters”;


I should say “issues”—that have been raised by the cabinet secretary, Kenny MacAskill.

I thank everyone who has given evidence on the bill—in shorthand, I refer members to the full list in annexes C and D of our report. I also thank yet again the members of the committee—the little darlings—for their diligence and good humour. In particular, I thank the inimitable David McLetchie, with his wicked wit. In quizzing the Lord President on his discretionary power to appoint six members of the council, he asked with an impish grin whether Lord Gill would comment on his “six-pack”. We should give Lord Gill his due: there was the merest flicker of a raised judicial eyebrow before he answered.

Like previous justice legislation, the bill has two main parts—as members know, such bills are quite my favourite. As the cabinet secretary said, part 1 will establish the Scottish civil justice council and part 2 will introduce contributions to criminal legal aid. I will cover each part in turn.

Part 1 received less media attention than part 2, but it nonetheless deals with a crucial issue. As the cabinet secretary said, it stems from the 2009 review of the civil courts by Lord Gill, who is now Lord President. That review proposed a package of structural and functional reforms.

The proposed creation of the council has received widespread support. Many believe that it is an important step in ensuring the effective operation and oversight of the Scottish civil justice system. However, the committee heard a number of concerns relating to the provisions, which included concerns about the council’s status. Some witnesses believed that it should be a non-departmental public body. There were concerns about whether the council’s functions and powers are appropriate—for example, should it prioritise updating rules versus advising on policy—and about the balance therein. There were also concerns about who would chair the council and how sub-committees might best be utilised. The committee is satisfied by the explanations and assurances that it received from the Lord President and the cabinet secretary on all those issues.

Perhaps the main concern that witnesses highlighted related to the composition of the council and the Lord President’s appointment process—the “six-pack” process. In particular, evidence centred on the balance of legal versus lay representatives. My colleague Jenny Marra raised that issue. To reflect specialist areas of law, some legal bodies suggested that there should be more solicitors on the council; I vote for that—okay, I do not really. Others, including consumer groups, believed that there should be a more even split between legal and lay members so that the views of users of the civil courts rather than those of just the practitioners would be taken into account. The committee shares concerns that the perspective of end users may not be fully represented on the council, but we expect that, once a new set of court rules is drafted, the balance of membership will shift over time. The committee notes that the Scottish Government will have powers to adjust the council’s mandatory membership if required.

Rules may seem to be dry as dust, but they are important in the processing of justice. They ensure that deadlines are met so that we do not have a Dickensian pace in our civil justice system. They require fair notice of the case pled and defended, for example. By their nature, they often require to be technical and specialised, but so is a mechanic’s toolbox. For me, they are simply the toolbox of the civil justice system. However, rules must keep pace with modern requirements and with technology. They must make allowances for the party litigant, accelerated court process, abuse of process, tardiness and so on. I speak from weary experience, having had to know court rules.

The committee welcomes the Lord President’s assurance that he will draft a statement of appointment practice based on the principles set out by the office of the Public Appointments Commissioner for Scotland. In any event, we have asked the Scottish Government to consider whether that might be put in the bill.

I turn to part 2, which is on criminal legal assistance.

Jenny Marra: Does the convener of the Justice Committee agree that the bill needs to be tightened up in part 1 on the policy element, so that the policy powers of the new council do not creep into the elected jurisdiction of this Parliament?

Christine Grahame: Unfortunately for me, I am not allowed to agree or disagree in this debate because I am speaking as convener. I have to represent all and sundry—I am sundry at the moment. I will be free on another occasion to take a view.

The principle of making contributions is already established in some forms of legal assistance such as civil legal aid. However, with regard to criminal legal aid, the vast majority of accused persons—as the cabinet secretary quite rightly said—do not pay anything for their legal representation and associated costs. Now we are introducing contributions to criminal legal aid for the first time. The Justice Committee found seven distinct areas of concern about that part of the bill.

One concern was whether it was right in principle to require contributions for criminal legal aid. It could be argued that there is a clear distinction between the civil litigant—at least the
pursuer, who has the option of whether to raise proceedings—and a defender in a criminal trial who has no option. On balance, the committee was not opposed in principle to recipients of criminal legal aid making a contribution towards its cost; there is more to say about that later. However, any contributions must be proportionate to the means of the accused and must be sufficiently flexible to take into account particular personal circumstances. That raised the issue—I think that Jenny Marra raised this as well—of whether the financial circumstances of the spouse or partner should be taken into account. Frankly, I do not have an easy answer. Perhaps that should be decided on a case-by-case basis—I am sure that we will examine that later.

Another concern was whether fairness required that there should be provision to enable refunds of legal aid contributions to be made in certain circumstances on acquittal. The committee had some sympathy with the argument that acquitted persons should be refunded their costs, so it asked the Scottish Government to consider further the issue of recovery of contributions—perhaps restricting that to a narrow range of cases, perhaps under judicial direction where the bench indicates that the case should never have been brought by the Crown in the first place. However, we would then have to consider an award of expenses against the Crown. Again, complications would arise if the defence were privately funded expenses against the Crown. Again, complications might be left to deal with things when all the evidence, such as the assessment, is not available.

We wondered whether the level of contributions that is being proposed is appropriate. A number of witnesses had concerns that the threshold had been set too low and that very poor and vulnerable people might be asked to make contributions. The cabinet secretary has indicated that he will bring draft regulations to the committee before we move to stage 2; that is useful. However, we were disappointed—rap over the knuckles here—that the equality impact assessment was not forthcoming during our deliberations. It was forthcoming later, but we did not have it at the time. It is not good enough that the committee is left to deal with things when all the evidence, such as the assessment, is not available.

We were concerned about whether it was right that solicitors rather than SLAB would collect summary criminal legal aid contributions. Representatives of the solicitors’ profession of course strongly objected to what they saw as an additional burden of collection being forced upon them and the committee asked the Government to reflect upon those concerns.

There was also the argument, which has some traction, that the relationship between agent and client might be compromised. Would it even lead to a change in plea? Would an accused who was unwilling to pay contributions simply plead? If the case was lost, how would the agent ever recover contributions? Who would pay him or her if they lost the case? Who would stump up if the accused was in prison? Why will SLAB not collect the contributions as it does for civil legal aid—is it so that solicitors will carry the loss? That is a fair point to make. If that was the case, would that mean that agents simply would not take cases because they would not want to carry losses?

The committee wants to know whether the proposed changes would affect the smooth running of the criminal justice system. For example, if someone has their legal aid suspended in the middle of a trial, what happens to the trial? What happens if there is a co-accused, and they are left hanging out to dry, waiting for someone to come in to represent them—[Interruption.]

I beg your pardon, Presiding Officer—I have just knocked over my glass after too much flamboyance.

There are issues around the suspension of legal aid that do not arise in civil cases where someone’s liberty is not at risk. [Interruption.]

What has happened? Have I given somebody an early bath?

The Presiding Officer: Jim Eadie is moving out of danger’s way. Carry on, Ms Grahame.

Christine Grahame: In order to do that he would have to leave the chamber entirely, as I see that he is doing.

The committee considers that it is crucial that any savings that are made are not in effect cancelled out as a result of the changes having unintended consequences. That is a mantra in law: watch out for those unintended consequences coming down the track. The committee has therefore called for the changes to be effectively monitored and for ministers to report to Parliament three years after the proposals come into effect.

Human rights is a huge issue, and the committee sought evidence on whether the Government’s proposals would comply with the European convention on human rights. Our concerns centred on whether an accused would be left without legal representation during a trial—as members have highlighted—and whether financial contributions were appropriate and equitable. Indeed, it was clear that, even if the office of the public defender stepped in, it would still be required to get those contributions, so that issue has not been solved.

I will conclude before I scatter any more fluid around the chamber. The committee supports the
general principles of the bill, but we urge the Scottish Government to consider carefully our recommendations, particularly on part 2. In that regard, I note the Scottish Government's response to our report and the cabinet secretary's comments this afternoon.

The bill is the committee's fourth, and I think that we have become a well-honed team in comprehending and scrutinising complex legislation. [Interruption.] I welcome Mr Eadie back to his seat—I promise that he will have a dry few minutes.

I hope that the committee's stage 1 report provides some assistance to members, and I look forward to hearing other contributions to the debate. I am very glad to sit down.

The Presiding Officer: I now call an accident-free Lewis Macdonald.

14:57

Lewis Macdonald (North East Scotland) (Lab): I hope that you are right, Presiding Officer.

Another parliamentary year, another two-part justice bill that is making two quite unrelated changes to Scotland's legal system in a single piece of legislation. As if the Criminal Cases (Punishment and Review) (Scotland) Bill was not enough of a stitch-together or enough of a mouthful, along comes the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Bill to trump it, both in the length of its title and in the absence of a common theme underpinning the two important things that it is trying to do.

The Criminal Cases (Punishment and Review) (Scotland) Bill was at least focused entirely on criminal justice, albeit in two quite different respects. The bill that is before us, however, combines a change to the oversight of civil justice with a change to the basis of legal aid in the criminal courts. That is why the bill is already being debated almost as if it were two separate pieces of legislation, although Parliament will vote on a single proposition at the end of the day.

The proposal in part 1 to create a Scottish civil justice council has been broadly welcomed, but it has—as we have heard—prompted some important debate. The fundamental question is whether the measure should simply bring existing procedures for civil courts up to date, or whether it should seek to move the oversight of civil justice on to a different level.

The existing rules councils for sheriff courts and the Court of Session focus on drafting and updating court rules or procedures. They are dominated by sheriffs, judges and lawyers, and effectively operate as in-house committees for the legal profession. The bill proposes to create a new civil justice council that will be involved in oversight of the system as a whole, which will include—as Jenny Marra highlighted—making an input to civil justice policy. The question is whether the way in which the council will be constituted is fully in line with its extended role and responsibilities.

There is general support for measures to cut out unnecessary duplication and harmonise court rules, and for creating a new organisation that can seek to represent the wider community, rather than judges and lawyers alone. There is some concern, however, that the bill has not gone far enough to achieve that objective. As it stands, only two out of 20 council members must be lay members representing consumers, compared with nine judges and lawyers and three public officials. The remaining six places on the council are to be filled at the discretion of the Lord President, who could choose to fill some or all of the places with people who are not lawyers or judges. However, he does not have to do so, with or without discussion with ministers, which is what Kenny MacAskill offered. It would equally be open to Parliament to choose to legislate on who else should be represented on the civil justice council—for example, trade unions or the insurance industry, both of which are represented on equivalent bodies in other jurisdictions.

Alan Rogerson said, with reference to having others represented in addition to those who earn their livings in the courts:

“If we are going to reform the civil justice system, we need people who have experience of what happens before the court system takes over”.—[Official Report, Justice Committee, 26 June 2012 (am); c 1551.]

Annabelle Ewing (Mid Scotland and Fife) (SNP): My understanding is that a lot of the detail will be addressed in specialist committees, which is where the really important stuff will take place. I would have thought that that would afford a considerable opportunity for all interested parties to have their contribution made and heard.

Lewis Macdonald: That echoes a point that Kenny MacAskill made. I do not disagree with that point, but I think that the oversight line of the council ought also to reflect a proper balance between legal and lay representation. There is an opportunity for Parliament to make that decision rather than leave it to the discretion of, or the choices made by, the Lord President or by him in consultation with the Government.

The organisation Friends of the Earth, whose primary interest here is in the bill’s impact on environmental law, is concerned to ensure that “membership of the council should not be dominated by judicial and legal practitioners”.

"membership of the council should not be dominated by judicial and legal practitioners".
in order to provide a balance. Citizens Advice Scotland is keen to see a “balance from the start” between lawyers and lay members rather than rely on the Lord President’s discretion to increase the number of lay members eventually, after an initial period of rules division dominated by members of the legal profession. Clearly, this is an area in which the bill might be strengthened by amendment, to which issue we will no doubt return.

Another aspect of part 1 that was highlighted in committee was the relationship between the civil justice council and ministers on policy matters, which Jenny Marra has mentioned. Professor Tom Mullen of the University of Glasgow described the bill as drafted as “confusing” in that regard and suggested that it might be “appropriate to include a provision that ministers could invite the council to look at a particular matter, and the council would then have a duty to do so.” — [Official Report, Justice Committee, 26 June 2012 (am); c 1558.]

That seems reasonable if the civil justice council is to go beyond the narrow area of court procedures. Again, we may return to that issue in due course.

The issues in part 2 are perhaps more fundamental—they are certainly more contentious—although, again, we have no difficulty with the bill’s general principles in that regard. Indeed, during the Labour debate on Scotland’s future earlier this month, I was happy to quote from the cabinet secretary’s defence of part 2, which was in similar terms to those that he used today. He told the Justice Committee that “it is right that those who can afford to pay towards the cost of their defence should do so ... That must be right when public finances are under such pressure.”

He promised to target help “at those who need it most.” — [Official Report, Justice Committee, 18 September 2012; c 1717.]

I could not agree more, and not just on the matter of legal aid. However, the question with any targeted benefits is how to ensure that support goes to those who need it most.

Article 6 of the ECHR guarantees the right to a fair trial, including the right of anyone who is charged with a criminal offence “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

That is not an unlimited right. The issues for any justice system in interpreting that are to determine when a person lacks sufficient means to pay for legal assistance and when the interests of justice require that that assistance be given free.

The proposal in the bill to introduce a means test for those elements of legal aid currently with no client contribution and to introduce a single assessment for all types of criminal legal aid have been broadly welcomed, but some of the details of the proposals have caused concern. First, there is the level of disposable income at which contributions will be required. Kenny MacAskill mentioned that up front in his opening speech. I am glad that ministers have dropped plans to count disability living allowance and personal independence payments as part of disposable income. However, many remain concerned about access to justice for poorer people in general.

The Law Society, for example, believes: “It is not realistic to expect anybody who has a disposable income of only £68 per week or a disposable capital of only £750 to be required to pay towards their legal costs.”

Professor Alan Miller of the Scottish Human Rights Commission told the Justice Committee that he was “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.” — [Official Report, Justice Committee, 11 September 2012; c 1692.]

That impact might be to create a perverse incentive for accused people to plead guilty to offences that they did not commit or to go to trial without legal representation rather than take on legal aid contributions that they could not afford.

The Government’s response—Mr MacAskill said it again today—has been that the means test that is being introduced for criminal legal aid is the same as already exists for civil legal aid. That begs the question whether the thresholds might disadvantage those on low incomes who seek access to civil justice, such as the victim of domestic abuse to whom the cabinet secretary referred. I would be interested to know when the thresholds for civil legal assistance were last properly reviewed. I note that the level at which the threshold is set was not uprated this year in the way that it has been uprated in past years.

A second area of concern is the lack of a proposal to refund financial contributions in the event of an acquittal. Again, the Government’s reasoning is that accused persons who pay their own costs do not get a refund if they are acquitted, so there is no reason to allow refunds to those on legal aid. That defence again raises questions, such as why those who are cleared of a crime have to pay to prove their innocence whatever their income. In that regard, Dr Cyrus Tata of the University of Strathclyde observed that the cabinet secretary seemed to be arguing that “two wrongs make a right”.

Thirdly—Christine Grahame mentioned this in the concluding part of her speech—there is
concern about the proposal that solicitors should be responsible for collecting contributions from those who receive legal aid in summary cases given that collection is already done in civil cases and will be done in solemn cases by the Scottish Legal Aid Board. As the convener of the Justice Committee said, that responsibility will be unwelcome to solicitors, particularly to smaller firms, but it might also have implications for clients. Country lawyers might well decide that the costs and inconvenience of collecting contributions are not worth the effort, in which case their area could be left without a solicitor who is prepared to take on criminal cases. That would reduce access to justice at the very time when many rural areas are facing the threat of closure of their local court.

As Christine Grahame said, unintended consequences might arise from a number of provisions in the bill, so they must be considered carefully at the next stage of proceedings. It is on that basis that we in this part of the chamber will support the general principles of the bill.

15:07

David McLetchie (Lothian) (Con): I am pleased to be able to speak in today’s stage 1 debate on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

Once again, the Parliament and the Justice Committee are considering a piece of legislation with two very different parts. Part 1 seeks to establish the Scottish civil justice council to reform the civil justice rules and keep the system under review. Part 2 deals with the entirely different matter of criminal legal aid and seeks to introduce a system of contributions for criminal legal assistance.

The fact that the bill deals with two distinct and unconnected areas of law is worth noting. While such an approach is not without precedent and can be justified on pragmatic grounds, it has potential to create handling difficulties when we consider legislation. Combining different provisions in one bill also makes finding the law on a specific matter more difficult and it is therefore not to be encouraged. I note that the Scottish Government is increasingly taking that approach and I urge caution against its becoming the norm for those very reasons.

Part 1 of the bill, which is less contentious, implements the key recommendation of the Scottish civil courts review, which was carried out by Lord Gill in 2009. It will replace the Sheriff Court Rules Council and the Court of Session Rules Council with a single body. Significantly, the new council will have a role

"to keep the civil justice system under review", which will place the organisation as one of the key players in law reform in Scotland.

That point has caused some stakeholders to question whether the bill will make an organisation that will have a significant advisory role sufficiently accountable. Unlike other organisations such as the Scottish Law Commission, the council will be designated a statutory advisory body, rather than a non-departmental public body. The Scottish Government has argued that the council’s main role will be to assist the Lord President, who will therefore have ultimate responsibility for court procedure, and that it would therefore not be appropriate to designate the council as an NDPB. However, that will have the effect that the council will be free from the accountability mechanisms and public appointment procedures that would apply to an NDPB. That is despite the fact that, according to Professor Paterson, who represented public law professors in Scotland, the council will be

"an NDPB in all but name".—[Official Report, Justice Committee, 26 June 2012 (am); c 1553.]

It may be appropriate therefore that the bill, if it does not designate the council as an NDPB, introduces an explicit recognition that the council must be accountable in its policy role.

Other witnesses sought reassurances as to where the boundaries of policy lay. As the bill progresses, I consider it a priority to examine whether the relevant provisions need to be tightened up to ensure that the council’s policy functions are not too wide.

The council’s membership has also attracted some criticism from a number of stakeholders, who are calling for greater representation of their interests. The council will have between 14 and 20 members and it is correct that its membership will be limited to a manageable size in respect of legal and lay representatives. However, I question whether it is right that only two solicitors will sit on the council when currently five solicitors sit on each of the two rules councils.

It seems that there are two main concerns over part 2 of the bill: that the thresholds at which contributions are to be made are set too low; and that it will result in innocent people being out of pocket as a result of actions of the state.

The bill proposes that if an individual has a weekly disposable income of £68 or more they will be responsible for collecting contributions. There are legitimate concerns
surrounding access to justice for society’s most vulnerable and poor people.

The committee heard an argument from the Faculty of Advocates and Dr Cyrus Tata of the University of Strathclyde that contributions should be introduced for criminal proceedings only if they are accompanied by refunds on acquittal. The argument for that position is convincing and is based on the idea that if the state takes an innocent person to court, that person should be left in no worse position than he or she was prior to the proceedings commencing. The Government’s reason for rejecting such refunds is that that would treat all legal aid recipients more favourably than those who were privately funded. The committee is correct to call on the Government to consider further its position on the matter.

I question whether it is appropriate for solicitors to take on responsibility for collecting any summary criminal legal aid contributions that are due. The Scottish Legal Aid Board will continue to administer the fund for solemn legal aid and in relation to most appeals. I fail to see why the Legal Aid Board, which is the very body tasked with administering legal assistance, cannot collect all contributions. Requiring solicitors to collect contributions will require them to carry out unpaid work and may lead them to seek adjournments because contributions have not been paid. The committee correctly argues that SLAB is better placed to maintain and enforce collection mechanisms, and I urge the Government to consider that.

The Scottish Conservatives will support the bill at stage 1, notwithstanding our call for greater thought from the Government in relation to part 2. I hope that the cabinet secretary will heed the concerns of others in that respect.

15:14

Roderick Campbell (North East Fife) (SNP): I refer members to my entry in the register of members’ interests as a member of the Faculty of Advocates.

As we know, the bill is in two parts. It is fair to say that one of the points of contention about part 1 was that, given the bill’s provisions on mandatory appointments such as those relating to the Law Society, the judiciary and the Faculty of Advocates, the council runs the risk of being lawyer-heavy with insufficient attention being paid to the interests of the users of the court as well as the wider public interest—and more so if the designated up to six Lord President appointees also include lawyers. There is an issue there. However, although an organisation such as the Forum of Insurance Claims Managers rightly refers to its 80 per cent interest in litigated cases, we need to recognise that, as the Lord President suggested, much of the council’s work at the start will involve drafting rules. Indeed, he described that as “a substantial project”.

Nevertheless, as the Lord President and the cabinet secretary—and, indeed, the academics Professors Mullen and Paterson—recognise, sub-committees will be very important. If they are set up from the start, they will be able to break down the work and it will be much easier to ensure that wider interests are represented in the Lord President’s appointments. We should also bear in mind that it will be possible for the Scottish Government to use secondary legislation to adjust the council’s mandatory membership and perhaps to reduce the number of lawyers in due course. The Lord President was also right to stress in his written evidence the fact that there was much talk of the experience in England and Wales, where the Spencer review led to a rebalancing of the membership of the Civil Justice Council to half legal and half lay members, without any recognition that rule-making functions in England and Wales belonged to a separate body.

Nevertheless, I hope that the Lord President recognises in his appointments the importance of the interests of the insurance sector and indeed the trade unions. I have every hope that in time the new council will have a greater focus on policy matters, not to usurp democratic input but, as the Lord President himself put it, to frame “the sort of system we want to have, how we want it to work and whose interests we want to protect”—[Official Report, Justice Committee, 4 September 2012; c 1610.]

taking its lead from Parliament on matters such as court structures or civil remedies.

As for part 2, I, like others, have no problem with the proposition that those who can afford to do so should contribute towards their criminal legal aid. At a time of real strain on the public purse, such an approach has to be right. However, as the Scottish Human Rights Commission suggests, contributions should not be pitched at a level that would impact on an accused person’s right to a fair trial.

As far as levels of contribution are concerned, I welcome not only the cabinet secretary’s commitment to regularly reviewing the human rights impacts of part 2 but the agreement reached with Capability Scotland and SLAB to exclude disability living allowance and its successor from assessments of disposable income.

Not unexpectedly, there was considerable opposition from solicitors to the suggestion that they collect criminal legal aid contributions in summary cases. SLAB estimates that collecting those contributions would cost it £600,000 and, of
course, solicitors fear substantial levels of non-payment. Attempts to draw on present experience from the history of collection in assistance by way of representation cases where guilty pleas were entered did not take matters forward greatly.

Mark Harrower of the Edinburgh Bar Association said that his firm made no attempt to collect contributions and, unsurprisingly, SLAB did not have any information on non-collection. However, it advised that in 2011-12 solicitors would have been required to collect £154,000 for criminal ABWOR cases. That is a relatively small figure, but I note from the bill’s financial memorandum that the average contribution payable under ABWOR under the new arrangements is estimated to be £143 from income and £187 from capital as opposed to the current maximum contribution of £142. It is important to remember that in summary cases 44 per cent of those making a contribution will pay below the current ABWOR maximum contribution of £142.

I know that many people in the legal profession believe the proposals to be a pay cut by another name and there is clearly a risk that delays associated with collection of contributions will impact on the administration of justice, even though they clearly should not. Nevertheless, we are in difficult financial times and I welcome the Scottish Government’s commitment to reporting back to Parliament on the impact of the proposals in due course.

In relation to the reimbursement of legal expenses, Scotland has, as the cabinet secretary has pointed out, no tradition of reimbursing the legal expenses of acquitted defendants. It is suggested that to reimburse the contributions of legally aided defendants who are acquitted would potentially advantage them at the expense of privately funded individuals.

James Wolffe QC, speaking for the Faculty of Advocates criminal bar association, believes that no one, whether paying privately or not, should be denied a refund of contributions, although he had no information to indicate how many privately funded people have been acquitted. There is clearly little evidence on the point.

In England and Wales, reimbursement started out as being for exceptional cases only. Since 1985, following the creation of the Crown Prosecution Service, reimbursement from central funds has been much broader and applies to all defendants; of course, there is provision for defendants to be asked to contribute towards costs, which is not part of our system. In his evidence, the cabinet secretary described the issue of reimbursement of legal expenses as “fraught”.

In its response to the committee, the Scottish Government has indicated that it is not persuaded that it would be right to make provision for the recovery of contributions on acquittal either as a general rule or in some cases.

I accept that the bill deals with criminal legal aid only and not with the wider issue of the recovery of legal expenses, but I hope that the wider issue merits being kept on the radar for the future. At a time of radical change in the criminal justice system, that seems not unreasonable.

15:21

Graeme Pearson (South Scotland) (Lab): The development of a Scottish civil justice council comes at the end of a long process of consultations, reviews and reports.

Not only will the creation of the council implement the reforms identified by Lord Gill but, as the Lord President acknowledges, properly constituted and directed, the council should deliver on-going modernisation, deal with matters affecting the administration of justice in our civil courts and create the necessary rules. As the cabinet secretary said in his opening speech, the council should be an agent for change. The Parliament hopes that it will take that responsibility seriously.

With a limit of no more than 20, the council’s membership reflects a significant presence of legal professionals: judges, solicitors and advocates. There are to be at least two representatives from the consumer protection community and, in evidence to the committee, the Lord President provided significant assurances that he will seek an appropriate balance on the council to ensure that all those who access civil justice across Scotland have their views considered and properly weighed.

As other speakers have said, the Lord President has access to six personal nominations. We hope that he will use those wisely. The Lord President carries a heavy burden in that regard, although I feel confident that the current Lord President is a match for that duty and, with Government support, will be able to deliver on what is a radical change for Scotland’s justice system. The precedents created now set the tone for future changes for civil justice in Scotland.

We are advised that the additional costs involved in the creation of the civil justice council are to be borne by the Scottish Court Service and paid for from fees that are paid into the system in relation to access to civil justice. That outcome is to be welcomed in these days of economic stress.

Part 2 of the bill revisits the provision of legal aid in the context of criminal justice.
Under current provisions, persons subject to the criminal process who get assistance by way of representation can, in appropriate circumstances, expect to contribute between £7 and £142 towards the cost of their legal representation. The bill proposes that such a citizen who has a disposable income in excess of £68 a week may be asked to contribute between £5 and £1,518 towards the cost of their legal representation. Such rules apply not only to indigenous Scots but to any person in Scotland from the European Union and, I imagine, from elsewhere in the world.

Although I welcome an approach that ensures that those who can pay do pay, I want to ensure that, in circumstances in which an accused person attracts prosecution, we will be able to apply rules in deciding ability to pay—rules that are efficient in their application and catch those who seek to hide their true wealth. At the same time, the rules need to protect those who are genuinely unable to finance proper legal representation.

Annabelle Ewing: Speaking as a lawyer, I make the point that lawyers already have to collect contributions for civil legal advice and assistance and, indeed, ABWOR. It is not a new thing. It really is incumbent on the lawyer to run the practice and get the money in, and it is not, therefore, unreasonable, if we are aligning civil and criminal legal aid systems, that that approach is adopted—and it has to be said that it is being adopted with respect only to summary criminal cases.

Graeme Pearson: I am obliged to the member for that point. Indeed, in evidence to the Justice Committee, many solicitors acknowledged that they had found that their ability to obtain fees in circumstances that they outlined had been severely stunted. The chaotic approach of some clients left solicitors in a position of investing in future service provision, taking the loss on the chin as a result. In terms of the future provision of services, the proposal in the bill seems a precarious way forward.

The provision of public defenders to fill the gap in circumstances in which solicitors feel unable to represent clients is a proposal that seems—on the basis of the available evidence—to be poorly thought out and lacking in true substance. I hope that that element will be further considered and fleshed out.

The Scottish Government must revisit those elements to assess the options that are available to it before taking matters further. The reluctance of SLAB to play a part in this part of the recovery of fees speaks volumes.

The knock-on effect arising from a client’s failure to pay the element of the fee due to their solicitor—perhaps leading on occasion to the withdrawal of services before or during a trial—was discussed in evidence that was given to the Justice Committee, and we heard that that could cause significant disruption with regard to the way in which trials are administered. The cabinet secretary would do well to consider that issue, which deserves further consideration.

I have sympathy with the view that judges should have the power to order the reimbursement of costs to an accused who is subsequently acquitted and discharged, in very specific circumstances.

The broad thrust of the bill’s intentions in part 1 and part 2 is to be welcomed. However, as always, the devil is in the detail.

15:29

Colin Keir (Edinburgh Western) (SNP): It has been fascinating to be a member of the Justice Committee, which, over the past few months, has listened to organisations and individuals—many of them distinguished—from within the legal profession. It is clear that managed change is required over the next few months simply because of the pressure on public finances. Every public and Government department has to manage its budget in the most efficient way, and justice can be no different. We must, however, maintain a quality of service that is fair to those who are involved in the system.

On the first part of the bill, the Lord President made a compelling case for reform. Although no witnesses were against the principle of the new council, there were some concerns about its make-up, as many members have said. I am happy with the number of council members being between 14 and 20, as anything larger could become overly bureaucratic. However, that is where some of the witness disagreements begin. Who should have a place on the council? Is the legal profession overrepresented? What about more laypeople being involved? There are also questions relating to the powers and role of the Lord President.

For those of us who are not legally qualified, the modernising and maintaining of court rules were probably not major issues when the bill was introduced. However, one witness had the foresight to bring along copies of the rules for both civil and criminal courts, and both sets of rules appeared to be between 6 and 8 inches deep. That may seem a minor point of showmanship, but given the complex, technical nature of the rules and the need for modernisation I believe that there must be—as the Lord President suggested—a very strong presence of legally qualified members, especially in the new council’s formative years.
Of course, the new council must also have lay members. We received strong representation on that from Scottish Women’s Aid and the Association of British Insurers.

Jenny Marra: Does the member agree that the lay members could also be qualified legally?

Colin Keir: Yes, of course. I have no objection to that at all. Over the years, I expect the composition of the council to change, especially after the court rules have been modernised, and more lay members will be involved—whether or not they are legally qualified. Some of the technical work can be done by committees set up by the council, which should help to speed up the process of court rule change. I am pleased that the Scottish Government will remove the requirement in section 11(4) that the deputy chair must be elected from the judicial members of the council, thus opening up the possibility of a layperson taking up the position.

Some witnesses thought that too much power is being given to the Lord President, particularly in respect of appointments. In the early stages, I had my concerns about that as well. However, having heard the evidence I am now convinced that the office of the Lord President is the correct avenue to travel. With the council being required to lay an annual report and business plan before Parliament, and with the Lord President publishing a statement of appointments practice, I believe that the checks and balances exist to allay fears.

Another problem to be faced is that of administrative justice. Like my colleagues on the Justice Committee, I see the future as being uncertain and will be interested to see what is proposed in the coming months.

I suspect that the second part of the bill will be regarded as the most contentious part. The cost of legal aid has risen over the past number of years and, like my colleagues on the Justice Committee, I am not opposed to the principle of the recipients of criminal legal aid making a contribution towards its cost. In the words of the convener of the Justice Committee, the system must be proportionate to the means of the individual and must be sufficiently flexible to take into account individual personal circumstances. That is particularly important for those on benefits, who may not be in a position to pay anything towards the costs. I am delighted that the Government has agreed with Capability Scotland and the Scottish Legal Aid Board that any payment of disability allowance or its successor, the personal independence allowance, should be disregarded in any assessment of the applicant’s disposable income.

As we have heard during the debate, there are concerns about the level of disposable income—which has been set at £68—at which a contribution would have to be paid. I am glad that the Scottish Government has clarified that that figure is a starting point and can be amended upwards in regulations. I am also happy that it will be kept under constant review. The fact that the Scottish Government has agreed that income and capital thresholds must be kept under review—and regular review at that—makes me feel a good deal easier about those within the system who have little in the way of personal funds.

Among other aspects of the bill that are worth highlighting is, as others have already pointed out, the effect of contributions being collected by solicitors rather than that job being given to the Scottish Legal Aid Board. However, I will leave those matters for another day.

15:35

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Once again, I am—I think—the first member to speak who is not a member of the Justice Committee. Let me begin by commending the Justice Committee for another excellent report. I always find that I am, if I have read the committee’s reports and oral evidence, absolutely prepared for the debate. That was perhaps rather a rash thing to say, but time will tell.

On part 1 of the bill, which provides for the civil justice council, I think that the main areas of concern are about who is to be on the body, how it is to be appointed, and how someone might be dismissed from it in the rare event that that is required. It seems to me to be of central importance that the opinions and needs of users and consumers must be adequately reflected in the make-up of the body. As Lewis Macdonald reminded us, what is currently written in the bill could mean that the civil justice council has as few as two non-legal members. When Jenny Marra raised that point in an intervention, the cabinet secretary said that he would discuss the issue with the Lord President. However, I think that we—and the bill—must take a view on the issue.

The same issue arises in the appointments procedure. It is not good enough to refer to the Lord President’s assurances, as I think the cabinet secretary did in relation both to this matter and to policy. The fact is that Lord Gill will not be Lord President forever and, as always, it is the words in the bill that matter. I think that there ought to be something about the appointments principles on the face of the bill.

The cabinet secretary also highlighted the policy role of the council when he referred to its keeping the civil justice system under review. As David McLetchie rightly said, those policy responsibilities must not be too wide and, as Jenny Marra said, they must be tightened up. Clearly, this is an area
that needs to be looked at during stage 2. Perhaps in order to emphasise the centrality of ministers and Parliament in matters of policy, there could be an amendment that would place a duty on the council to provide advice to ministers on policy. I have a general concern that too many of the decisions are being left to whoever happens to be Lord President at the time. At the end of the day, ministers and Parliament must have an important role in all this.

Finally on part 1, I note the concerns of Scottish Women’s Aid about the wording on alternative dispute resolution at section 2(3). Scottish Women’s Aid made the important point that alternative dispute resolution must not be assumed to be required in all cases because, clearly, it is not appropriate in domestic abuse cases.

That point provides me with a bridge to part 2 of the bill, on which I was also struck by what Scottish Women’s Aid said—the example was also quoted by the cabinet secretary—about the apparent injustice in domestic abuse situations in which a woman might have to pay for civil legal aid while the violent man does not. All I say in response to that—which the cabinet secretary made central to his argument—is that it is dangerous to base a whole case on one example. For a long time, I have argued that women should not have to pay the money that they currently pay in order to get injunctions and so on. My preference would be that no contributions at all be required in domestic abuse cases in the civil courts.

Domestic abuse apart, I think that the criminal situation is different from the civil situation, because the power of the state is against the person involved, who has no choice and may be innocent. There are also ECHR implications concerning the right to representation. I note that Professor Alan Miller said that there had been no consideration. I note that Scottish Women’s Aid made the important point that women are in receipt of legal aid. I understand that it would not be financially possible to refund everyone who was acquitted, but if the new system comes in—particularly at the £68 disposable income threshold—I hope that there will be a refund for people who are in receipt of legal aid.

The changes that are being proposed by various members in the debate are perfectly feasible, as well as desirable. We are not talking about enormous sums of money—the total saving on part 2 of the bill is less than £4 million. Some of the suggested changes would still allow substantial savings, would be more equitable and would be more in the interests of justice.

15:42

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I am the second person who is not a member of the Justice Committee to speak in the debate. I do not know whether Malcolm Chisholm and I are starting a bit of a run of speeches by non-committee members. We will see where that takes the debate.

I welcome the introduction of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Unlike Lewis Macdonald, I do not particularly think that that is a mouthful; it is, indeed, a punchy title.

The bill is important. We must be consistent in always being prepared to consider progressing reforms that will ensure that our country’s legal system is fit for the times.

I congratulate the Justice Committee on its work so far in assessing the bill, and I thank it for its informative stage 1 report. I am sure that the
committee—under the astute convenership of my colleague, Christine Grahame—will continue to contribute positively to scrutiny of the bill.

I welcome the proposal to create the Scottish civil justice council, which comes from a recommendation in Lord Gill’s review. Any reform of that nature should be based on expert opinion; that can fairly be said to be the case with that proposal. The proposal is welcomed by much of civic society. As other members have, I received a large number of briefings in advance of the debate, which reflects the great deal of interest in the bill among stakeholders. The briefings show broad support for the creation of the Scottish civil justice council.

I will cite some of the briefings. Citizens Advice Scotland said that it sees the council as being “an integral body to ensure the success of the reforms and then afterwards as a body to ensure these principles of coherence, accessibility and sustainability are upheld.”

In particular, it welcomes “The intention that appointment to the council will be in line with the principles associated with public appointments process.”

The Association of British Insurers “supports the civil justice provisions in the Bill” and “agrees that a body should be responsible for the implementation of the reforms proposed by Lord Gill.”

It also “supports the creation of a Scottish Civil Justice Council”, as do the Forum of Scottish Claims Managers, the Law Society of Scotland and—this is interesting because we might not have expected it—Friends of the Earth Scotland. Friends of the Earth has an interest under the Aarhus convention, which recognises every person’s right to a healthy environment, and to which the European Union and the United Kingdom are signatories.

That demonstrates a fair degree of support for creation of the council. Lest members accuse me of quoting selectively from the briefings—people have run into trouble of late by quoting selectively—I accept that there are—

Lewis Macdonald: Mr Hepburn makes an offer that I cannot refuse. Does he accept that, although Friends of the Earth and others who have made representations support the principle of a civil justice council, they believe that it is important that the new body has from its beginning a balance between legal and lay representatives?

Jamie Hepburn: I must say that Mr Macdonald did not need to intervene, because I was about to make exactly that point. I accept that concerns have been expressed—Mr Macdonald’s point about the composition of the council being the primary one. Christine Grahame also mentioned that the issue was raised when the Justice Committee took evidence. I am fully confident that, because we are only at stage 1 of the bill process, we can continue to consider that matter. I heard the cabinet secretary and the Justice Committee convener say that the bill contains powers that will ensure that the composition of the council could be considered again in the future. It is welcome that so many stakeholders are engaged in the process.

I turn now to part 2, which will make changes to criminal legal aid. Incidentally, I am entirely relaxed that the bill deals with two different matters and I am sure that we are capable of dealing with any proposed legislation that does that. It is interesting to refer back to the consultation paper that the Scottish Government issued on that. It said that, “In a time of reduced expenditure it is essential to focus legal aid on those who need it most”.

We can surely all unite behind that principle. I do not think that it would be contentious at all. It is clear that, in these straitened financial times, it makes sense to target support at those who need it most.

Of course, contributions are already payable in civil legal aid and for advice and assistance, including in criminal cases that involve assistance by way of representation. Therefore, the cabinet secretary’s point that the changes are a matter of evolution rather than revolution was fair. It was also fair to point out that a similar, but less generous, scheme that operates in England seems to indicate that we cannot expect great problems with the operation of such a scheme in Scotland.

I also welcome the fact that the system of contributions will be progressive, with the first £68 of disposable income not being assessable for contribution. I understand that some people feel that the figure should be higher. I return to the point that I made earlier that we are at stage 1 of the process, so I am sure that they can continue to make that case. The level could also be increased by regulation in the future.

As the deputy convener of the Parliament’s Welfare Reform Committee, I hugely welcome the fact that DLA and its successor personal independence payments will not be considered in any assessment for contributions. The committee has seen plenty of evidence of the difficulties that recipients already face. Inclusion Scotland was right to say that classing those benefits as income could have led to unfair treatment of disabled people. It placed that comment firmly in the context of the UK Government’s welfare reform
agenda. It is welcome that the Scottish Government has committed to not including those benefits in any assessment.

It seems to be clear that the Scottish Government’s approach will be to work with the Justice Committee and interested stakeholders to finesse the bill. I think that that is the right approach and one that the Government should be commended for adopting. I am sure that it will lead to the development of the best possible bill, which is what we will see happening at stage 2 of the process.

15:50

Alison McInnes (North East Scotland) (LD): As we know—it has been said many times during the debate—the bill is in two distinct parts. Part 1 will establish the Scottish civil justice council and part 2 will make changes to the current framework for criminal legal assistance. The Scottish Liberal Democrats can support the principle of the bill, although there are a number of areas in which we will seek improvements, as the bill progresses.

I will touch on the part 1 provisions only briefly—most of my comments relate to part 2. The proposal to set up a Scottish civil justice council arose from Lord Gill’s 2009 review of the Scottish civil courts. It is an entirely sensible suggestion; indeed, it is a necessary step if further recommendations from the Gill review are to be properly implemented. The council’s establishment should also ensure that the civil justice system is subjected to continuous improvement.

I welcome the Lord President’s assurance that although the council will not be an non-departmental public body, the appointment process will adhere to good-practice principles for public appointments—that is essential if we are to be confident in the new council—but Malcolm Chisholm is right to ask that that be enshrined in the bill.

Much of the evidence that we received in committee related to the proposed make-up of the council. As things stand, a majority of mandatory appointees will be members of the legal profession. As we have heard, the bill will give the Lord President discretion to appoint up to six additional members. From the outset, I would like the new council to include a fair balance of lay and legal representation. End users of the courts should have a clear voice. The Government has said that the bill strikes the right balance, but I ask the cabinet secretary to give further thought to guaranteeing that there will be such a balance among members of the council.

The Justice Committee recommended that lay members should not be precluded from being appointed to the role of deputy chair, and I welcome the Government’s indication that it will amend the bill to that effect.

Part 2 concerns criminal legal assistance. Although, in principle, the idea of recovering some costs for that is acceptable, the evidence to the committee has raised concerns about practicality. We must ask ourselves whether the financial savings that are likely to be made are proportionate to the risks and, indeed, the disbenefits that might arise.

I believe that access to justice and to fairness, and proportionality should underpin the new arrangements, but we have received a number of representations that, so far, the proposed arrangements do not live up to those criteria. Under the bill, anyone with disposable income of £68 per week or more, or disposable capital of £750 or more, will have to pay a contribution towards ABWOR or criminal legal aid. There is genuine concern that those thresholds are too low and will result in poor and vulnerable people having to pay contributions.

At this stage, it is difficult to bring anything fresh to the debate, but there is an issue on which I think no one has touched. The details of the charging will be set out in regulations and in SLAB’s scheme of eligibility. The Justice Committee agreed with the Subordinate Legislation Committee’s view that that power is a significant one, and that there is no good reason why it should not be exercised through an instrument that is subject to the affirmative procedure. The Government gave its response to that in Mr MacAskill’s letter to the Justice Committee. He said:

“The scheme will provide direction to solicitors granting ABWOR on how to apply the undue hardship test … It is not considered that once the scheme is initially approved and published that it would be a static document. As the scheme is concerned with what constitutes undue hardship for a client, or the dependents of a client, it is important that the scheme can be flexible and responsive to emerging needs. I therefore envisage that the scheme would be a ‘living document’ and one which the Board would keep under constant review ... I expect that Scottish Ministers’ clearance of any revisals to the scheme could be obtained in most cases in just a few days. If the scheme were contained in a statutory instrument we could find ourselves in a situation where necessary, and perhaps urgent, changes are required but a Parliamentary process must be followed which prevents quick dissemination of the change.”

That response causes me real concern and sets alarm bells ringing. Of course we want the scheme to be flexible, but we do not want the Government to be making it up as it goes along. I do not believe that the detail has been properly worked through or that sufficient time has been taken to define “undue hardship”, and there is nothing to guard against the contributory net being cast ever wider to catch more and more people in it. That
adds to my belief that members of Parliament must be able to scrutinise the regulations, which must be subject to parliamentary process. I urge the cabinet secretary to reconsider his stance on that.

The Government’s movement on disregarding disability living allowance and, in time, the PIP is welcome, but it is not the end of the story. The cabinet secretary must continue to work with Capability Scotland to find an appropriate and balanced way of calculating disability-related expenditure. We need the outcome of that before the bill completes its progress through Parliament.

Section 17 will enable ministers to disapply the requirement to obtain contributions from people who are held in police custody. The Government has said that it intends “to discuss potential to use this provision with the Law Society”.

I would welcome more clarity on that.

Concern is widespread in the legal profession that collecting summary legal aid contributions will be difficult for firms and could lead them to have to write off a proportion of their income. Such a requirement could have unintended consequences for the functioning of the summary criminal justice system and could lead to adjournments and delays, as we have heard. For that reason, I am inclined to think that SLAB is better placed to collect such contributions. I urge the Government to revisit the issue at stage 2.

We support the bill’s principles, but with a number of caveats. I hope that the Government will reflect on the many concerns that all members have raised today and will lodge amendments at stage 2 that address those concerns. The cabinet secretary must ensure that access to justice, fairness and proportionality are at the heart of his proposals.

15:56

Annabelle Ewing (Mid Scotland and Fife) (SNP): I am pleased to speak in this stage 1 debate on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. I, too, am not a member of the Justice Committee. I think that I am the third non-member to speak; we should form a new group—[Interruption.] However, as the Minister for Community Safety and Legal Affairs prompts me to say, I am a member of the Law Society of Scotland and hold a current practising certificate. In the past, I have been on the registers of civil and criminal legal aid practitioners. That is important to put on the record, as far as I understand the rules.

As we have heard from many members, part 1 of the bill proposes to establish a new civil justice council, which will replace and expand on the functions of the Sheriff Court Rules Council and the Court of Session Rules Council. The new council will be under the Lord President’s direction and oversight, and the Scottish Court Service will provide secretariat support.

Consequently, there will be a single body, which will afford greater coherence in the structure for setting court rules. I understand that the proposal has been widely welcomed as a positive development in the determination to improve the justice system’s operation in Scotland.

I note and have heard this afternoon that, further to the Justice Committee’s scrutiny of part 1, issues have arisen in relation to the council’s remit and composition, on which I will make a few comments. The committee has—rightly—sought clarification of the likely scope of the new council’s proposed policy role, given the key doctrine of the separation of powers. I was pleased to note that the cabinet secretary confirms in his response, dated 18 October 2012, to the committee’s stage 1 report that the council’s role in policy making will be “essentially advisory”. In effect, he confirms that the bill will not impinge on the doctrine of the separation of powers.

As for the new council’s composition, I note that the committee raised issues about the need to ensure proper representation of the interests of not only what could perhaps be termed the usual justice suspects but—importantly—end users. A number of members have made that point. My reading of the bill is that a balance between those two groups is being sought. I note that it is to be at the discretion of the Lord President to flesh that out in practice when he has the opportunity to appoint six additional members. From reading the report, I note that the Lord President has given assurances to the committee that a wide range of interests and users will be represented and that, given that the council’s initial priority will be drafting the new, updated rules of court, there will be a need for specialist legal input at the outset.

From the representations that we have all, I think, received from different bodies, it seems that it is not just the legal profession that wants more places. David McLetchie referred to that issue. I think that it wants equivalence with the current position, which is five solicitor members, but it would have two. Groups such as Citizens Advice Scotland and representatives from the insurance industry are also lobbying for more places.

As I said in my intervention on Lewis Macdonald, I believe that we must strike a balance, as the council must be able to operate and not become unwieldy. That point was well made by the cabinet secretary. I also said earlier in an intervention that I believe that, as a matter of practice, a lot of the detailed work, which is far and
away the most important work that will be done, will be carried out by specialist subject committees rather than at the full council level.

**Lewis Macdonald:** When Annabelle Ewing intervened on my speech, she suggested that some lay interests could well be represented by the council sub-committees. Is it not equally true that some of the specialist work that will be required for rules revision in the initial period could be delegated to sub-committees and that, therefore, the lay-legal balance of the council could be a separate matter?

**Annabelle Ewing:** I accept that that is a possibility, but I am not entirely sure whether that is the best way forward in the initial period to get the rules updated and out there. However, the point is certainly interesting, and it would be worth looking into it further as progress is made on the bill.

I would welcome the cabinet secretary’s agreement to lodge an amendment at stage 2 to ensure that the deputy chair of the council can be either a judicial member or a lay member. That is an important concession that has been made, which reflects issues that have been raised this afternoon on the composition of the council.

It is obvious that, in the final minute or so that is available to me, I do not have enough time to go into detail on the bill’s criminal legal assistance provisions but, as I mentioned in an earlier intervention, it seems to me that the key purpose is the alignment of the criminal legal assistance scheme with the civil legal aid scheme. I believe that, as a principle, that has gained acceptance across the board. The fundamental, underlying principle is that the recipient of criminal legal assistance should make a contribution to his or her legal costs if they are able to do so.

As a member of the Welfare Reform Committee, I very much welcome the undertakings to disregard disability living allowance and to work with Capability Scotland on disability-related expenditure. I make a plea: Inclusion Scotland is very keen to be involved in that process, and I hope that there is a role for it. I also hope that war pensions will be disregarded.

In conclusion, the bill will bring forward much-needed changes to the justice system. It seems to be expected that some 82 per cent of cases will result in nil contributions, but it is important to ensure that, with the massive Westminster cuts to the Scottish budget that we face, the broad scope of the current legal aid scheme can be maintained.

16:04

**Mary Fee (West Scotland) (Lab):** I, too, feel the need to confess that I am not a member of the Justice Committee. We are a growing band of people who are watching the backs of members of that committee.

I would like to focus more on part 2 of the bill, but I have some words to say about part 1 first.

The creation of the Scottish civil justice council is important for the efficiency and effectiveness of civil justice in Scotland. It will help to raise the level of civil justice to that of a modern system. I welcome the creation of such a body, which will enable the justice system to move on and implement more court reform legislation.

As I understand it, the council will have a wide remit to contribute to the on-going improvement of the civil justice system. With the creation of the new council, there is further hope that the groundwork is being laid for real change. We are embarking on a long period of reforms to our civil courts system and I agree with the statement from Lord Gill that

“The next few years will be a period of transition”.

However, I share the concerns that David McLetchie expressed about the fact that the Government has chosen not to make the council a non-departmental public body. In the next few years, the council is expected to help to implement wide-ranging reforms to our court system and I feel that it will be lacking that extra level of scrutiny that NDPBs have.

The report from the Justice Committee says that the council will not be

“exempt from scrutiny and we do not anticipate that in practice it will be.”

What scrutiny will be in place in practice for a body that will have an important role in the implementation of reforms to our court system?

With the make-up of the council yet to be agreed, I seek a response from the minister on the gender balance within the council, given that women are involved in at least half of civil cases that involve matters of the family and relationships.

Part 2 of the bill, on criminal legal assistance, is my main focus today. At first when I heard that plans were to be put in place to take contributions from those seeking legal aid, I was extremely concerned and I continue to have some reservations. I hope that those can be eased throughout the stages of the bill. Protecting legal aid is paramount, especially in times of recession. Civil legal aid applications are up 26 per cent since 2007-08—there is a clear link between that rise and the effects of the recession on families, for example.

I appreciate the need to address how we protect legal aid, but asking some quite frankly disadvantaged people—I do not simply mean that
in the financial sense—to contribute is of concern. Although exceptions are made for some people and certain factors are taken into consideration, I feel that the proposed level of disposable income is too low. The reason for that is simple—the classification of disposable income appears to include paying for energy costs, food bills, transport costs and other day-to-day costs that sometimes we do not account for. Living costs are rising on an almost daily basis and leaving those costs within disposable income does not favour working people.

If we look at appendix 1 of a submission from the Scottish Legal Aid Board, we see examples of the likely contributions for certain people. Case 4 gives an example of someone with an assessed disposable income of £160 per week. Although that may appear a lot over the month, there is a failure to look at the cost of food, transport and energy for the parent and child, yet the person would be expected to pay £470 for summary criminal aid. The case is acknowledged as being fictional, but if it were real, that would not appear to be fair on the parent.

I am also concerned at the lack of evidence on or investigation into whether it is fair or appropriate to take the income of a spouse or a partner into account when calculating eligibility for legal assistance. That view was also expressed by the convener of the Justice Committee.

Undue hardship must be applied in all cases, and I commend the cabinet secretary for disregarding disability living allowance—soon to be personal independence payments—in income assessments for criminal legal assistance. That would have had a further devastating effect on the welfare of disabled people when combined with the Tory attacks. However, the cabinet secretary has given a lifeline of support to disabled people who find themselves in the criminal justice system.

With the changes to legal assistance expected to go through, the debate moves on to the collection of contributions. It would be unjustified to expect the Scottish Legal Aid Board to make those collections on behalf of law firms, given the reductions in its own administrative budget. Law firms already have the means to collect fees from private clients, and only 18 per cent of those on legal aid are expected to make contributions. That amounts to firms collecting contributions from between 29 and 167 cases per year, the cost of which analysis shows to be between 2.6 and 6 per cent of earnings from criminal cases.

There has been much discussion about the perversion of people pleading not guilty in order to have their fees paid for them, but I have concerns that some people might plead guilty if their contributions will be lower than they would be for pleading not guilty. That could be a dangerous effect of the proposals that would harm the right to a fair trial and twist the perversion in the reverse.

16:10

Sandra White (Glasgow Kelvin) (SNP): As a new member of the Justice Committee, I think that the debate has been a good one. All the contributions so far—whether they were from members of the committee or not—have been very informative for me and for other members, and perhaps even for those in the public gallery.

I will concentrate on a few points that members and interested parties have raised. First, I will touch on the proposed Scottish civil justice council. Having looked through the papers and read the Justice Committee’s report, I believe that the council will be an agent of change. It will have a much wider role than the rules councils for the sheriff courts and the Court of Session, which—as members have mentioned—it will replace. I believe that giving the council a wider role to advise and make recommendations on improving the civil justice system is generally a good thing.

Jenny Marra and other members raised the point about lay members of the new council, and I welcome the cabinet secretary’s reply that he will address that issue in his speech.

I want to ask the cabinet secretary a couple of questions about the civil justice council, which will undergo changes throughout the years as the justice system changes. Does the cabinet secretary view the council as an evolving body?

Can he reassure members that, if the changes are to take place, they will be monitored and—as my colleague mentioned—checks and balances will be put in place to ensure that there is full transparency in the council and discussion at a parliamentary level or otherwise?

Part 2 of the bill refers to criminal legal assistance. I have respect for Malcolm Chisholm and I take on board what he has said. However, if we are to protect access to the justice system as far as possible in relation to civil and criminal cases, we must target legal assistance at those who need it the most.

It is right for those who can afford to pay towards the cost of their defence to do so, which is what happens at present with civil legal aid. The expansion of contributions brings criminal legal aid in line with civil legal aid and corrects a manifest injustice in the current system.

Malcolm Chisholm and the cabinet secretary have both mentioned that issue. However, is it right that a victim of domestic violence must go to court to protect herself and be liable for a contribution to civil legal aid while the perpetrator of the crime can receive full criminal legal aid even
Almost every member has mentioned the £68 threshold. As I said, I have been reading through the papers as a new member of the Justice Committee, and my understanding is that the starting figure of £68 per week is not—as Mary Fee mentioned in her contribution—gross income or even take-home income. It is what is left after deductions, and there is quite a long list of deductions. It includes housing costs, council tax, childcare costs, loan repayments, maintenance repayments, costs associated with disability—which have been mentioned and which I will pick up on—and an allowance for dependent spouses and children. On top of that, the board has the discretion to waive a contribution if it would cause undue hardship. We need to look at that particular issue, but we have had assurances that the £68 figure can be reviewed.

Like others, I thank the cabinet secretary for what he said about DLA, which I regard as a positive step. I also thank Inclusion Scotland for its welcome briefing and positive comments on the subject of legal aid and benefits. I echo other members’ comments about the decision not to take DLA and PIP into account with regard to the bill’s provisions.

Jenny Marra: Does the member agree that, as well as DLA, war pensions should not be considered as disposable income?

Sandra White: Obviously, those are Westminster issues, so perhaps the member should speak to her Westminster colleagues about them. In that respect, I believe that the war widow’s pension, too, should not be taxable.

I will finish with a quote from Inclusion Scotland that may, in fact, address the issue that Jenny Marra just raised. With reference to not taking DLA and PIP into account, Inclusion Scotland said:

“This is particularly salient in the context of the significant cumulative damage already being done to disabled people’s incomes under the UK Government’s welfare reforms.”

We should support the bill at stage 1.

16:16

Helen Eadie (Cowdenbeath) (Lab): I thank the Justice Committee, its clerks and the witnesses for their work in scrutinising the bill. Christine Grahame, the committee convener, also has to be thanked for her clear elucidation of the issues. I agree with my party that we should support the bill’s general principles at stage 1. My contribution this afternoon will consider the issues around the alterations to charging, what happens in other jurisdictions, and the consultation responses.

I have chosen to comment only a little on the Scottish civil justice council, primarily because of shortage of time. However, there were 40 responses to the consultation, so I burned the midnight oil this week reading them. I paid particular attention to those from the Scottish Trades Union Congress, ASLEF and Friends of the Earth—other colleagues have referred to that organisation—and to the interesting comments that they made. I also read some of the submissions from the legal profession.

I was especially concerned to take on board some of the comments about issues such as whether members of the council should be paid. I understand the cabinet secretary’s concern about that, given the tight financial position, but we need to reflect on the consultation responses and take on board the fact that we do not want to end up with a council full of retirees. We must ensure that there is a balance of representation on the council and that it does not include only people from large companies of corporate solicitors. We ought to consider that issue as the bill progresses. Further, council members should be reminded in every possible way that they have a strategic remit and should not pursue a personal lobbyist-type agenda. I think that we would all want that aspect to be monitored carefully.

I always take an interest in the number of responses that any bill consultation gets. As I said, this bill had 40 responses, but I note that there were only 10 respondents on the proposals for the charging changes. That does not really mean very much, but it is interesting to keep in mind that, for example, the consultation on the independence referendum had 26,000 respondents and that there were 56,000 respondents to the consultation on the smoking legislation. That just gives us something to reflect on.

I, too, welcome the acceptance by the Scottish Legal Aid Board and the cabinet secretary of the representations that were made on behalf of people with physical and mental disabilities. That acceptance will address the particular issues that were raised by witnesses about their especially vulnerable position and differing needs. I and the Scottish Labour Party therefore welcome the cabinet secretary’s agreement that DLA and its replacement—the personal independence payment—should not form part of the income calculations for legal aid.

A practising solicitor noted in his response to the consultation that the governing principles do not adequately express the superiority of an overriding principle of justice. To that end, it was suggested that
“insofar as possible justice should be done” should be the paramount principle when any change to the current system is considered. I hope that that point will be kept to the fore. It is always difficult, in any situation, to alter charges.

People who know me will not be surprised to hear that I sought to identify what happens elsewhere in the world, especially in other parts of the EU. We learn from the policy memorandum that other jurisdictions already have systems of contributions in their policy regimes. In England and Wales, a contributory system has operated for more serious cases for a number of years. In New Zealand, criminal legal aid is usually available only to those who face a sentence of six months or more.

In Finland, legal aid can be given in relation to both court proceedings and other matters. Those who have contributory legal aid are charged a small fee of about £30 in addition to any contribution. A defendant who faces a sentence of four months or more is usually entitled to request a public defender regardless of their financial situation, and the state covers the cost of that. However, if the defendant is convicted, he or she is obliged to pay or contribute to the costs.

In the Netherlands, free legal assistance is provided for more serious crimes where defendants are detained in police custody.

I agree with my party, Scottish Labour. We are sympathetic to the idea that those who can afford to make a contribution to the cost of their legal aid should do so, but concerns were raised at committee that need to be addressed. I will skip over some of them, including the concern about the threshold of disposable income of £68 per week, which others have mentioned, and move on to Scottish Labour’s concern that the Scottish Government proposes not to reimburse those who are acquitted of a crime by refunding their legal contributions. That would mean that those who were acquitted of a crime when in receipt of legal aid would have to pay to prove their innocence. I agree with all that David McClatchie said on the issue of refunding contributions in the event of acquittal.

Whatever happens, I agree with the respondents to the consultation that any new system should minimise complexity for solicitors, applicants and the board. The system should be streamlined and easy to apply, and it should be designed to be easily processed using the legal aid online system. I understand that the key principle that appeared to have the most support in the consultation responses is:

“Practicality of application - the financial eligibility tests should be straightforward and easy to apply and minimise differences between different aid types. The collection of contributions should be straightforward and efficient.”

That leads me to my final, personal view that contributions should be collected by the Scottish Legal Aid Board and that it should not be down to solicitors to collect them. I agree with the arguments that Graeme Pearson expressed this afternoon in that regard.

16:23

Nigel Don (Angus North and Mearns) (SNP): This has been a fascinating debate. It is one to which I come very late and I therefore have relatively little to say. Having served my time on the Justice Committee last time round, I—

Christine Grahame: You are welcome back, darling.

Nigel Don: Thank you. Maybe I will come back, or maybe not.

I have nothing else to declare on the subject, except that I am grateful to my colleague Annabelle Ewing for mentioning the separation of powers, which is not something that we talk about in this place very often. I am delighted that she mentioned the subject, because I had every intention of doing so. Some of the representations that we have heard about the proposed Scottish civil justice council do not bear that matter in mind, so it might be an idea to put a little on the record about what the separation of powers means.

Historically, the separation of powers has been the idea that the executive, which is the Government, should be separate from the legislature, which is the Parliament, and the judiciary, which is the courts. That is roughly where the American system finds itself. When the President’s Executive seems to be in a markedly different position from the politics of the legislature, we can see that that does not really work. I suspect that that is why in these islands we have long since worked on the idea that the Executive and the Parliament should pretty much be the same thing. That way we can at least all be singing from the same hymn sheet.

For a very long time we have recognised that the courts are separate and that underpins most of the Government’s response to the points that have been made about how much control should be in statute for the Lord President’s committee. I am grateful to Graeme Pearson for his comment about a heavy burden on the Lord—

Christine Grahame: The Lord President.

Nigel Don: The Lord President. I am sorry, we have too many lords.

I think that Graeme Pearson’s comment is absolutely right, but Lord Gill will plainly be up to it,
of course. It is his job to run the courts and ensure that they do their job properly. With respect, it is our job not to tell him how to do it, but to make sure that he has the powers to do it and the legal background or underpinning for what he wants to do. Bear it in mind that, at the end of the day, if push comes to shove we can tell him what to do, but we would be wise never to do so.

**Jenny Marra:** Nigel Don illustrates the separation of powers. Does he agree that the policy remit currently in the bill is a policy creep into this Parliament’s jurisdiction? His argument on the separation of powers should perhaps be addressed in the bill and the powers made a lot clearer and separated more.

**Nigel Don:** I accept that there is a risk of creep every time that we change something and put those kinds of words down, but I do not believe that that will happen in practice. The Lord President knows fine well what he and the Parliament are supposed to be doing. Our constitution works only when the two sides of our separated powers understand their remits.

**Jenny Marra:** It was said many times in the Justice Committee that we cannot legislate on the basis of one incumbent in a post. However benign he may be, Lord Gill will not be Lord President forever. We must make sure that our statutes are as robust as possible and give further Lord Presidents clear guidance.

**Nigel Don:** I understand the principle, but I disagree with it. I do not think that we need to give the Lord President guidance. The Lord President is one of a long line of Lord Presidents who know exactly what they do and understand what things are about. We have probably got the balance about right, but it is important that we have this kind of discussion and understand the basis on which we legislate. I am sure that Lord Gill understands that and that his successors will.

I have a direct question for the cabinet secretary on something to which I should perhaps know the answer but do not. Section 6 of the bill sets out who will be on the council and lists the Lord President, the chief executive of the Scottish Courts Service and others. The question that needs to be addressed is, what happens if one of those people is unable to attend? I am not talking about being on holiday. If someone is incapable of attending, for one reason or another, is there a deputy who can step in and is that allowed in statute? It is not obvious in the bill. I suspect that that should be allowed if one of the appointees were to be physically unavailable for a while.

I will move on—rapidly—to the legal aid issue of part 2. It seems that the principle behind the bill’s provision is that legal aid and the rules on legal aid should ensure that there is an incentive for the accused to tell the truth. If the provision stops the anomaly that means that it is better for someone to plead not guilty when they know fine well that they are guilty, it seems a very good step in the right direction. I think that that is what is happening and it seems that that should be the fundamental principle that underlies any of the rules on legal aid. As long as we are moving towards a situation where it is in everyone’s interests—including lawyers’ interests—that the truth is told as early as possible, we might be going in the right direction.

I want briefly to mention the issue of eligibility, which other members have referred to. The Subordinate Legislation Committee, of which I am convener, commented on the scheme of eligibility, which is set out in section 18, and the Government has responded that such significant powers are best left with ministers because of the flexibility required. However, others contend that that should not be the case. For what it is worth, my opinion is that the Government is probably right. Particularly when the powers are introduced, those skilled in this art will have to find some way of making them work and I am pretty sure that having to come back to this Parliament, with all the associated timetabling issues, is not a good way of providing flexibility. Nevertheless, we must ensure that the policy by which the scheme should work is laid down either in statute or in subordinate legislation thereafter. I think that that is where we are, but any thinking on the matter should focus on ensuring that the statute and regulations lay down the policy and that those who are skilled in the art can deal with the numbers afterwards.

As for refunds, there is a decent philosophical argument behind the approach that has, however, not been pushed to the nth degree, and perhaps I might be allowed to do so for a few seconds. If I am accused of something that I am simply not guilty of, it is quite possible that my life will be seriously inconvenienced and my professional reputation ruined. No one is suggesting that the state compensate me for most of that inconvenience or any loss of professional reputation. If we should be refunding those found not guilty, why are we not compensating them for accusing them in the first place?

**Christine Grahame:** I dread to comment, having not practised for such a long time, but I think that someone can sue, say, the police only if they have not practised for such a long time, but I think that someone can sue, say, the police only if there has been a malicious prosecution. It would have to be something pretty heavy duty.

**Nigel Don:** If the member will forgive me, my question was more rhetorical than legal. If that is the understood legal position, there is no particular argument for refunding people found not guilty on relatively small matters when there might be much larger consequences for the accused.
16:32

**Margaret Mitchell (Central Scotland) (Con):** I welcome the opportunity to speak in this afternoon’s stage 1 debate on the Scottish Civil Justice Council and Criminal Legal Assistance Bill and pay tribute to the Justice Committee for its scrutiny of the legislation.

Part 1, which follows on from the Gill review, would create a single body tasked to keep the civil justice system under review. Initially, the Scottish civil justice council will focus on the daunting task of updating the 3,400 pages of rules for the Court of Session and sheriff court; significantly, however, it will also play an important role in reviewing the wider civil justice system.

The creation of the council with this remit is a major step that will introduce a new player into the world of law reform in Scotland. Led by the Lord President and with the eminent legal and consumer representation on it, the new council, which is being created by statute, will carry real political weight. In such circumstances, it is essential that the organisation be sufficiently transparent and accountable. Although I recognise and whole-heartedly agree that the judiciary’s independence is a vital principle that must be maintained, that should not be confused or conflated with the necessity of ensuring that appointments to the new council are not only accountable and transparent, but seen to be so.

I therefore share the concerns expressed by not only a number of MSPs this afternoon, but a host of organisations ranging from Citizens Advice Scotland to the Environmental Law Centre Scotland that the Lord President’s appointments to an organisation that is an NDPB in all but name will not be subject to the Public Appointments Commissioner for Scotland’s code of practice. If they were, it would ensure that the appointment process was transparent and robust and would, crucially, be the subject of scrutiny by the Standards, Procedures and Public Appointments Committee. It would also bring the council in line with other comparable organisations, including the Scottish Criminal Cases Review Commission, the Scottish Law Commission, SLAB and the Scottish Legal Complaints Commission. Furthermore, it would follow the recommendations of the Gill review.

Instead, the bill merely requires that the Lord President publish a statement of appointment practice without the appointments being subject to any external scrutiny. The bill does not even require such scrutiny of the appointment of judicial members. I therefore urge the Scottish Government to reconsider the provision, especially as the new council is to have the status of a statutory advisory body.

I note with interest the reasoning in part 2 of the bill for introducing criminal legal aid contributions, which in fact mirrors the Scottish Conservatives’ position that the affordability of universal services should be re-examined. However, I dispute the assertion that the proposal to introduce contributions for criminal legal assistance without a corresponding provision to refund those acquitted is either fair or in the best interests of Scotland.

**Annabelle Ewing:** I am not entirely clear, so the member can perhaps clarify her position. Is she equating, for example, free prescriptions in the health service at the point of need and free personal care for the elderly with criminal legal assistance for the, we think, around 18 per cent of applicants who will be required to make a contribution?

**Margaret Mitchell:** The reasoning behind the proposal, which is that those who can afford to pay should pay, is what I am interested in. That is certainly not the policy that this Government has taken forward with the introduction of free prescriptions.

It seems to me that it is clear that having chosen to cut the legal aid bill by £10 million in real terms in the next financial year, with a further £10 million reduction planned for 2014-15, the Scottish Government now needs a policy to fund the savings. For the reasons pointed out by David McLetchie and others, the policy is both unfair and, at worst, risks access to justice, which could mean that it falls foul of article 6 of the ECHR. The convener of the Justice Committee and other members have highlighted that issue. Furthermore, the starting point for the decision to introduce contributions for criminal legal aid is that it will bring criminal legal aid in line with civil cases, where contributions already exist. However, as Malcolm Chisholm pointed out, that is a false comparison.

Criminal court proceedings are different from most civil cases in that they involve the Crown—the state—bringing proceedings against an individual. Criminal cases do not involve financial rewards to the successful party, legal costs cannot be recovered in criminal cases and, crucially, the failure to win a civil case does not end up in imprisonment for the losing party. The difference between civil and criminal cases means that if contributions are to be introduced, they must apply only to those who can truly afford to pay. Despite the cabinet secretary’s response to my intervention, there is a concerning lack of clarity over what exactly we mean by “disposable income”, because there is no definition in the bill.

In addition, the introduction of legal aid contributions without refunds means that individuals who are wrongly accused of a crime
and who have to suffer the stress and indignity of criminal proceedings will be out of pocket if they fall on the wrong side of the contributions threshold. In contrast, a guilty serial offender thug will still be able to seek state-funded legal representation to defend themselves simply because of their income level. I suggest, cabinet secretary, that there is no fairness in that. Not only that but, as the Faculty of Advocates told the Justice Committee, the proposed contributions could well create a perverse incentive for accused who feel that they cannot afford to pay to plead guilty, merely because that would result in a fixed or reduced fee.

Further, there is a fundamental inconsistency in the bill’s provision that will allow those who are retained in police custody to receive free, non-means-tested legal assistance while means testing for legal aid will apply to those in other cases that go to court. I have no doubt that the spectre of Cadder loomed large in the decision to make that distinction.

It is imperative that, if this bill is passed, its impact is closely monitored. I urge the Government to consider including a statutory review clause in the bill.

16:41

Jenny Marra (North East Scotland) (Lab): As we have heard this afternoon, the principles that underlie the bill are broadly agreed across the chamber. However, in Labour’s view, the bill would be strengthened if certain points were taken on board by the Scottish Government.

I want to address the issue of civil justice policy in part 1 of the bill—I have already raised the issue in interventions. The bill mandates the council to recommend changes in civil justice policy to the Lord President, but no similar obligation exists to recommend the changes to ministers. It is our belief that policy is the preserve of the democratically accountable Government and Parliament, and should not be weakened by placing a policy obligation on an unelected body. That is a concern that is shared by some of the most eminent public law professors in Scotland. Governments are accountable to the electorate for their policy choices and, through the parliamentary system, MSPs and stakeholders should have every opportunity to scrutinise those decisions.

When I questioned the Lord President in the Justice Committee on the policy scope, he assured me categorically that the policy remit would merely be the policy of the rules and would not extend beyond that. I ask the cabinet secretary, therefore, to address the issue in his closing remarks. Would it not be better to include in the bill a much clearer explanation of the extent of the policy remit in order to avoid any creep into the jurisdiction of ministers and the Parliament, as has been discussed this afternoon?

A second concern with part 1 relates to the request by several organisations for transparency in the council’s functioning. I have heard persuasive arguments from those representing court users for greater transparency when court rules or civil justice procedures are being reviewed. They state that the publication of potential changes or an obligation to consult would be valuable to their work. I would be interested to hear the minister’s opinion of those suggestions.

Another concern with part 1 that has been well rehearsed today concerns the composition of the council. We have heard many arguments that special committees will allow for more specialist representation, but I think that Malcolm Chisholm summed it up well when he said that it is quite possible that only two laypeople will be on the council. If there is a feeling across the chamber that we should increase that representation, it is important to put that in the bill so that we can ensure that it can happen.

I was reminded by Mary Fee’s speech of a debate that we have had in this chamber regarding gender balance. As Labour has said in Parliament before, 80 per cent of people on Scottish public bodies are male, and I understand that the composition of the current council is one female and 12 males. I would be interested in the cabinet secretary’s response in looking for a better gender balance—perhaps the 40:40:20 model that Labour has recommended in the chamber before.

We know the impact of our justice system on women and of, as Baroness Helena Kennedy has often eloquently put it, the inherent bias against women in our justice system.

Turning to part 2, I will reiterate some of the concerns with the proposed level of contributions. The Government has chosen a lower limit of £68 because that is the weekly equivalent of the civil legal aid amount. It has sought justification for that in the fact that it is higher than the level in England and Wales. However, I have heard persuasive arguments to suggest that that method of calculation is flawed and that the level may be too low. The first rests on the fact that contributions for legal aid in England and Wales exist only for Crown Court cases, which account for a much lower proportion of cases than the bill provides for. The second is based on the differences between civil and criminal cases. Similarly, there are differences between the eligibility criteria for civil legal aid and the proposed undue hardship test, and the rate for civil legal aid contributions has not increased.

Kenny MacAskill: Is the member aware that the magistrates court in England operates an in-
or-out system in which there is no contribution? In that system, anyone with an annual disposable income of more than £3,398, which is just over £65 a week, fails the means test and does not get legal aid at all—not even with a contribution. Is the Scottish system not much better? Is she arguing that those who receive civil legal aid should have a harsher commitment to make than those involved in criminal cases?

**Jenny Marra:** I am arguing that we need to take a much harder look at the comparisons that have been made, which the Government has put before us, and drill down to the detail. If the Government is going to use the situation in England and Wales as justification, we must ensure that we are comparing like with like.

We must consider contributions alongside the chaotic lifestyles of many people who enter the criminal justice system—that point was well made by Graeme Pearson in the Justice Committee. Many organisations in Scotland have argued that people simply will not be able to afford to contribute at such a low threshold, which, as the Law Society has stated, could lead to a perverse incentive for the accused to plead guilty. If one of the core aims of the bill is to eradicate perverse incentives, I ask the minister to provide answers to why the Government remains content with such a low threshold.

I welcome the Government’s decision to stop considering disability living allowance as disposable income. However, I also ask it to consider doing the same with the war pensions, which have been mentioned this afternoon. Currently, the bill considers veterans’ war pensions as disposable income, and veterans would welcome that consideration being taken out.

**Kenny MacAskill:** Let me make it clear that war pensions are currently discounted in the assessment for ABWOR. The criteria for assessing disposable income will be set out in draft regulations. Given that we are seeking to mirror what is done in ABWOR in many instances, the position of war pensions will be considered. Considering the sympathetic view that we have taken with regard to ABWOR, the member could read into that the sympathetic view that we are likely to take.

**Jenny Marra:** I welcome the cabinet secretary’s indication that he will take a sympathetic view on that. The fact that we are seeking to mirror the arrangements for ABWOR is not a good enough reason, however. We must use the bill to ensure that we get it right for war veterans.

A second concern with part 2 is the Government’s decision not to reimburse acquitted persons for their legal aid contributions. I have heard justification for that from the cabinet secretary, who argued that those who pay their legal fees privately are not reimbursed either. However, several organisations question the fairness and practicality of this approach.

**Annabelle Ewing:** Will the member take an intervention?

**The Deputy Presiding Officer (John Scott):** The member is in her final minute.

**Jenny Marra:** I am sorry, but I do not have time.

Malcolm Chisholm proposed the very practical solution of a refund for acquittals that have been funded by legal aid contributions, and perhaps that could be considered by the cabinet secretary.

Presiding Officer, I believe that I am out of time, so I will close my summing up there.

**The Deputy Presiding Officer:** Well done. I call Kenny MacAskill.

16:50

**Kenny MacAskill:** We have had a very good debate. There is uniformity around the chamber in providing some general support for the principles of the bill, and I am grateful for that.

Both the convener of the Justice Committee—in a flamboyant speech, if I may put it that way—and David McLetchie commented on the hybrid nature of the bill. However, we need to have these matters. I accept that, in an ideal world, we would have an entirely separate focus on these aspects, but we need to avoid overloading the Justice Committee or other committees. However, I accept the legitimate point that was made by Mr McLetchie, as well as by Graeme Pearson, Christine Grahame and many others. The devil is in the detail and this is a matter where there is a great deal of detail. Some things will have to come out in regulations.

Perhaps in dealing with the detail, I can try to address some of the specific points that were raised. First, Margaret Mitchell asked whether the civil justice council will be a statutory consultee. The council will have the power to “consult such persons as it considers appropriate”, as provided for in section 3(2)(d). That is a power rather than a duty. There will be opportunities to contribute to the council’s work through its committees, and it is envisaged that the council will carry out consultations where appropriate. That seems to me to strike an appropriate balance.

Mary Fee said that the council should be made an NDPB to ensure scrutiny and accountability. However, the council will advise the Lord President and oversight rests with him. It will not be under ministerial direction and will therefore not
be an NDPB. I think that that is how it should be. However, the Lord President will not have unfettered discretion: ministers may amend the balance of the membership; an annual report and business plan must be laid before Parliament; and I intend to make the council subject to freedom of information.

Malcolm Chisholm correctly made the point that we should have the appointment principles for the civil justice council on the face of the bill, rather than relying on assurances. I do not think that we want to make the process unduly bureaucratic, but I am willing to consider putting some statement of those principles in the bill at stage 2. I think that the commitment that has already been made by the Lord President can be added to.

Jenny Marra asked whether the council’s powers in respect of policy could creep into the Government’s and the Parliament’s decision-making powers. We need to make clear that the council will be an advisory body. It will have duties to advise the Lord President and it will have powers to advise Scottish ministers. The council must lay an annual report before Parliament. There is no need to place a protection in the bill. The decisions that appropriately rest with Government, Parliament and the judiciary will continue to do so—that is addressed in our response to the stage 1 report—so there is the appropriate separation of powers.

Mr McLetchie raised a legitimate point about why there will be only two solicitors on the council, which he is correct will be fewer than on the existing councils. The bill provides for a minimum of two solicitors and it also provides for a minimum of two advocates. The bill seeks to achieve a balance, where we have a limited number of people who can be members of the council. As was pointed out by others, much of the work will be carried out at committee level, and the current councils have around 29 members at any one time. There will necessarily be fewer members of different types if membership is to be kept to a workable limit, but I can give an assurance that the involvement of the solicitor profession will continue—at a minimum of two, although it might be more, given the Lord President’s selection. Also, in terms of the working arrangements, those who have the appropriate skills will be asked and will be contributing.

Lewis Macdonald asked whether the Scottish ministers should be able to direct, or seek advice from, the council. That point was also raised by Malcolm Chisholm. I think that it is appropriate that oversight and direction of the council should sit with the Lord President and not with ministers. That is appropriate because the council will be a body that advises him, not ministers. However, it is quite clear that the council will be able to advise ministers and we do not need to compel the council to do so in the bill. We can get advice from the body, which may come through the Justice Committee or the Government. If we feel that it is appropriate to do so, we can take that advice and legislate on it. If we feel that the council is going in a direction that we do not like or recommending a policy that would be unacceptable to Parliament, we are not required to accept that advice. The balance that has been set is appropriate.

Helen Eadie asked whether council members should be paid. The bill allows council and committee members to be remunerated for non-salaried positions. Serving judges, Scottish Court Service staff and Scottish Government and SLAB officials who have a salary and remuneration will not receive anything in addition for attending. Those who are perhaps giving up their time in private practice will be entitled to receive the appropriate remuneration. That strikes an appropriate balance—those who are doing their job in improving justice for which they are paid anyway should not get an additional entitlement, but others who are giving up their own time from paid work should be given that opportunity.

Questions have been asked about the second part of the bill. I reassure Christine Grahame, who asked whether the suspension of legal aid mid-trial would cause problems for the system—I think that the issue was touched on by Mr McLetchie, too—that the bill does not give the power to suspend a certificate if a contribution is unpaid. We are confident that arrangements can be made for the few cases in which an agent withdraws. As Mr McLetchie knows, the Public Defence Solicitors Office is a matter of some sensitivity to the profession, but it is possible that we could put in the PDSO and that would be the solution. However, I have indicated that I will not prejudge matters and I am happy to discuss the issue with the Law Society. That option is available, and if the Law Society can think of another way to do it, I am happy to enter into that discussion. The reason why I am unable to give an unequivocal answer is that we are entering into discussion and it would be inappropriate to prejudge its outcome.

Christine Grahame also asked whether the assessment of spouses’ income is unjust. That issue will be covered in regulations. A spouse who is a victim will not have their resources assessed and an allowance will be made for the cost of dependants, including spouses. Also, issues related to spouses can be ignored if there is undue hardship.

Graeme Pearson referred to the use of the PDSO. As I have said, that is a matter of some sensitivity to the Law Society, and I accept that.

Malcolm Chisholm mentioned thresholds, which Jenny Marra, too, commented on. Contribution
levels were substantially reformed in 2009 and they were uprated in 2011. I appreciate that there may be some issues with where matters have got to since 1986—when I was still a practising lawyer—but we have been addressing the issue. If there is any slippage, that relates to those who have gone before us.

We do not think that SLAB is better placed to collect summary contributions, which are best collected by the legal agents. The exception is when there is a significant sum involved, which is why we are using SLAB to collect contributions for solemn proceedings. That is what happens in civil proceedings and ABWOR: it is the solicitor who sees, assesses and deals with the person at the time who will collect the contributions. In the main, we are not talking about huge amounts of money, and it is for that reason that we remain committed to that approach, because it is important that the solicitor addresses that.

Mary Fee thinks that the contribution of £470 in case 4 of the SLAB examples is unfair. The person in that example earns £482 a week. That is not a king’s ransom or a Premier League footballer’s wages, but £470 does not seem to me to be an unfair level of contribution for somebody who is facing a criminal charge to make when they have an income of £482 a week.

We realise that those are matters of balance and will have to be reviewed. That is why we are happy to ensure that the regulations will be available to the committee as we go into stage 2 and stage 3. They will have to be reviewed and updated as circumstances change. We have given a direction on DLA and are doing something similar on war pensions.

These are difficult times. We must make changes to legal aid, but there is a fundamental principle that the victim of crime should not be expected to contribute while the perpetrator is not expected to do likewise. The bill changes a manifest injustice that existed in the law of Scotland. There will be difficulties for the legal profession in some instances, but let us remember that 82 per cent of those who apply for and receive criminal legal aid will do so without making a contribution. The remaining 18 per cent will make a limited contribution—one that they are perfectly capable of meeting.
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Edinburgh Bar Association to the Convener

I take this opportunity to write on behalf of the members of the Edinburgh Bar Association to extend our thanks and gratitude to the Justice Committee for the thorough debate and careful consideration that has been given to the submissions that have been made in relation to the issue of summary Legal Aid contributions. It has been clear that the Committee has given consideration to the issues raised by both the Law Society of Scotland and the Edinburgh Bar Association.

It is in this context that I now write to express our disappointment and exasperation at the position expressed by the Scottish Legal Aid Board and the Scottish Government in relation to the ongoing negotiations. A representative of the Law Society Legal Aid negotiating team has met with the Edinburgh Bar Association and various other Bar Associations across Scotland to advise of the outcome of a meeting with the Scottish Legal Aid Board and a senior civil servant which took place on 31 October 2012. Despite assurances that there was to be ongoing negotiation and full consideration of all the issues considered by the Justice Committee at this stage of the Bill, it was stated in unequivocal terms by the Legal Aid Board that the Scottish Legal Aid Board will, under no circumstances, collect contributions in relation to summary criminal Legal Aid. The Law Society Representatives were advised that neither the Scottish Legal Aid Board nor the Government Representatives were willing to discuss this issue.

It was further stated that there will be no potential movement in relation to this position under any circumstances and that there will be no amendment to the legislation on that basis.

I feel it is extremely important that the Justice Committee is made aware of this situation given the efforts made by its members to fully and fairly explore the issues raised by this piece of legislation.

Having garnered the views of the profession, there is an extremely strong sense of disappointment and disillusionment. The profession feel that it has been made clear that the decision in relation to the collection of contributions has been made and it now faces another heavy cut in fees.

It is with some regret that I now advise that the Edinburgh Bar Association has as a result of this development taken the decision to consider taking industrial action at a future date.

Should you wish to discuss any issues arising from these matters please do not hesitate to contact myself.

Cameron Tait
President
1 November 2012
The Faculty of Procurators of Dumfries wishes to announce its support of the Edinburgh Bar Association and the Glasgow Bar Association in their opposition to the Scottish Government’s current proposals regarding introduction of a scheme of contributions in criminal legal aid.

The Faculty has no issue with the general principle that, particularly in this day and age of financial austerity, those who can pay something towards their legal expenses should do so. However the Scottish Government’s scheme is fatally flawed.

(1) The level of income accused persons can earn before they become liable to pay contributions towards criminal legal aid and advice and assistance, is far too low.

(2) The amount of the contributions are far too high and in many summary cases can easily exceed the total value of the legal aid payment in respect of that case. Many people on low and modest incomes will therefore, effectively, be removed from any form of state assistance with the legal expenses they will incur in defending themselves from allegations of crime brought against them by that state.

(3) Individual firms are to be made responsible for collecting those contributions (rather than being collected by Scottish Legal Aid Board as is done in civil legal aid cases), thus placing yet another unnecessary administrative burden (and therefore cost) on solicitors while they are supposed to be defending the person from whom they are supposed to collect money.

(4) Finally it has been suggested by the Scottish Government and their colleagues in the Scottish Legal Aid Board that, if a private firm cannot collect a contribution and withdraws from acting as a result, the Scottish Government’s own lawyers in the Public Defence Solicitors Organisation will cover the case. They, however, will not have to worry about collecting contributions. The Scottish Legal Aid Board have said they will be willing to recover the contribution from clients of the PDSO. Whether they will insist on doing so in the case of those who refuse to pay, however, has not been clarified. If they do not, this gives a government-funded and backed organisation an unfair, anti-competitive and illegal advantage over the private firms against whom they compete: potentially, a client who does not want to pay their solicitor simply has to refuse to pay, and the government will represent them anyway, without charging the client the fee the government makes the private solicitor charge.

The Scottish Government, through the Cabinet Secretary for Justice, has said that these proposals will not affect access to justice. This remark either demonstrates a complete lack of understanding of real life, or is simply untrue and should be recognised as such by a Cabinet Secretary who claims to know about legal practice. The Scottish Parliament’s Justice Committee has criticised the proposals and asked the Scottish Government to reconsider their proposals because of their serious concerns about access to justice for the citizens of Scotland. The Scottish
Government is now telling the profession that they have no intention of changing any of these points.

In the absence of any sensible engagement or debate, the question has to arise as to whether the Scottish Government are ever going to listen to anything other than direct action. For that reason, the Faculty of Procurators of Dumfries supports of the Edinburgh Bar Association and the Glasgow Bar Association in their decisions to take industrial action and, should the Scottish Government continue on its current course against the interests of the citizens of Scotland, this Faculty will decide democratically what specific action it will take.

Ranald Lindsay
Dean
Faculty of Procurators of Dumfriesshire
9 November 2012.

Notes:

1. The Faculty of Procurators is a voluntary body representing solicitors in Dumfriesshire and has over 100 members in private law firms, local authority and in the Procurator Fiscal service.
2. Members of the Faculty staff criminal courts in Dumfries, Annan and Kirkcudbright routinely as well as cases in other sheriff courts, High Court cases and appeals.
3. Legal aid is administered by the Scottish Legal Aid Board, which is public body based in Edinburgh. To receive legal aid, accused persons must apply to them, proving that they are financially eligible and that it is in the interests of justice for them to received legal aid.
4. Most criminal cases are prosecuted under summary (non-jury) procedure in local sheriff and justice of the peace courts.
5. Legal aid paid to a solicitor for most summary cases is set at a fixed fee depending on the court in which the case proceeds. For a case involving investigation, procedural hearings, preparation for and conduct of a trial lasting more than half an hour but finishing in one day (as most do), a solicitor's firm is paid a flat rate fee of £345 plus VAT for a JP Court case or £585 plus VAT for a Sheriff Court case. This fee does not change no matter how many times the case calls in court. This is the amount paid to the firm to cover overheads, costs, wages, tax etc. Nothing is paid until the case is finished.
6. Accused persons pleading guilty or receiving advice only pay a contribution towards their legal expenses (like an excess on car insurance) if their disposable income is more than £105 per week. They are not eligible for government-funded help if their disposable income is more than £245 per week.
7. Accused persons pleading not guilty and who are granted legal aid by the Scottish Legal Aid Board do not currently pay a contribution. The same financial eligibility figures apply.
8. Under the new scheme, a person would have to pay a contribution on either advice, a guilty plea or a not guilty plea if they had a disposable income of more than £68 per week. The amount they would have to pay depends on which court is dealing with their case and whether they are pleading guilty or not guilty.
9. For example, a person with a disposable income of £105 per week, currently entitled to free help would have to pay:
   a. £67.20 pleading guilty in the JP Court,
   b. £72.25 pleading not guilty in the JP Court,
   c. £102.50 pleading guilty in the Sheriff Court,
   d. £109.20 pleading not guilty in the Sheriff Court.

10. A person with a disposable income of £175 per week, currently obliged to pay £70 towards their legal costs in some cases would have to pay
    a. £363.20 pleading guilty in the JP Court,
    b. £401.00 pleading not guilty in the JP Court,
    c. £590.00 pleading guilty in the Sheriff Court,
    d. £629.20 pleading not guilty in the Sheriff Court.

These amounts would have to be restricted to the whole amount payable to their solicitor, thus persons with this income would not receive any help from the Scottish Legal Aid Board.
We are a small firm based in Aberdeen. Our firm was founded in 1980. We commenced with being mostly Private Client and then took a decision to take on Legal Aid work which over the years has expanded considerably. Over the last few years however it has become increasingly clear that this Government wishes to reduce access to justice. The Scottish Legal Aid Board is a bureaucratic nightmare to anyone who has dealings with it. We are somewhat surprised that their level of expenditure is not looked at more closely. There are over 60 firms in Aberdeen and at present there are under 10 doing any form of Legal Aid. We suspect that there will be even fewer in the next few years as the remuneration is becoming less and less. We would oppose the lowering of the Eligibility Threshold of Criminal Legal Aid. We would oppose the rise in contribution levels and also the suggestion that solicitors should collect contributions. If this latter measure is introduced, we may well decide that it is simply not worth our while to represent people who have contributions. The knock-on effect of these measures as proposed is rarely thought through. We believe it will cause delay and add to the costs of the Criminal Justice System if these measures are introduced.

Hamish Lindsay
Lindsay & Kirk
9 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from Iain Hingston to the Committee

I am a Partner with the firm of Graeme Murray and Co in Aberdeen. My business is significantly dependant on criminal court work. I was a Procurator Fiscal Depute for 6 years and joined this firm in 2006. I have seen, in even that limited time, the deliberate attack upon my profession and my colleagues, orchestrated largely by SLAB. I do not require to state to you the importance which should be placed on what we do, being as we are an essential element of the justice system and the only line of defence against the state and police and their often unjustified prosecutions (and persecutions) of this country’s citizens. I believe in what I do and I had hoped to make a career of it.

With each passing year, however, it seems this is ever more unlikely. I will not dwell upon (nor reiterate in detail) the oft reported fact that my profession has seen an effective 20 year pay freeze and, indeed, cut in some cases. I continue to work, as do my colleagues, not because we cannot do anything else but because I know what I do is important. What I am not prepared to do, however, is to lie back on this occasion without acknowledging and protesting certain key proposals in this Bill and the way in which certain politicians and SLAB have sought to force these upon us. Much is made of “fairness” in our system but rarely are we criminal defence lawyers included in that. It is hard enough in this climate of ever-increasing diversions away from court proceedings to operate a business (with all the essential operating costs that entails) without the nightmare that would be contributions recoverable by the profession. Like many of my colleagues, I rarely recover contributions in ABWOR cases beyond a letter or 2 to the client. I realise that, effectively, I will never see that money and the cost of pursuing it far exceeds the sum concerned. However, were that to apply to summary legal aid, the vast majority of my and my colleagues’ business, then I am left with certain options, none of which prove attractive. The position would have to be that I will not appear unless the contribution has been paid. In some cases, it will be. In many, it won’t, particularly given the ludicrous threshold of £68 of disposable income above which contributions fall to be paid. In that case, I either (a) appear anyway as “some money is better than none”, an attitude SLAB and certain politicians are relying upon, and I have an obligation to the court above all else; (b) delay cases until my contribution is paid or (c) withdraw from acting.

It has not yet been explained to my satisfaction why SLAB, who I understand already collects civil contributions, cannot undertake this role, other than they don’t want to. Combined with the aforementioned threshold, this is a direct attack on the legal aid system and reduces, rather than increases, the access to justice that SLAB is obliged to provide. It has been known for some time that SLAB wishes to “kill us off” but we are still here. The PDSO is not the cost-effective and all-encompassing solution that SLAB would have you believe. Independence is essential and that is only provided for by an independent bar. Passing this Bill in this form will have dire consequences for that, putting firms out of business and further limiting access to justice for this country’s citizens.
When this matter is looked at on Tuesday, please consider these points and the no
doubt countless others from colleagues across the country. As a profession (and
professional debaters), it is often difficult to get a consensus – for the avoidance of
doubt, we are united here.

Iain Hingston
Partner
Graeme Murray and Co
9 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from Aberdeen Bar Association to the Committee

I refer to the above and acknowledge that you are probably working your way through a number of communications from Solicitors and Scottish Bar Associations before Tuesday’s debate but I would be obliged if you were to consider the following, prior to making a decision about the amendments I understand to have been tabled.

Aberdeen Bar Association do not question that if a person is in a position to contribute to the funding of your legal costs then that person should contribute.

However we wish to object to two elements of the bill: Firstly the level at which it will require contribution to the first legal aid bill (those with a disposable income of as little as £68.00), and also the obligation of collection of those contributions by their solicitors.

Difficult economic times do not make a good backdrop for those who are perceived as privileged to make objections to cuts. But the above noted areas of the Bill require reversal to counter the resultant dilutions of the current principles of justice, as well as ultimately creating a new body of unemployed. Furthermore, it is Aberdeen Bar Association’s view that the proposed bill will cost the tax payer no less and would not make anticipated savings.

The weekly disposable income of £68.00 must be looked at again. The reality for many is that either family, other debts or predilection in spending will require them to prioritise their available cash and they will struggle to place their legal costs at the top of their list regardless of the potential seriousness of the criminal case concerned. Failure to pay the contribution then becomes a burden of another kind on the family and other dependents who may be innocent but struggling members of our society.

The question must be asked:- how are they to be represented if they fail to make their contributions? Either they will be placed in the position that they represent themselves, with the chaos that follows from there, or they will move from solicitor to solicitor until they become unrepresentable. Alternatively, does the Scottish Legal Aid Board’s PDSO represent them? If so there are both cost and principles of justice implications for all scenarios. The cost to the tax payer will be that, the case -has to be returned to court for a later consideration with all the costs that court continuations bring. The PDSO is a branch of SLAB, a Government funded organisation. SLAB has been silent as to how they will make up the shortfall when the already cash strapped accused fails to make a contribution to them, just as she does to the individual solicitor.

Further, should the government not ask themselves what the legal implications are if the independent criminal practitioner is undercut by a public body? Notwithstanding the-desirability of a market place for legal services, a lack of available independent criminal practitioners means the independence of representation of the accused is
firmly called into question.

Meanwhile the individual solicitor who has to collect contributions has buckled under the burden of a number of hidden costs. These costs include; the fee for lodging small claims summons to recover the unpaid contribution; and the very real possibility of their insurance becoming an unmanageable burden as their practice must change to handle cash and the loss of repeat business. This is not simply a cry for money from the fund. The prospect of being subject by your solicitor to the payment of your contribution is an impeachment of the trust between the client and his representative. This is a trust that is fundamental to the honesty of the representation for the criminal client to the court.

Alternatively the solicitor will take the hit from the unpaid contributions. The work may be done, but with no recovery of the contribution. The drop in income will create a lack of available funds, not only for their office overhead cost (costs which the PDSO has paid for them directly by SLAB) but their payment to employees; those who are secretaries, paralegals, IT employees, young officer juniors and older mail room employees, who in the employment of Scotland’s solicitors number thousands.

As you will know solicitors are determined to object to these elements of the Bill but are at pains to advise that this is not about affluent, middle class, privileged individuals looking out for themselves. This is Scotland’s legal community seeking to protect the integrity and independence of the representation of the accused and the access of the accused to that representation, in order that Scotland continues to have a balanced criminal justice system. Equally firms and practitioners can be in a position to contribute meaningfully to the wider economy and protect employees’ jobs but the Bill will prevent them from doing so.

Rosemary J O’Neill
President
Aberdeen Bar Association
11 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from Lynn Bentley to the Committee

I should be grateful if the following email might be circulated to members of the Justice Committee prior to the meeting on the 13th.

I write on behalf of myself and my Criminal Department partner Peter Shepherd.

Whilst we are aware of the constraints on the publicly funded Criminal Legal Aid budget we have extreme concerns regarding the proposed level at which contributions are proposed together with the proposal that we should be required to collect the contributions from our Clients in summary cases and their combined affect on access to justice by some of the most vulnerable.

We are aware that the President of Aberdeen Bar Association, Rosemary O’Neill, has written on behalf of the ABA and we adopt all that she says regarding the matter. Between us Peter and I have a combined total of sixty years in this area of work. We are already aware of suspects who feel under pressure to enter inappropriate pleas due to the potential cost of defending a matter. We have accepted cuts already imposed in the level of payment in summary block fees and in necessary travel time.

We have reduced our staffing to an absolute minimum and we have felt unable to fund a Trainee for the past few years, due to the cost thereof with the resultant shortage of the next generation of properly trained defence solicitors being at crisis level.

Our primary concern, as Officers of Court, remains ensuring access to justice, by a fair and proper legal aid system. We believe that this will be denied if the Bill, as currently proposed, is passed.

Lynn Bentley
Partner, Criminal Department
Aberdeen Considine
12 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from Michael Monro to the Committee

I am advised that the Justice Committee is to be meeting tomorrow, Tuesday 13 November to discuss, inter alia, changes in the current provision of legal aid for persons being prosecuted in Scotland.

For reasons which no-one understands the Justice Secretary, no doubt with advice from SLAB is determined that there should be a system of contribution by anyone applying for criminal legal aid in summary proceedings with the threshold being as low as £68 a week. Whilst in my opinion such a decision is disgraceful in that the lowest limit is ridiculously low it is made even worse by the suggestion that such contributions be ingathered by the solicitor. The Board is to ingather solemn contributions as it presently does with civil contributions so why not also summary monies? The infrastructure is obviously in place at SLAB so surely logic dictates it ingather summary contributions.

How do those who support the suggestion of client contributions expect solicitor to deal with a case if contributions are to be paid out of state benefits received in the main fortnightly. Is the solicitor to wait until client has paid all his contribution and then proceed to prepare the defence? That could well result in the conclusion of the criminal prosecution being delayed months which is not in the interest of the victim of crime or any witnesses. Summary procedure is already subject to lengthy delay due to lack of resources within the Courts and Procurators Fiscal offices. A solicitor will, I foresee, have to go before a Sheriff and ask that a case be postponed due to lack of payment of contributions or full payment of contributions.

We are all aware the lack of full payment of Fiscal fines and also the failure of FEOs in gathering fines imposed by the Courts. How is it expected that anyone will be more successful in getting in money from such disadvantaged people as we represent in the criminal courts.

I would therefore ask that the committee remove the requirement of contributions, which failing to have the threshold far more than £68 and without any doubt at all the contributions be ingathered by SLAB.

I have been in private practice since 1974 and have provided legal aid since 1977. I have never contacted a Government dept. in my life but so important are these proposals and the risk of creating a shambles in our court system so obvious I ask that the Justice Committee acts in the interests of justice and not in the interests of the Justice Minister and the Scottish Legal Aid Board.

Michael Monro
Senior Partner
Mackie and Dewar
12 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from George Mathers and Co. to the Committee

We are George Mathers & Co. established in Aberdeen in 1981 and ever since then have been intensely engaged in predominantly Court work. We have other valued specialisms but in the main, most of our resources are deployed in dealing with Criminal Legal Aid cases. It follows that we have more than thirty years’ experience in that area and some of our practitioners still date from the start. Over that period we have already witnessed major changes in respect of which we have consulted where possible and implemented.

Against that background and experience, these most recent proposals serve to take a wrecking ball to the administration of justice, and in particular to access to it. We are seriously concerned that this Government’s notion of consultation is more akin to the Thatcherite model of telling us beforehand what it is later intended to be done anyway, than anything remotely meaningful for the concept. For example and specifically, the catastrophic proposal to abolish corroboration which finds no support from the Law Society of Scotland, the profession at large, the police federation and thirty-one out of thirty-two Judges, would remove bedrock protections from our system which will never be retrieved. That is what is being fought for, and it is against that background this debate should be seen.

There already exists a system of contributions in respect of civil Legal Aid Certificates. This has been administered for decades by the Board and is well understood. Separately, for initial advice and assistance Solicitors are used to assessing any initial contribution and collecting it. What is being proposed is fundamentally different and prejudicial for access to justice. It is worth remembering that the original ethos of Legal Aid was to provide the same access as if the individual could afford to pay. This idea is prejudicial and without principle. The notion that people with an income starting at £68.00 weekly can afford to contribute to the cost of their case is absurd as a starting point. Even the keycard for advice and assistance requires no initial contribution below a weekly income of £105.00. The civil Legal Aid system centrally administered by the Board provides a mechanism for regular collection of staged contributions as a graduated payment towards the greater, total cost of the case. This system seeks to adopt a similar arrangement at proportionately greater cost compared to the total.

Despite the well established Board arrangements, it is proposed Solicitors do the collecting. Two things flow from that. The Solicitor will need to manufacture time to address those arrangements, none of which is chargeable thereby reducing even further the profitability of such work. Secondly each firm will need to consider what to do in the event of non-payment. Either we do the work anyway, and even further reduce any chance of earning anything from the case with all the consequences for staffing levels and financial strain, or we adopt a position of refusing to do the work without payment.
We as a firm recently had no choice but to make redundancies. This proposal means that that prospect may have to be looked at again. If we refuse to do the work the client is left unrepresented with all the consequential outcomes for Court delays, adjournments and denial of access to justice. In no sense whatever are clients put in a better position with this. It is interesting to note that in respect of the PDSO their contributions will be collected for them by the body patently best placed to do so, namely SLAB.

The justification given, such as it is not based on principle. Rather it is said that the Legal Aid bill is too high and must be reduced. The profession has no control over what is deemed worthy of prosecution. That is for the Crown. Neither do we have control over new statutory offences. That is for Parliament, effectively with an absolute majority, for the Government. We as Solicitors work hard within the system with decreasing profitability and increasing pressure on finite resources. This is a bad proposal, devoid of principle and with serious consequences for access to justice and employment. It should be rejected or at the very least subject to amendment in favour of the Board doing the administration.

George Mathers & Co.
Solicitors
12 November 2012
Scottish Civil Justice Council and Criminal Legal Assistance Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 26 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 2

Jenny Marra

25 In section 2, page 1, line 18, at end insert—

<( ) to provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system,

( ) to provide such advice on matters relating to the civil justice system as may be requested by the Scottish Ministers, and

( ) to consider how to make the civil justice system more accessible, fair and efficient.>

Jenny Marra

26 In section 2, page 1, leave out line 23

Jenny Marra

27 In section 2, page 2, line 6, at end insert—

<( ) Before preparing draft rules under subsection (1)(c) the Council must consult such persons as it considers appropriate.>

Kenny MacAskill

1 In section 2, page 2, line 7, leave out subsection (4) and insert—

<(4) For the purposes of this Part, “draft civil procedure rules” are draft rules which relate to a matter in subsection (5).

(5) Those matters are—

(a) any matter relating to a court within the remit of the Council which the Court of Session may regulate by act of sederunt,

(b) any matter relating to a court within the remit of the Council in anticipation of the Court of Session being given power to regulate the matter by act of sederunt, or

(c) any matter relating to a proposed court in anticipation of—
(i) the court being established and added to the remit of the Council, and
(iii) the Court of Session being given power to regulate the matter by act of sederunt.

(6) The courts within the remit of the Council are—
(a) the Court of Session, and
(b) the sheriff court.

Section 3

Kenny MacAskill
2 In section 3, page 2, leave out lines 16 to 19

Jenny Marra
28 In section 3, page 2, line 24, at end insert—
<(  ) make proposals for research into the civil justice system,>

Jenny Marra
29 In section 3, page 2, leave out lines 25 and 26

Jenny Marra
30 In section 3, page 2, line 27, at end insert <under this section or section 2(1)>

After section 3

Margaret Mitchell
12 After section 3, insert—
<Consultation of the Council
Nothing in this Act requires the Scottish Ministers to consult the Council on any matter.>

Section 4

Kenny MacAskill
3 In section 4, page 2, line 34, after <approves> insert <draft>

Kenny MacAskill
4 In section 4, page 2, line 36, leave out <civil procedure rules> and insert <rules which relate to a matter in section 2(5)>
Section 6

Jenny Marra
31 In section 6, page 3, line 19, after <least> insert <2 and not more than>

Jenny Marra
32 In section 6, page 3, line 22, leave out <at least>

Jenny Marra
33 In section 6, page 3, line 23, leave out <at least>

Jenny Marra
34 In section 6, page 3, leave out lines 24 to 30 and insert—

<( ) at least 8 and not more than 10 persons (“LP members”) who are not judges, practising advocates or practising solicitors, and who include—
(i) at least 2 persons with experience and knowledge of consumer affairs,
(ii) persons with knowledge of the non-commercial legal advice sector, and
(iii) persons able to represent the interests of different categories of litigants.>

Section 7

Jenny Marra
35 In section 7, page 4, line 10, at end insert—

<( ) In appointing persons to be members of the Council, the Lord President must ensure that the proportion of both men and women appointed is at least 40 per cent of the membership.>

Jenny Marra
36 In section 7, page 4, leave out line 15

Kenny MacAskill
5 In section 7, page 4, line 16, at end insert—

<(2A) In preparing the statement of appointment practice the Lord President must have regard to the principles in subsection (2B).
(2B) The principles are—
(a) appointments to the Council should be made fairly and openly, and
(b) so far as reasonably practicable, all eligible persons should be afforded an opportunity to be considered for appointment.>
Margaret Mitchell

13 In section 7, page 4, line 16, at end insert—

<( ) When preparing a statement of appointment practice under subsection (2), the Lord President must ensure that the statement applies as far as practicable guidance set out in the code of practice prepared and published under section 2(1) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), with such modifications as the Lord President considers to be appropriate to the circumstances of appointing members to the Council.

( ) Before publishing a statement of appointment practice under subsection (2), the Lord President must consult the Public Appointments Commissioner for Scotland.>

Jenny Marra

37 In section 7, page 4, leave out line 22

Section 9

Jenny Marra

38 In section 9, page 5, leave out line 23

Section 10

Jenny Marra

39 In section 10, page 5, leave out line 33

Section 11

Kenny MacAskill

6 In section 11, page 6, line 5, leave out <chair meetings> and insert <be chair>

Kenny MacAskill

7 In section 11, page 6, line 6, leave out <do so> and insert <be chair>

Kenny MacAskill

8 In section 11, page 6, line 11, leave out <chair meetings> and insert <be chair>

Kenny MacAskill

9 In section 11, page 6, line 13, leave out <, from the judicial members,>

Kenny MacAskill

10 In section 11, page 6, line 14, leave out <chairing member> and insert <chair>
Section 12

Jenny Marra

40 In section 12, page 6, line 22, at end insert—

<(3A) The Council must ensure that its proceedings and those of any committees and sub-committees established by it are held in public.

(3B) Despite sub-section (3A), the Council or, as the case may be, any of its committees or sub-committees may decide to hold all or part of any proceedings in private.

(3C) The Council must publish—

(a) agendas for its proceedings and those of its committees and sub-committees,

(b) the papers relating to those proceedings,

(c) such reports of those proceedings as it thinks fit.

(3D) Despite sub-section (3C), the Council may decide that all or part of any agenda, paper or report need not be published.

(3E) The Council must publish a statement setting out—

(a) the circumstances in which its proceedings and those of its committees and sub-committees may be held in private, and

(b) the circumstances in which agendas, papers and reports need not be published.>

Section 16

Kenny MacAskill

11 In section 16, page 7, line 30, at beginning insert <draft>

Section 19

Jenny Marra

41 In section 19, page 9, line 34, leave out <has disposable income of, or exceeding, £68 per week and>

Jenny Marra

42 In section 19, page 9, line 36, leave out from <or> and end of line 37 and insert <and

( ) has disposable income or capital exceeding such amounts as may be prescribed by regulations made under section 33ZA(1).>

Margaret Mitchell

14 In section 19, page 10, leave out lines 1 to 11 and insert—

<( ) It is for the Board to determine the amount of and collect any contribution payable by the client under subsection (2).>
Section 20

Jenny Marra

43 In section 20, page 10, line 23, leave out <has disposable income of, or exceeding, £68 a week and>

Jenny Marra

44 In section 20, page 10, line 25, leave out from <or> to end of line 26 and insert <and ( ) has disposable income or capital exceeding such amounts as may be prescribed by regulations made under section 33ZA(1).>

Margaret Mitchell

15 In section 20, page 10, line 30, leave out from beginning to end of line 5 on page 11 and insert—

<( ) It is for the Board to determine the amount of and collect any contribution payable by A under subsection (3).>

Margaret Mitchell

16 In section 20, page 11, leave out lines 10 and 11

Margaret Mitchell

17 In section 20, page 11, line 12, leave out <second> and insert <first>

Margaret Mitchell

18 In section 20, page 11, line 16, leave out <third> and insert <second>

After section 21

Graeme Pearson

45 After section 21, insert—

<Refund of contributions for criminal legal assistance in certain circumstances

Refund of contributions for criminal legal assistance in certain circumstances

After section 25AD of the 1986 Act, inserted by section 20, insert—

“25AE Refund of contributions for criminal legal assistance in certain circumstances

At the conclusion of the proceedings, the court in which those proceedings are concluded may order any contribution for criminal legal assistance due or paid by virtue of this Act to be remitted or refunded to the person from or by whom, or in respect of whom, the contribution was due or paid if—

(a) the person has been acquitted of an offence, and

(b) the court considers that it is in the interests of justice for the contribution to be refunded.”.>
Section 22

Margaret Mitchell
19 In section 22, page 12, line 5, leave out <may> and insert <must>

Margaret Mitchell
20 In section 22, page 12, line 8, at end insert—

<( ) Regulations made under subsection (1) must include a definition of—
   (i) disposable income, and
   (ii) disposable capital.>

Margaret Mitchell
21 In section 22, page 12, line 8, at end insert—

<( ) Regulations made under subsection (1) must not make provision for the solicitor providing the assistance to determine the amount of, or collect, a contribution.>

Margaret Mitchell
22 In section 22, page 12, leave out lines 16 and 17

Margaret Mitchell
23 In section 22, page 12, line 29, at end insert—

<33ZB Regulations about refunding contributions in certain circumstances
The Scottish Ministers must by regulations make arrangements for any contribution for criminal legal assistance due or paid by virtue of this Act to be remitted or refunded in a case where proceedings are concluded without the person from whom, or in respect of whom, the contribution was due or paid, being convicted.”.>

Before section 24

Margaret Mitchell
24 Before section 24, insert—

<Report on operation and effect of Part 2
(1) The Scottish Ministers must, before the end of the 3 year period, lay before the Scottish Parliament a report on the operation and effect of Part 2 of this Act.
(2) The report must, in particular, contain information about the effect that the operation of Part 2 has had on—
   (a) the efficient and effective functioning of the criminal justice system, and
   (b) access to justice, having particular regard to access to justice for persons living in rural areas.
(3) The Scottish Ministers must, as soon as practicable after the report has been laid before the Parliament, publish the report in such manner as they consider appropriate.

(4) In this section “the 3 year period” means the period of 3 years beginning with the day on which any provision in Part 2 comes into force.
Scottish Civil Justice Council and Criminal Legal Assistance Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

### Role of Council
25, 26, 28, 29, 30

### Preparation of rules
27, 1, 2, 3, 4, 11

### Consultation of Council
12

### Composition of Council
31, 32, 33, 34, 36, 37, 38, 39

### Appointments by the Lord President
35, 5, 13

### Chair and deputy chair of Council
6, 7, 8, 9, 10

### Proceedings in public
40

### Threshold for contributions
41, 42, 43, 44, 19, 20

### Collection of contributions
14, 15, 16, 17, 18, 21, 22

### Refund of contributions
45, 23
JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

32nd Meeting, 2012 (Session 4)

Tuesday 13 November 2012

Present:

Roderick Campbell
Christine Grahame (Convener)
Jenny Marra (Deputy Convener)
Graeme Pearson

John Finnie
Colin Keir
Margaret Mitchell (Committee Substitute)
Sandra White

Apologies were received from Alison McInnes and David McLetchie.

The meeting opened at 9.50 am.

Scottish Civil Justice Council and Criminal Legal Assistance Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 28, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

The following amendments were disagreed to (by division)—

25 (For 3, Against 5, Abstentions 0)
27 (For 3, Against 5, Abstentions 0)
31 (For 3, Against 4, Abstentions 1)
32 (For 3, Against 4, Abstentions 1)
33 (For 3, Against 4, Abstentions 1)
34 (For 3, Against 4, Abstentions 1)
35 (For 2, Against 6, Abstentions 0)
13 (For 3, Against 5, Abstentions 0)
40 (For 3, Against 5, Abstentions 0)
41 (For 2, Against 5, Abstentions 1)
42 (For 2, Against 5, Abstentions 1)
14 (For 3, Against 5, Abstentions 0)
43 (For 2, Against 5, Abstentions 1)
44 (For 2, Against 5, Abstentions 1)
15 (For 3, Against 5, Abstentions 0)
16 (For 3, Against 5, Abstentions 0)
19 (For 3, Against 5, Abstentions 0)
20 (For 3, Against 5, Abstentions 0)
21 (For 3, Against 5, Abstentions 0)
22 (For 3, Against 5, Abstentions 0)
23 (For 3, Against 5, Abstentions 0)
24 (For 3, Against 5, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 12 and 45.
The following amendments were not moved: 26, 29, 30, 36, 37, 38, 39, 17 and 18.

The following provisions were agreed to without amendment: sections 1, 5, 6, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and the long title.

The following provisions were agreed to as amended: sections 2, 3, 4, 7, 11 and 16.

The Committee completed Stage 2 consideration of the Bill.

Roderick Campbell declared an interest as a member of the Faculty of Advocates.
Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 2

09:51

The Convener: Item 2 is stage 2 proceedings on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. I welcome the Cabinet Secretary for Justice and his officials. Members should have copies of the bill, the marshalled list and the groupings of amendments for consideration today.

I hope that you are all ready. I will take the amendments at a reasonable pace; I say that for some of the elderly members of the committee who have said that I accelerate too much—naming no names, Mr Campbell.

Section 1 agreed to.

Section 2—Functions of the Council

The Convener: Amendment 25, in the name of Jenny Marra, is grouped with amendments 26 and 28 to 30.

Jenny Marra (North East Scotland) (Lab): Amendment 25 would give the Scottish civil justice council a duty to advise the Scottish Government on civil justice matters and a duty to consider how to make the civil justice system more accessible, fair and efficient. The bill gives the council a duty to advise the Lord President on changes to the civil justice system, but not a duty to advise the Scottish Government on that, and there is no duty for the council to consider how to make the civil justice system more accessible, fair and efficient. I believe that to afford the council a duty to advise the Scottish Government as well as the Lord President on civil justice matters is the right way in which to ensure that civil justice policy remains the preserve of our democratically elected Parliament and Government.

Constitutionally, it is for the Government to make policy and for the Parliament, including the Justice Committee, to scrutinise it. Although I was reassured by the Lord President’s interpretation of the bill, that reference to policy was in relation to policy of rules of court. I believe that the bill should be beyond interpretation, and the insertion of the provision that I propose will allow the Government to continue to execute its obligation over civil justice policy in its wider definition, should the council take it upon itself to consider that.

Both the Cabinet Secretary for Justice and the Lord President have concluded that the council will be tasked with implementing the Lord President’s recommendations from the Gill review. Those are wide ranging and they touch on a number of areas...
of civil justice policy. For that reason, both the obligation to advise the Government on the changes and the obligation to consider how the reforms will make our civil justice system fairer, more accessible and more efficient are important provisions.

I move amendment 25.

**The Cabinet Secretary for Justice (Kenny MacAskill):** I will discuss amendment 25 and its consequential amendments 26 and 29 first. I appreciate that Jenny Marra is seeking to ensure that the bill is clear about where responsibility for justice policy properly lies. However, I do not agree that the bill is unclear in that respect. I hope that I can provide some reassurances on what I agree is an important constitutional issue.

The council will essentially be an advisory body. It must advise the Lord President on improvements to the civil justice system and it must assist the Lord President in the Court of Session in preparing rules of court.

The council’s duties to advise the Lord President should be understood within the context of the Lord President’s statutory functions under the Judiciary and Courts (Scotland) Act 2008 “for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts.”

It is in that context that the council’s duties to advise the Lord President should be viewed. The council’s advisory functions are intended to assist the Lord President in fulfilling his duties under the 2008 act.

The bill makes it clear that the council “may” advise ministers. I see no need to compel it to do so. Ministers and the Parliament can take the council’s advice into account if we so wish. The Lord President discussed those issues when he appeared before the committee and I understand that the committee was largely reassured by his evidence.

Comparisons have been drawn with the Civil Justice Council in England and Wales. That body is a non-departmental public body under ministerial direction. I believe it appropriate that responsibility for the Scottish council, which will differ in several ways from the Civil Justice Council in England and Wales, will rest with the Lord President. The Government will remain the body responsible—and responsible to Parliament—for the development of wider justice policy. Nothing in the bill will affect the capacity of the executive, the legislature and the judiciary to continue to make the decisions that appropriately rest with them.

I am unsure whether amendment 25 would achieve the clarity desired. I submit that the proposed dual function might even blur the lines, as it suggests that the council must consider matters that properly sit with ministers. With regard to the proposal to place a duty on the council to

“consider how to make the civil justice system more fair, accessible and efficient”.

the bill as drafted provides at section 2(3) that the council does not have to merely “consider” that issue but that for all its functions, which encompass the whole civil justice system, it must have regard to the principle that the civil justice system should be fair, accessible and efficient. I believe that that is a stronger protection that will permeate as a guiding principle for all the council’s functions.

Amendment 28 would add the ability to make proposals for research to the council’s powers. Although I consider that there is little doubt that the council would be able to do that under the bill as drafted, I am happy for the bill to highlight that. Amendment 30 seeks to insert a reference to the sections under which the council may make recommendations. Section 3(2)(g) already provides that the council may publish “any recommendation it makes”. I believe that amendment 30 is therefore unnecessary.

I invite the committee to reject Jenny Marra’s amendments, with the exception of amendment 28, which I am pleased to support.

**Jenny Marra:** I have said what I want to say on the amendments, and I press amendment 25.

**The Convener:** The question is, that amendment 25 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)

**Against**
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 25 disagreed to.

**The Convener:** Amendment 26, in the name of Jenny Marra, has been debated with amendment 25.

**Jenny Marra:** As amendment 25 has been defeated, I will not move amendment 26.

**Amendment 26 not moved.**
The Convener: Amendment 27, in the name of Jenny Marra, is grouped with amendments 1 to 4 and 11.

Jenny Marra: Amendment 27 would give the council an obligation to consult on changes to the rules of court. Given the complexity of many rules of court, organisations have frequently raised concerns that court users do not have an adequate understanding of the rules. Organisations such as Scottish Women’s Aid have said that having the opportunity to engage with the council on proposed changes would improve the service that they provide by ensuring that they are informed and engaged in the decision-making process. I believe that the council would benefit, too. To afford it the ability to consult on rule changes would ensure that it made decisions with the benefit of the views of all interested organisations.

I move amendment 27.

Kenny MacAskill: Jenny Marra’s amendment 27 would require the council to consult

“such persons as it considers appropriate before preparing draft rules”.

However, the bill gives the council flexibility in that regard. Under section 3, the council will have powers to consult on any issue within its remit.

10:00

As I have mentioned previously, the expectation is that much of the council’s work will be carried out at committee level where there will be ample opportunity for individuals and organisations to contribute. The Civil Procedure Rule Committee in England and Wales, which drafts rules and has no policy function, is required under section 2(6) of the Civil Procedure Act 1997 to

“consult such persons as they consider appropriate, and ... meet (unless it is inexpedient to do so)”

before making or amending rules. The Scottish council, which will have the power to consult on any matter within its remit, will have much broader functions than the Civil Procedure Rule Committee and will necessarily operate in a more inclusive manner. I do not think, therefore, that a statutory duty to consult is needed.

I appreciate Jenny Marra’s concern and the concern of some stakeholders that the council might operate as a closed shop. However, I do not believe that that will happen. Indeed, I do not believe that the bill, which opens up the current arrangements significantly, would allow it. The estimated costs of the council that are provided in the financial memorandum to the bill include the costs associated with public consultation, which are up to £10,000 a year and significantly more during civil courts reform—potentially, up to £50,000 at the busiest period. Those figures were developed in collaboration with the Lord President’s office. I hope that the committee will take that as a good sign that the council will consult.

Although the existing councils carry out consultations—such as on the new rules on the inner house of the Court of Session, for which the consultation extended to the holding of a public meeting—I consider that it would be disproportionate and undesirable to require the council to consult prior to preparing every set of rules. In many cases, rules will make technical changes purely to give effect to primary or subordinate legislation, the subject matter of which may have already been subject to extensive consultation and which, in any case, will have been considered by Parliament. I believe that the broad power to consult is sufficient and do not, therefore, consider it necessary to place upon the council the statutory duty contained in amendment 27.

Amendments 1 to 4 and 11 in my name have been identified as necessary to ensure that, should proposals for any new court be brought forward, the council would be able to consider and prepare draft rules for that court at an early stage. As members are aware, the council’s immediate task will be to prepare the draft court rules for implementation of the Scottish Government’s planned programme of civil courts reform. One of the proposals under consideration is the creation of a sheriff appeal court, as recommended by the Scottish civil courts review. The amendments ensure that, should such a proposal be brought forward at any time, the council would be able to give it due consideration and make the necessary preparations for implementation.

I urge Jenny Marra to withdraw amendment 27 and invite the committee to agree to my amendments 1 to 4 and 11.

Roderick Campbell (North East Fife) (SNP): I have difficulty with the statutory duty that Jenny Marra proposes, as it seems unnecessarily to tie the hands. There may be occasions on which consultation would be appropriate, and making a statutory duty before anything is produced by the council seems to be the wrong way forward.

Jenny Marra: I feel that the statutory duty to consult would strengthen the new council and its ties with the public at large. Organisations’ right to be consulted would enhance the public’s understanding and appreciation of the civil court rules and make the court process a lot smoother for those who use it. I press amendment 27.

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.
The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)

Against
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 27 disagreed to.

Amendment 1 moved—[Kenny MacAskill]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Powers of the Council
Amendment 2 moved—[Kenny MacAskill]—and agreed to.
Amendment 28 moved—[Jenny Marra]—and agreed to.

Amendments 29 and 30 not moved.
Section 3, as amended, agreed to.

The Convener: Am I going slowly enough?
Roderick Campbell: Just about.

Jenny Marra: Nearly.

The Convener: That is faint praise.

After section 3

The Convener: The next group is on consultation of the council. Amendment 12, in the name of Margaret Mitchell, is the only amendment in the group.

Margaret Mitchell (Central Scotland) (Con): Amendment 12 seeks to clarify an issue that I raised at stage 1. Part 1 of the bill establishes the Scottish civil justice council, which will be led by the Lord President with a membership comprising legal and consumer representatives. Although the council will have a predominantly advisory role, it will clearly be a significant player in the law reform world, and its opinion will obviously carry weight.

Given that part 1 allows the council to offer advice and make recommendations to Scottish ministers on the development of the civil justice system, I have lodged a probing amendment to allow a discussion on whether the bill might go further than that and introduce a presumption that the council must be consulted in certain circumstances. For example, if a policy were to be introduced that either directly or indirectly affected the civil justice system, would Scottish ministers be compelled by law to consult the council? I can cite other examples of statutory consultees that have been created by legislation, mainly within planning law under which it is necessary to consult local authorities.

Other amendments that will be debated this morning seek to better define the council’s policy functions and remit. Amendment 12 has a similar objective in that it clarifies that, notwithstanding the council’s power to offer advice, nothing in the bill places a requirement on ministers to consult the council. I am interested to hear the cabinet secretary’s view on the effect of the bill’s current drafting in this area.

The Convener: It might be a probing amendment, Mrs Mitchell, but you are still required to move it.

Margaret Mitchell: I move amendment 12.

Kenny MacAskill: I appreciate what Margaret Mitchell is seeking with amendment 12, and entirely agree that the bill should not oblige ministers to consult the council. That is why nothing in the bill will have that effect.

We have already discussed the separation of powers, and I am happy to restate my assurances that the council is an advisory body and that nothing in the bill will interfere with the powers of ministers or the Parliament. That said, I do not believe that there is any doubt within the bill that needs to be addressed by amendment 12.

I therefore ask Margaret Mitchell to withdraw amendment 12.

Amendment 12, by agreement, withdrawn.

Section 4—Court of Session to consider rules
Amendments 3 and 4 moved—[Kenny MacAskill]—and agreed to.

Section 4, as amended, agreed to.

Section 5 agreed to.

Section 6—Composition of the Council
The Convener: The next group is on composition of the council. Amendment 31, in the name of Jenny Marra, is grouped with amendments 32 to 34 and 36 to 39.

Jenny Marra: Amendment 31 seeks to afford the council flexibility in the number of judicial members that can be appointed by changing the wording of the current proposal from “at least 4 judges” to “at least 2 and not more than 4”. It can be seen as a consequential amendment to facilitate the changes that are outlined in
amendment 34, which seeks to increase representation by lay members on the council.

Convener, do you want me to speak to amendments 32 to 34?

The Convener: Yes. This is your opportunity to speak to all the amendments.

Jenny Marra: Similarly, amendment 32, which seeks to afford the council two practising advocates instead of “at least 2”, and amendment 33, which seeks to afford the council two practising solicitors instead of “at least 2”, can be seen as consequential amendments to facilitate the changes that are outlined in amendment 34.

Amendment 34 seeks to give the council a greater number of members who do not work specifically within the legal sector, in order to reflect the desire of many organisations that made representations to the committee on the council’s composition. In any consideration of the workings of our civil justice and court system, it is important that we have representation from a broad range of interests. I understand that one concern about limiting the number of legal professionals on the council may be that rules of court are too technical to be understood by groups that represent litigants. However, many organisations with legally trained personnel would bring both the necessary legal knowledge and insight of their particular areas of the civil justice system to the council.

I move amendment 31.

Graeme Pearson (South Scotland) (Lab): I will merely add to what Jenny Marra has said. The cabinet secretary will be aware that a number of witnesses expressed concern to us about the closed nature of the legal establishment and their inability to influence discussions within the civil court environment. The suggestions that Jenny has made in amendments 31 to 34 would open up that closed environment and give opportunity to public members to influence the way forward. It seems that we have an opportunity now to show a sign for the future, which will likely not be available to us in the next few years. I encourage the cabinet secretary to look well on amendments 31 to 34.

Roderick Campbell: I ought to declare an interest: I am a member of the Faculty of Advocates.

Although I have some sympathy with the line that there may be too many prescribed lawyers, I also think that we should bear it in mind that this may be the starting point for the rules council. After rules are up and running, it would be possible to change the mandatory appointees, albeit by secondary legislation. I think that that would be the better way forward.

John Finnie (Highlands and Islands) (Ind): I disagree with Rod Campbell and I agree with Graeme Pearson. This is the opportunity to set the position from the outset. The danger is that we will establish a group of legal people without the necessary range. I am thinking particularly of the environmental people who should be involved.

Colin Keir (Edinburgh Western) (SNP): I firmly agree with Rod Campbell. Going by what the Lord President explained to us in his testimony, things will be far more technical in the initial period. I will not support the amendment.

Margaret Mitchell: Jenny Marra’s amendments look very reasonable, so I would be interested to hear what the cabinet secretary has to say about why they should or should not be agreed to.

The Convener: He is going to do that anyway, but I do not mind you saying it.

Kenny MacAskill: Amendments 31 to 33 would set the maximum number of lawyer and judicial members at what the bill currently provides as a minimum. Amendment 34 would increase the mandatory minimum membership from 14 to 18 and would provide that none of the Lord President’s discretionary appointments may be judges, practising solicitors or advocates.

The group of amendments would fundamentally alter the council’s membership and deprive the council of the flexibility and capability that the Scottish Government believes are necessary for the council to carry out its functions most effectively.

Amendment 34 would also specify that none of the Lord President’s discretionary appointments may be judges or practising advocates or solicitors—a point that was touched on by Graeme Pearson and John Finnie. The removal of practising solicitors in particular from eligibility for appointment as LP members could lead to a number of worthy candidates—who would not sit on the body as representatives of the profession—being precluded. For instance, lawyers who work for voluntary organisations, consumer bodies, or environmental bodies, or academics who also practise, might be unable to become members. I am sure that that is not what is intended.

The provision for flexible appointments strikes the right balance to allow the council to take account of the range of interests in civil justice, and to include technical expertise for its detailed work, without creating an unduly large and unwieldy body. It will allow the membership to evolve as its role develops. I have no doubt that Mr Pearson and Mr Finnie both know that lawyers are, precisely because they add value to an organisation’s aims and ethos, frequently employed and appointed by the types of organisations that I mentioned. To preclude them
would be detrimental to that interest or group. I note that lay membership of the Civil Justice Council in England and Wales was strengthened following the Spencer review recommendations in that regard.

The bill as it stands would allow up to 11 non-legal persons to be appointed—more than half the maximum membership of 20. The establishing legislation for the Civil Justice Council in England and Wales specifies only the categories of members, not the numbers. The numbers, and therefore the balance, are set by ministers in consultation with the Lord Chief Justice. Further, and importantly, that body does not have responsibility for drafting rules of court. The arrangements for the Civil Procedure Rules Committee therefore need to be borne in mind when making comparisons with the situation across the border. That committee has between 6 and 9 judicial members, 6 lawyers and 2 lay members.

10:15

I have heard from a variety of groups that are seeking greater representation on the council, including the judiciary, the legal profession and the insurance industry, which has been in touch with many members. Rod Campbell has raised that issue with me. I consider that the range of views that have been expressed and the lack of consensus on the issue suggest that there is a need for flexibility, and that that flexibility will be achieved by allowing the Lord President the discretion that is provided for in the bill. The membership of a body such as the council, with its technical drafting role and policy function, must reflect both roles, and the bill’s provisions will allow the council to evolve as its focus shifts from the initial rule-drafting task towards its function of systematic review.

The argument has been made that the technical work can be carried out through the council’s committees instead. That may be true—it is equally true for activities other than rules preparation—but given that the technical work will be the body’s bread and butter for the next two to three years, it seems to be appropriate that the membership should adequately reflect that.

Users’ and the public’s interests must be included at the heart of the council’s work, of course. I expect that there will be an adequate number of lay members on the council and that court users’ interests will be represented by all members of the council—not just the lay members—which is why the bill requires the council to have regard to the principles of fairness, accessibility and efficiency in carrying out all of its functions.

Capping of the number of judicial, advocate and solicitor members would limit the council’s capacity to carry out the complex technical work that is needed to implement the many procedural changes that civil courts reform will require, and it could impact on the organisations that many people wish to see represented. The bill provides for an appropriate balance of technical expertise in membership of the council, both on the rules of court and policy issues.

The bill will allow the council to evolve as its focus changes over time. As the Lord President identified in his evidence to the committee, after the proposed programme of civil courts reform has been implemented, the membership composition of the council may require to be amended to reflect changing priorities, and ultimately ministers will retain the ability to amend the membership through subordinate legislation, if necessary. Rod Campbell mentioned that.

I therefore urge the committee not to support the amendments.

Jenny Marra: Before I decide whether to press the amendments, I am interested to hear whether the cabinet secretary might be open to making the provision for lawyers. He explained that lawyers who work for external organisations and who might still be practising would be precluded from being included. Would he be open to including in the provisions lawyers who are also practising?

Kenny MacAskill: I am happy to consider anything. A person either is or is not a lawyer. If a person specifies that they cannot be a lawyer, that rules them out, whether they are there as a representative of the Faculty of Advocates, the Law Society of Scotland, a consumer group or an environmental group. I think that drafting that would be very difficult, but I am happy to consider such matters. People tend to wear particular hats. If a person is a lawyer, he or she is a lawyer unless they specify that they are representing the Law Society of Scotland, for example. I can reflect on the matter. The Lord President must also have flexibility to deal with claims that we know are being made from the Association of British Insurers and those who represent consumer interests. He is aware of the competing groups, which will ebb and flow in time as issues matter. That is a matter for him, but I am happy to reflect on that.

Jenny Marra: I thank the cabinet secretary for undertaking to reflect on that. In the meantime, I would like to press amendment 31.

The Convener: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
For
Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 31 disagreed to.

Jenny Marra: I am sorry, convener, but was not the vote three for the amendment and three against it?

The Convener: No.

Jenny Marra: Okay. Thank you. I am sorry.

The Convener: I do not mind being corrected. Two people are correcting me now. If anybody else wants to join in, they should feel free to do so.

Am I going slowly enough?

Jenny Marra: Not quite slowly enough for me, obviously.

The Convener: I was just checking.

Amendment 32 moved—[Jenny Marra].

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 33 disagreed to.

Amendment 34 moved—[Jenny Marra].

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 34 disagreed to.

Section 6 agreed to.

Section 7—Lord President appointment process

The Convener: Section 7 is on appointments by the Lord President. Amendment 35, in the name of Jenny Marra, is grouped with amendments 5 and 13.

Jenny Marra: Amendment 35 would ensure gender parity on the council. It would guarantee that council membership would be gender balanced, with a minimum 40 per cent of men and 40 per cent of women being appointed. The other 20 per cent would be flexible.

A large gender gap still exists in Scotland’s legal sector, not least in its governing bodies over which the Government has power. For example, as of June this year, the Judicial Appointments Board
for Scotland comprised 70 per cent men, the Scottish Legal Complaints Commission comprised 66 per cent men, the Scottish Law Commission comprised 80 per cent men, and the Scottish Court Service comprised 68 per cent men. I could go on.

It is also true to say that many cases that go through our courts affect women disproportionately. It would show leadership and foresight if we were to ensure gender parity on such a public body.

I move amendment 35.

Kenny MacAskill: Amendment 35 deals with a very important issue, which we have discussed before in relation to the Scottish police service and the Scottish fire and rescue service when considering the Police and Fire Reform (Scotland) Bill. My view remains that equality of opportunity for women and men—indeed, for many groups—needs to be addressed, but I am not persuaded that quotas for specialist expert bodies are the right approach. I hope that amendment 5 in my name, which will insert the principle that appointments be made fairly—I will speak to that more fully in a minute—will help to address some of Jenny Marra’s concerns about appointments.

Margaret Mitchell’s amendment 13 would require that the code of practice for making ministerial appointments, which is set by the office of the Public Appointments Commissioner for Scotland, apply to the Lord President’s statement of appointment practice “as far as practicable” and “with such modifications as the Lord President considers to be appropriate”.

It would also require the Lord President to “consult the Public Appointments Commissioner for Scotland” before publishing the statement.

The majority of appointments to the council will be made by the Lord President, rather than by Scottish ministers, who will appoint one member of staff of the Scottish Government. The Lord President indicated to the committee his intention to draw on the principles in the Public Appointments Commissioner for Scotland’s code of practice on making appointments. I welcome that commitment. However, I do not agree that those appointments should be tied by statute to that code, which is designed specifically for ministerial appointments to public bodies, is non-statutory, and may change from time to time. It does not seem to be appropriate to bind the Lord President in primary legislation to a set of principles that are not in primary legislation, that are designed for a different purpose, and that are susceptible to change, nor does it seem appropriate to introduce a role for the Public Appointments Commissioner for Scotland in that regard.

Instead—I note Margaret Mitchell’s and others’ concerns—I offer amendment 5, which adds to the commitment that has already been made by the Lord President and embodies what I consider are appropriate principles to guide the making of appointments, while ensuring that a proportionate approach is maintained. By specifying that the Lord President, when drawing up his statement of appointment practice, “must have regard to the principles” that appointments “be made fairly and openly” and that “all eligible persons” have the “opportunity to be considered”, I submit that amendment 5 goes further than amendment 13 in some respects.

I urge the committee not to accept Jenny Marra’s and Margaret Mitchell’s amendments and invite it to approve amendment 5.

Margaret Mitchell: Amendment 13 seeks to address the widespread concerns about the process of appointments to the council. Many witnesses told the Justice Committee at stage 1 that the process should be more prescriptive, and in particular that it should comply with the guidelines that the Public Appointments Commissioner for Scotland’s 2011 code of practice sets out.

I note that appointments to the Civil Justice Council in England and Wales are expected to comply with standard public appointments procedures. The commissioner’s guidelines also apply to appointments to comparable organisations such as the Scottish Legal Aid Board, the Scottish Legal Complaints Commission and the Judicial Appointments Board for Scotland.

The Scottish Government has taken the view that the council should be given the status of a statutory advisory body rather than a non-departmental public body. Significantly, that departs from the recommendations of the Gill review. The effect of designating the council as a statutory advisory body is that the important accountability mechanisms—including the public appointments procedure—will not apply.

The council has been described as an NDPB in all but name, and it is clear that there is little distinction between the council, which is to be an arm’s-length body with an advisory remit that is paid for by the public purse, and other NDPBs. The council will have an advisory role in an important part of our justice system, and appointments must be made in an open and transparent way.
I accept that the Public Appointments Commissioner for Scotland regulates ministerial appointments, and that is why amendment 13 does not seek to bring the council completely within the remit of the Public Appointments and Public Bodies etc (Scotland) Act 2003. However, it is important that appointments be made as far as possible within the rules that are laid down by the commissioner.

Amendment 13 would require the Lord President to prepare and publish a statement of appointments practice, which would, as far as appropriate, follow the commissioner’s code of practice. The words “as far as appropriate” are included in the amendment to provide the necessary flexibility for appointments that are made by the Lord President.

Amendment 13 is, therefore, similar to amendment 5 in the name of the cabinet secretary, which broadly states the code of practice and requires that the Lord President “have regard to the principles” that are embodied in the code. However, the significant difference is that amendment 13 would additionally require the Lord President to “consult the Public Appointments Commissioner for Scotland” when drawing up his statement.

That is important, because it will involve an independent external expert in the appointments process and help to provide the transparency that we need and which is necessary for the council. For that reason, I reject the cabinet secretary’s arguments on that specific point. Without that additional provision, the Lord President would be tasked with interpreting the code of practice both in drawing up the statement of appointment practice and in making the actual appointment. That seems largely to amount to a tick-box exercise that would not provide transparency at all. In contrast, under amendment 13, the commissioner would be able to advise and make recommendations to the Lord President.

I understand that the terms of the Standards, Procedures and Public Appointments Committee’s remit would enable parliamentary scrutiny of the appointments that are made by the Lord President, if the committee so wishes. I would welcome confirmation from the cabinet secretary as to whether the Scottish Government shares that view, as it is important that Parliament has a mechanism for considering and reporting on those appointments.

Kenny MacAskill: These are matters about which the Lord President has indicated a willingness to be as open, fair and accessible as possible. I have no doubt that he will be appearing before this committee in connection with a variety of matters and will doubtless be prepared to discuss issues at that point.

This is about showing some respect and keeping the separation of powers. I believe that amendment 5 in my name provides the necessary assurances.

10:30

Jenny Marra: I support the remarks of Margaret Mitchell on the code of practice and the issues of public appointment and public bodies.

On amendment 35, in my name, on gender parity, I heard no reason from the cabinet secretary for why my proposal should not happen. He heard me make the same argument in connection with the Police and Fire Reform (Scotland) Bill.

The figures that I read out provide overwhelming evidence that not enough is being done to ensure balanced gender representation on our public bodies, and I think that this would be a simple and easy way to redress the imbalance in our legal system. I urge the cabinet secretary to reconsider his position and to support amendment 35.

The Convener: The question is, that amendment 35 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 35 disagreed to.

Amendment 36 not moved.

Amendment 5 moved—[Kenny MacAskill]—and agreed to.

Amendment 13 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 13 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.
Amendment 38 not moved.

Section 9 agreed to.

Section 10—Expenses and remuneration
Amendment 39 not moved.

Section 10 agreed to.

Section 11—Chairing of meetings
The Convener: Amendment 6, in the name of the cabinet secretary, is grouped with amendments 7 to 10.

Kenny MacAskill: I will begin with amendment 9. Section 11 provides that the Lord President may determine that he, or any Court of Session judge member of the council, is to chair council meetings. It also provides that a deputy chair is to be elected by the council from the judicial members.

Having considered the views that were expressed in evidence regarding the role of lay members on the council, I agree with the committee’s view, expressed in its stage 1 report, that lay members should not be precluded from the position of deputy chair. Accordingly, amendment 9 removes the requirement that a deputy chair is to be elected from the judicial members of the council and leaves the selection of the deputy chair to the council.

Amendments 6, 7, 8 and 10 are drafting amendments to remove any doubt about the ability of the deputy chair to chair meetings of the council.

I move amendment 6.

Amendment 6 agreed to.

Amendments 7 to 10 moved—[Kenny MacAskill]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Proceedings
The Convener: Amendment 40, in the name of Jenny Marra, is in a group on its own.

Jenny Marra: Amendment 40 has been taken from a Government-supported amendment to the recent Police and Fire Reform (Scotland) Bill, which was dealt with by this committee. It seeks to add a layer of transparency to the council’s proceedings by affording it the ability to hold proceedings in public and to publish details of its proceedings and other related materials. Given the complexity of some rules of court, there would be advantage for the public and lay organisations if council meetings were held in public. Greater understanding of the thinking behind changes to rules of court and our civil justice system would filter down to court users and the wider public.

We should expect the same level of transparency from all the public bodies that we create, to ensure that the Government takes a consistent approach to transparency and accountability. Given that a similar provision made its way into the Police and Fire Reform (Scotland) Act 2012, I expect the approach to make its way into the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

I move amendment 40.

Kenny MacAskill: There are good arguments for certain public bodies holding proceedings in public, but I am not persuaded that the new council, which will be advisory in nature, should be required to do so.

In general, bodies that are required by statute to hold proceedings publicly, such as local police or fire boards, have quite different purposes and functions from those of the proposed council. Such bodies are responsible for service delivery, including the allocation of public funds. It is therefore correct that the public should be given a right of access. The council will consider and advise on important issues, but it will not be responsible for making final decisions.

I appreciate that concerns about the council’s accountability and opportunities to scrutinise it are at the root of amendment 40, and I hope that I can allay some of those concerns. The council will be required to lay an annual report and business plan before the Parliament. Under section 5(3), “The report must include a summary of the recommendations made (if any) by the Council”.

The report and plan, and the council’s recommendations, will therefore be published. If
the Parliament wants publicly to consider any of the issues that have been raised, it will do so.

Court rules are already laid before the Parliament and published. The Parliament’s consideration of the rules is a matter of public record. Also, the existing civil rules councils do not currently operate in secret. Although they do not meet in public, they publish minutes of their proceedings online. The Lord President has assured me that he intends the new council to be more proactive in relation to the material about its work that is published.

There is also the seemingly small matter of the practicability of amendment 40. Requiring council and committee meetings to be held in public would mean that the Scottish Court Service would have to put in place suitable arrangements for public access. That would pose difficulties in finding suitable accommodation, which would add to the costs of the body, especially during civil courts reform, when meetings could take place regularly.

There is nothing in the bill that prevents the council from holding public meetings if it wants to do so. Some of the people who are calling for more robust accountability mechanisms are very much the sort of people who I expect might become members of the council or its committees. I therefore trust that the matter can be left to the council.

That said, I agree with Jenny Marra that the new council should carry out its activities in an open and transparent manner. That is why the bill introduces a new requirement for the laying of plans and reports before the Parliament. It is why I lodged amendment 5 in respect of appointments being made fairly and openly, and it is why the Scottish Government has decided to extend freedom of information coverage to the new council and to the Criminal Courts Rules Council. That will be done by subordinate legislation, which will be laid before the Parliament in the new year. I would be happy to provide a draft order before stage 3, should that be desired.

We are not in disagreement over the principle of amendment 40; the question is the best and most proportionate means of achieving the same end. The arrangements that I described will provide for robust mechanisms for ensuring proper scrutiny and accountability. Freedom of information, in particular, will be more robust, because the council will not have the discretion for which amendment 40 would provide.

I urge Jenny Marra to withdraw amendment 40.

**Jenny Marra:** The most robust and confident government institutions and arms of government welcome meeting in public and opening themselves to the highest level of scrutiny and accountability. As many as possible of our public organisations should meet in public. The cabinet secretary’s argument about cost does not stack up. There are many meeting venues in our court system that would be easily accessible to the public, so I do not think that the argument about practicability is a good reason not to take a robust approach to transparency. I press amendment 40.

**The Convener:** The question is, that amendment 40 be agreed to. Are we all agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

**Against**
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 3, Against 5, Abstentions 0.

**Amendment 40 disagreed to.**

**Section 12 agreed to.**

**Sections 13 to 15 agreed to.**

---

**Section 16—Interpretation of Part 1**

**Amendment 11 moved**—[Kenny MacAskill]—and agreed to.

**Section 16, as amended, agreed to.**

**Sections 17 and 18 agreed to.**

**The Convener:** I have a little scribble that tells me that, at this point, I need to pause for a short time for a changeover of officials. I therefore suspend the meeting for one minute—which means that everyone should stay put.

10:40
**Meeting suspended.**

10:41

**On resuming**—

**Section 19—Clients’ contributions for criminal assistance by way of representation**

**The Convener:** We are all sitting comfortably, so we will begin. Amendment 41, in the name of Jenny Marra, is grouped with amendments 42 to 44, 19 and 20.

**Jenny Marra:** Amendment 41, which seeks to remove from the bill the £68 contribution threshold
for assistance by way of representation payments, can be seen as a consequential amendment to facilitate amendment 42, which seeks to have the rates of contribution for ABWOR in relation to disposable income or capital set by regulation instead of primary legislation.

Regulations are easier to amend and indeed are more commonly amended than primary legislation. Despite wage freezes and the increasing cost of living, the contribution rates for civil justice, which are set by altering primary legislation, have not been amended this year. If we keep this £68 figure in primary legislation, it will be out of date within three months, never mind six months, a year or three years, as prices and the cost of living rise in this recession. Given that changes to primary legislation are not common, it would be much better for figures that in the interests of justice need to be regularly reviewed to be set out in regulations. Amendments 43 and 44 seek to have a similar effect for criminal legal aid as amendments 41 and 42 have for ABWOR.

I move amendment 41.

Margaret Mitchell: Amendments 19 and 20 seek to require Scottish ministers to make regulations that explicitly state what the bill means by “disposable income” and “disposable capital”. I accept that the definition of disposable income will inevitably be complex, which is why I am not suggesting that it be included in the bill. Nevertheless, it is important to have a legally binding definition and that Parliament be given the opportunity to consider it.

The definition of “disposable income” is central to the working of the legislation, because it determines the point at which an individual is required to contribute to their legal representation. If the threshold is wrong, poor and vulnerable people could be forced to pay when they might be unable to afford to do so. Although the cabinet secretary and the Scottish Legal Aid Board have assured the committee that disposable income would be determined only after a long list of necessary costs were deducted, evidence given to the committee shows that stakeholders disagree on what exactly should be included as disposable income. For example, some witnesses have expressed concern that non-passported benefits will be taken into account, while others have called for the disability living allowance and its replacement to be disregarded.

10:45

The inclusion of the resources of spouses or partners could also cause confusion and I believe that it could be controversial. Does it mean that, if the total household disposable income exceeds the threshold, one member of the household who has been accused of a crime and who earns below the threshold will have to make a contribution?

Equally, there is much confusion over what is to constitute disposable capital. The policy memorandum to the bill states:

“Capital includes savings and anything else of value owned by the client”,

with some essential exceptions. That, in turn, could result in elderly individuals who may have significant capital but no disposable income being forced to contribute to legal aid. Such questions cannot be left to interpretation and should be set out in subordinate legislation. In the interests of clarity, the cabinet secretary must come up with a definitive list that can be debated so that those accused of a crime know exactly what will be taken into account as income and capital and what will not.

Amendment 19 would oblige ministers to make regulations about contributions for criminal legal assistance. The bill currently gives ministers that power without requiring regulations. Amendment 20 would ensure that ministers include a definition of both disposable income and disposable capital in the regulations.

I am sympathetic to the intent behind the amendments in Jenny Marra’s name, but they would result in uncertainty as to the precise threshold. At this point in time and for that reason, I cannot support them.

Kenny MacAskill: These amendments focus on the threshold above which a person’s contribution towards their criminal legal aid fees will be assessed. Many comments have been made during evidence sessions on the proposed threshold, and many of my colleagues raised the subject in the stage 1 debate.

As I stated in my response to the committee’s stage 1 report, a number of principles have been applied in reaching the figure of £68: achieving consistency in contribution thresholds between the different aid types used in criminal cases, which are currently ABWOR when someone pleads guilty, and criminal legal aid when someone pleads not guilty; achieving consistency with the level of income support as that is the level at which state support for a person is essential, and £68 is just over the personal allowance level for a single person over 25 at 2011-12 rates; and avoiding sharp differences in contribution based on small differences in income or capital. That has led to the development of the graduated approach that the committee will have seen in the draft regulations that were forwarded recently.

Basing a decision such as this on a set of principles means that those principles will continue
to apply whenever changes to the threshold might be necessary to maintain access to justice for those in need of criminal legal aid. Principles not only provide the impetus for future changes but ensure that any changes are justifiable and timeous. Indeed, the link to income support levels will likely see an increase in that threshold sooner rather than later.

I see that the amendments proposed do not suggest an alteration to the level of threshold but focus on how that is presented, whether in the bill or in regulations. It is interesting and surprising to see amendments 41 and 43, lodged by Jenny Marra, which propose removing the threshold from the face of the bill and placing the determination of disposable income and capital in regulation. Legal aid legislation is complex and much of the detail needs to be set out in regulations. However, where possible, the Legal Aid (Scotland) Act 1986 shows on its face the threshold below which a person may be eligible for a particular legal aid type and the threshold above which a contribution will be due. That is currently done in the 1986 act for advice and assistance, which includes ABWOR, and for civil legal aid.

Sections 19 and 20 of the bill continue that important practice. As a result, it is important that the bill clearly specifies the level of income as the level below which contributions cannot be levied, with the regulations providing the means to alter that level. Amendments 41 and 43 would also remove the direct link in sections 19 and 20 to the provisions of the 1986 act that "passport" those in receipt of passported benefits, ensuring that no contribution is required for them.

Amendments 42 and 44 are related to the removal of the threshold from the bill, which is proposed by amendments 41 and 43, and would not improve what we have in the bill in terms of describing the content of regulations. Substantial amendments would need to be made to the draft regulations that the committee has been forwarded, for example to ensure that those people in receipt of passported benefits would not be required to pay any contribution. As I have said, the consequence of that would be that it would no longer be clear in the bill that some people would not have to pay any contribution.

In my view, the amendments do nothing but remove clarity about the levels at which no contribution is due. Therefore, I urge the committee to retain the threshold as it is in the bill and to reject amendments 41 to 44.

The Convener: Did you address the contributions based on the income and capital of a wife? I think that that issue was raised by Margaret Mitchell, but I cannot remember whether you addressed it.

Kenny MacAskill: It has been made clear that, when there is a conflict, those things will not be taken into account. We have evidence from the Scottish Legal Aid Board that it would also consider whether there was undue hardship. It is clear from paragraph 4(c) of new schedule 2A to the Advice and Assistance (Consolidation and Amendment) (Scotland) Regulations 1996, as proposed in the draft regulations, that

"the resources of any spouse or civil partner of the person concerned are treated as that spouse's resources unless-

(i) the spouse or civil partner has a contrary interest in the matter in respect of which the person concerned is applying for criminal assistance by way of representation;

(ii) the person concerned and spouse or civil partner are living separate and apart; or

(iii) in all the circumstances of the case it would be inequitable or impractical to do so."

When there is a conflict, such as domestic violence, that will be taken into account. In other circumstances—it is difficult to speculate on what they might be—there will still be the opportunity to approach the board.

Margaret Mitchell: Let us be clear about this, cabinet secretary. If a husband and wife are living together and the wife is earning less than would normally qualify her for a contribution towards legal assistance, will the household income be considered and could she be liable?

Kenny MacAskill: It is the household income that will be considered except when they are living separate and apart, when there is a conflict of interest or when there is some other matter that the board could reflect on. Deductions will be made in respect of the assessment of the disposable income of a spouse just as deductions will be made for children.

The basis of the individual applying for legal aid is that, first, matters will be assessed irrespective of whether there is a contrary interest, with deductions made for the spouse and children and other matters. In a particular case, there may be a conflict—for example, if the person and their spouse are living separate and apart—and the spouse’s income will then not be taken into account.

The Convener: I call Jenny Marra to wind up, please. I have forgotten what you are winding up on.

Jenny Marra: Can I address Margaret Mitchell’s amendment as well?

The Convener: Well, you really ought to have done that earlier, but I will let you do it now. You can slip it into your winding up. That is just between you and me—nobody heard me say that.
Jenny Marra: Thank you, convener. I will address that point first. I was interested in the cabinet secretary’s response to Margaret Mitchell’s amendment. He said that there will be a provision for circumstances in which there is a conflict of interests, whereby the board will decide whether a wife or spouse is eligible to make a contribution. I would be interested to know whether such a conflict of interest will be defined in the legislation or whether it will be left to judicial discretion.

I turn to my amendments—where are we?

The Convener: You are winding up and pressing or withdrawing amendment 41. I have kind of lost what we were doing myself, it was such a long time ago.

Jenny Marra: Amendment 41 seeks to take the threshold out of the bill. The cabinet secretary is being slightly mischievous—if I may say so—about the intention of the amendment in saying that people whose disposable income fell below the £68 threshold would have to pay a criminal legal aid contribution. I suggest that taking the figure of £68 out of the bill and putting the figures into regulations would leave no scope for that interpretation. Thresholds would be provided for in legislation, but they would be in the regulations.

Before deciding whether to press the amendment, I have a question for the cabinet secretary. Given that the figure of £68 is going to be in the bill—in primary legislation—how regularly does he expect it to be reviewed?

Kenny MacAskill: That is not a matter on which I can bind my successors. It is a matter that the board will require to consider and Governments will require to address, as has been the case since legal aid was established.

I do not think that it is a question of being mischievous. It is a question of being factual about the position. It is also fair to say that it is not a question of judicial discretion. The discretion would be for the Scottish Legal Aid Board. The only aspect of judicial discretion would be if somebody was to ask for a judicial review of the matter and it came before the appeal court.

As was mentioned in the stage 1 debate, the regulations will provide that war pensions and disability living allowance are not included in the calculation of disposable income. That said, I am happy to work with the committee to reconsider the threshold. My view is that, if people want a higher threshold to apply for criminal legal aid, it would have to be replicated across the board with civil legal aid. There would be a gross disparity if we expected a victim of domestic violence to pay a higher level than the alleged perpetrator of that violence. Also, the caveat has to be that the cost of any increase would have to be met from the current legal aid budget, which would mean that it would have to come out of fees.

I am happy to enter discussions on the matter with the Law Society of Scotland and to see whether it is willing to share the burden across civil and criminal legal aid for parity but, as I said, that would impact on fees. I will return to the committee on the matter in due course.

Amendment 19 presents some technical difficulties that arise from the conversion of “may” into “must”. First and most important, if one wants to convert a power to an obligation in legislation, one needs to specify exactly what that obligation is; otherwise, it could be satisfied with minimal effort by Scottish ministers. Such a specific explanation in section 22 on what the regulations must cover would be long—possibly as long and detailed as the regulations themselves.

Secondly, “must” might be complied with only once, and again it would provide a risk of minimal effort by Scottish ministers, whereas “may” will allow Scottish ministers to exercise the power repeatedly, as and when necessary.

Thirdly, regulations would need to be ready at the same time as the obligation to make them came into force. Otherwise, Scottish ministers would be in breach of the obligation as soon as it had effect. In any event, the system will not work without regulations, so there is nothing to fear from the use of the word “may” in the bill.

On amendment 20, which was also lodged by Margaret Mitchell, I see no need to include definitions of disposable income and disposable capital in regulations. There are such definitions in section 42 of the Legal Aid (Scotland) Act 1986, and that provision includes a power to prescribe in regulations what constitutes disposable income and disposable capital. In practice, that power has to be used before the contributions regime or the new test for criminal ABWOR can operate. The section 42 power will be used when the draft regulations that have been shared with the committee are made. Section 42 has been in place since enactment in 1986 and it has been exercised for the advice and assistance regulations and the civil legal aid regulations, which contain long schedules that are similar to the schedules in the draft regulations.

I ask the committee to reject amendments 19 and 20.

The Convener: As we went in a circle back to the cabinet secretary, I will let the other two members come back in if they wish to do so. Margaret, more has been said on your amendments.

Margaret Mitchell: Notwithstanding what the cabinet secretary said, I believe that there is an
overriding requirement to ensure that we establish exactly what is meant by “disposable income” and “disposable capital”. I will therefore move both my amendments.

**The Convener:** We have not reached that point yet. However, you are not persuaded.

**Margaret Mitchell:** I am not, convenor.

**Jenny Marra:** For clarification, cabinet secretary, did you say that you are prepared to enter discussions on removing the £68 limit from the bill?

**Kenny MacAskill:** I am prepared to enter discussions with the Law Society of Scotland not about removing the figure from the bill and dealing with the matter through regulations but about increasing it. As I explained, there are good reasons for the inclusion of the £68 limit. I am happy to consider the matter, but the caveats are, one, that there would have to be parity with civil legal aid; two, that the cost would have to be met from the existing budget; and, three, that it would come from fees that are paid to the profession. However, I will enter discussions on that.

**Jenny Marra:** You will enter discussions with a view to keeping the figure in the bill but reviewing it regularly.

**Kenny MacAskill:** It is to be reviewed. As I touched on, these matters will also be dependent on changes to benefits and any increase in the allowances paid there. We think that it is important that the figure is kept in the bill, because it ties in with a whole variety of matters. Any changes that would involve uprating would come about through regulations. I am happy to discuss any increase, but the principle should remain in the bill.

11:00

**Jenny Marra:** How regularly would such a review take place?

**Kenny MacAskill:** I cannot address the issue of a review, as that will be for Governments to decide. It will also depend on when benefit changes come through. Given the coalition Government’s proposals, that might be a negative thing, so we would have to consider matters in that regard. Some of those factors are not in my control because they are beyond the powers of this Parliament.

**Jenny Marra:** I thank the cabinet secretary for his clarification. In the meantime, before those discussions, I will press amendment 41.

**The Convener:** The question is, that amendment 41 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
- Marra, Jenny (North East Scotland) (Lab)
- Pearson, Graeme (South Scotland) (Lab)

**Against**
- Campbell, Roderick (North East Fife) (SNP)
- Finnie, John (Highlands and Islands) (Ind)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Keir, Colin (Edinburgh Western) (SNP)
- White, Sandra (Glasgow Kelvin) (SNP)

**Abstentions**
- Mitchell, Margaret (Central Scotland) (Con)

**The Convener:** The result of the division is: For 2, Against 5, Abstentions 1.

**Amendment 41 disagreed to.**

**Amendment 42 moved—[Jenny Marra].**

**The Convener:** The question is, that amendment 42 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
- Marra, Jenny (North East Scotland) (Lab)
- Pearson, Graeme (South Scotland) (Lab)

**Against**
- Campbell, Roderick (North East Fife) (SNP)
- Finnie, John (Highlands and Islands) (Ind)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Keir, Colin (Edinburgh Western) (SNP)
- White, Sandra (Glasgow Kelvin) (SNP)

**Abstentions**
- Mitchell, Margaret (Central Scotland) (Con)

**The Convener:** The result of the division is: For 2, Against 5, Abstentions 1.

**Amendment 42 disagreed to.**

**The Convener:** Amendment 14, in the name of Margaret Mitchell, is grouped with amendments 15 to 18, 21 and 22.

**Margaret Mitchell:** Amendments 14 to 18, 21 and 22 seek to alter the way in which the bill deals with the determination and collection of contributions. The amendments will require the Scottish Legal Aid Board to determine and collect any contributions that are payable under the bill.

The amendments will not require SLAB to collect the limited contributions that are currently collected by solicitors, mainly because that amounts to just over 5 per cent of the amount that the bill would require solicitors to collect. SLAB is best placed to determine and collect legal aid contributions. It has a 95 per cent collection rate in civil legal aid cases, and therefore it already has the apparatus and collection procedures that are
required to carry out large-scale collections of contributions.

SLAB was established by statute to administer legal aid funds. It therefore seems frankly preposterous that the Government proposes that private business should determine and collect such a large percentage of legal aid contributions.

I will spell out the risks in the Government's proposal. Criminal legal aid solicitors, who have accepted significant cuts to their fees in recent years, will be required to collect around £2.7 million in summary legal aid and assistance by way of representation contributions in criminal cases.

The Government's proposal will result in criminal legal aid solicitors either being unable to collect contributions in a significant number of cases or having to delay proceedings in order to secure those contributions. There is no doubt that requiring solicitors to collect summary criminal legal aid contributions will almost certainly result in court delays and an increase in cases in which the accused persons represent themselves.

I was a member of the former Justice 1 Committee, which scrutinised and supported reforms to the High Court and summary courts that were intended to address delays. It beggars belief that the Scottish National Party Government is, with its ill-judged proposal, undermining that constructive and effective legislation, which has resulted in significant reductions in trial adjournments in recent years.

In addition, the proposed system could discourage solicitors from taking on legal aid work, which is already low paid in comparison with other legal work. That raises very definite issues around access to justice.

Understandably, the proposal is strongly opposed by the legal profession. The Edinburgh and Glasgow Bar Associations have already indicated that they intend to strike if the plans go ahead. Although I do not condone that strike action, it is a reflection of serious opposition to the Government's proposal.

In its stage 1 report, the Justice Committee invited the Government to reflect further on the issue. The Scottish Government has responded by saying that solicitors already have systems in place for collecting client contributions and that under its plans 82 per cent of clients will not have to make any contributions.

I question both assertions. According to a survey by the Law Society of Scotland, more than 70 per cent of respondent firms stated that they either never or rarely collect ABWOR contributions simply because of the difficulty in doing so. Moreover, the Government's claim that 82 per cent of clients will not have to make any contributions is based on modelling of only four medium-sized firms, which is just not extensive or representative enough to be relied on.

Taking all that into consideration, I believe that there can be only one explanation for these disruptive and damaging proposals: the Government just does not want to foot the bill for the additional resources that SLAB will require to determine and collect contributions. Moreover, it is no surprise that SLAB supports the proposal for some of its work to be carried out by lawyers, particularly given that in 2011-12, the Scottish Government reduced SLAB's budget after freezing it for three years.

In effect, the proposal to introduce contributions amounts to a cut in legal aid fees. Solicitors will be expected to collect contributions to ensure that they are fully paid and if they are unable to do so the Government will simply say, “Tough luck”. I accept that requiring SLAB to collect the majority of contributions will have significant resource implications but that is the fairest and most efficient way in which to proceed. Surely the Scottish Government will now accept that fact and provide SLAB will adequate resources to do its job.

Amendment 14 seeks to require SLAB to determine and collect contributions for criminal ABWOR introduced by section 19. As with the other amendments in the group, the amendment has been drafted to cover both the determination and collection of contributions, given that both of those will put unnecessary burdens on lawyers.

Amendment 15 seeks to require SLAB to determine and collect contributions for criminal legal aid introduced by section 20. Amendment 16 seeks to clarify that the fees paid to solicitors are paid by order of the court and the board out of legal aid requirements.

Amendments 17 and 18 are consequential on amendment 16, and amendment 21 seeks to make it clear that regulations on contributions for criminal legal assistance cannot require solicitors to determine or collect contributions. Finally, amendment 22 seeks to remove the subsection that would allow regulations to specify whether it is for the board or solicitors to determine or collect contributions.

I move amendment 14.

John Finnie: As you might expect, cabinet secretary, we have had a lot of last-minute submissions from various people. Indeed, this morning, I met and spoke to the solicitors who are standing in front of this building. One of the submissions that we have received has come from the Scottish Legal Aid Board, which, in a section
about the collection of contributions by the PDSO, says:

“The PDSO will determine the amount of and collect contributions. In the event of non-payment and where the PDSO has taken reasonable steps to collect and it is cost effective to do so, the Board will pursue the outstanding payments.”

There seems to have been some confusion around that. I am reassured by your comments about undue hardship, reviewing an increase in the threshold and other issues, but when I was speaking to the solicitors out front the issue of the £600,000 figure given previously for the collection of fees was raised. I realise that this is literally a back-of-a-piece-of-paper calculation, but it was proposed that removing £5 from every solicitor’s fee would pay for the cost of collection by SLAB. Given your comments about the overall cost envelope in the earlier discussion about thresholds, would you be prepared to consider such a move?

The Convener: Would it be useful, that question having been posed, to hear from other members before we hear from the cabinet secretary? What does the committee want to do? Should we deal with that question first?

Jenny Marra: Yes.

The Convener: That is fine—whatever suits. I will give the cabinet secretary a moment, because the question has just been put to him. Take your time, cabinet secretary. Do we want to move—

Jenny Marra: He is ready.

The Convener: Ms Marra is taking over. I will have to limit the muffins—I think that members are overwhelmed by them.

Are you prepared, cabinet secretary?

Kenny MacAskill: What I can say—

The Convener: I am sorry—John Finnie has something to add.

John Finnie: I should say that I was asking about the principle of further discussions on the issue; I am not expecting the cabinet secretary to negotiate with the Law Society in public.

Kenny MacAskill: I think that it was suggested by some in the profession that the PDSO would not collect contributions. That is not the case—the PDSO will seek to collect contributions. The PDSO is employed by the Scottish Legal Aid Board. If people were not to pay their contributions, SLAB would seek to recover that money. There is a point of principle, which it will seek to enforce.

It would be fair to say that SLAB is not a collection agency. If it were to seek to become a collection agency for all firms, it would incur increased costs as a result of having to hire in people to pursue contributions. There are probably private firms that are better placed to carry out mass debt recovery—some legal firms do that on an industrial scale. It would be better for them to recover the money.

As I said to Jenny Marra, I have a fixed envelope. If the Law Society has any proposals—so far, it has not had any proposals, other than simply to refuse to accept what is proposed—I will be happy to take them on board. I will offer to vary the thresholds. I am prepared to consider out-of-the-box solutions. There may be an argument that it would be better to pay the levy to an already established private firm that does debt collection for organisations from utility companies through to catalogue companies. Such firms are well known.

However, if it would be preferable, I could put it to the chief executive of SLAB that a contribution should be made to the cost of collection and that we could hire in people to do that work, but it would need to be funded from there, because my principle is that we must preserve the integrity of the legal aid service.

John Finnie: You are amenable to discussions with the board about that.

Kenny MacAskill: Absolutely.

John Finnie: Thank you very much.

Roderick Campbell: I want to discuss the current situation in relation to ABWOR. We heard evidence that the total amount of ABWOR contributions that should have been collected by solicitors was £154,000, and that 6.2 per cent of applications for ABWOR grants involved a contribution, out of a total of 42,853 successful applications. By my calculations, that means that, at present, the average contribution payable for ABWOR would be about £58.

Looking at the proposals, we can see that just under half the people who will have to make a contribution under the new system will be required to pay less than the current maximum of £142, so although we are talking about a significant increase, it is not an overwhelming increase. I suggest that the evidence on the current collection situation is less than satisfactory. Margaret Mitchell referred to the Law Society’s survey, but it is based only on the 15 per cent of firms that responded. It is not the case that 75 per cent of those firms said that they collected under no circumstances; they said that they did so rarely.

I have had letters from a number of lawyers in which they have not provided a full explanation of why they do not collect. Some talk about relations with their clients, while others talk about the economics of the situation. However, we had evidence from Dr Lancaster of SLAB that between 5 and 10 per cent of the income from criminal
cases of many firms comes from private clients. That suggests that there are firms that can collect a lower value of contributions than the value of contributions that they currently collect from private clients, so I think that the case in respect of collections is overegged. I sympathise with very small firms, in particular, on which certain demands will be placed that might not be placed on the larger firms. I just wanted to put those thoughts on the record.

11:15

Graeme Pearson: In relation to the case being overegged, with due respect to Roderick Campbell, it is often the case that those who view other people’s difficulties do not quite appreciate the impact of such economic restraints.

I will address some of the matters that the cabinet secretary covered. I fully agree with what Margaret Mitchell said about support for the amendments in her name. There is no doubt that the Law Society of Scotland, in its evidence to us at various times, took the view that the consultation process did not enable it to feed into discussions effectively and that developments were something of a moving feast that changed from day to day.

I hope that the Government has fully considered the scale of the economic impact, particularly on the small firms to which Roderick Campbell referred. In rural areas, we rely heavily on small firms to maintain legal aid support for people going to local courts. In the event that firms cannot continue to support work in small courts throughout the country, considerable pressure will be placed on our system and there will be a threat to the fair and equitable delivery of justice in Scotland that we all want. I hope that the cabinet secretary will reconsider his stance. He seems to have decided on his approach and our debate seems to have had no impact on his position.

Jenny Marra: I listened to what Roderick Campbell said about ABWOR. However, I have heard much evidence from defence solicitors in Scotland, and many solicitors do not collect the ABWOR contribution to which they are entitled because their clients cannot afford to make it. Thresholds should not be based on a situation that does not reflect what is really happening in our criminal justice system.

The cabinet secretary said that the Scottish Legal Aid Board is not a debt collector, but under the bill SLAB will collect contributions in solemn matters, and it already has the infrastructure and staff to enable it to do so. Perhaps it is collecting those contributions because, given the fees that are involved, the risk of not doing so is too large. Is not the cabinet secretary simply passing the risk of not collecting in summary matters from SLAB to private defence solicitors?

The Convener: I have a question that was put in many of the submissions that we received. Why is it that civil legal aid contributions are collected by the board and not criminal legal aid contributions? Could the Government pursue the matter in discussions with the Law Society and consider the collection of civil legal aid contributions by firms? The suggestion is controversial, but the approach would create parity between criminal practitioners and civil practitioners.

I am not suggesting that that is the solution. However, I accept that the legal aid budget is tight. I do not want what is happening to legal aid representation in England to happen here. There is an argument that if criminal practitioners are to collect contributions, why should civil practitioners be any different? I am interested to know whether such an approach has ever been discussed with the Law Society.

Kenny MacAskill: There has been some thinking by the Law Society of Scotland and the Scottish Legal Aid Board, I think. I am more than happy to allow those bodies to continue to discuss the issue. There are advantages as well as disadvantages to such an approach. An advantage is that the contribution is immediately treated as a fee and people get access to it. As I said to John Finnie, I am happy to discuss the matter with the Law Society—it might be better if initial discussions were with the Scottish Legal Aid Board, but I am happy to broker discussions.

The Convener: Do you have further comments on the amendments in the group?

Kenny MacAskill: I should put on record, given that Margaret Mitchell talked about cuts, that last year’s legal aid costs were the second highest in the history of legal aid, at just under £160 million. Some two thirds of the figure went on criminal legal aid and 14 firms received more than £1 million from the public purse. It is a bit rich of a member of a party that is in government south of the border to talk about cuts, given the contrast between the situation in Scotland and the 8 per cent cut in legal aid that Westminster has imposed south of the border and the 17.5 per cent cuts that will be imposed in 2014-15.

This is about preserving the integrity of the Scottish legal aid service to make sure that we cater for all our people. I see Ms Marra shaking her head as if to say no, but that includes the person who came to my surgery last night who is paying a contribution as she seeks a divorce from a person who has perpetrated violence against her. I do not see people arguing for parity there.
We are seeking to preserve the integrity of a budget that has been cut. Legal aid is now not available south of the border in cases that relate to asylum, clinical negligence, criminal injuries compensation, debt, employment, housing, immigration, family and welfare benefits. It is important in Scotland that access to justice is available to people. More people are now able to access legal aid than ever before and it is important that we recognise that and, within the tight envelope that is foisted on us by Westminster, seek to look after the interests of all.

Amendments 14 and 15 propose changes to another aspect of the bill that has been the subject of some comment. As stated in my response to the committee’s stage 1 report, I do not consider it unreasonable to expect a solicitor to collect his or her fees directly from the client who is being provided with legal assistance, nor do I consider the collection of fees to be anything other than a routine part of business for most, if not all, law firms.

I know that solicitors have lobbied hard to have removed from the bill their responsibility to collect from their clients their fees in summary cases and instead to place that responsibility on the Scottish Legal Aid Board. The amendments provide not only for that transfer but for the transfer of responsibility for the determination of contributions to the Scottish Legal Aid Board.

I repeat that the bill proposes evolution, not revolution. Solicitors have been responsible for the assessment and collection of advice and assistance contributions since the Legal Advice and Assistance Act 1972. The Legal Aid (Scotland) Act 1986 added the concept of advice and assistance by way of representation—ABWOR—for which solicitors collect contributions. Of course, in the case of privately paying clients, solicitors collect the entire fee from their clients. There has been no complaint that solicitors have been acting as “unpaid debt collectors” over the 25 years since the 1986 act came into force.

Regulations providing for ABWOR for children will be introduced during 2013 as a result of the Children’s Hearings (Scotland) Act 2010. Under those regulations, solicitors will be required to assess and collect contributions in respect of welfare-based and offence-based cases. The assessment and collection of contributions for criminal legal aid in the bill is in line with those other aspects of legal aid.

There are few solicitors whose work comprises solely criminal practice and who do not already have processes in place to collect fees from clients in respect of ABWOR. Indeed, few businesses do not have processes in place to collect fees for services that they provide to a client or customer. Being a solicitor who registers with the Scottish Legal Aid Board should not entitle someone to demand that the public purse funds the collection of fees payable to them for the services provided by them to a client.

I remain firmly of the view that solicitors are much better placed to collect relatively small contributions from their clients. That is also in their client’s interest. For example, the draft regulations provide flexibility in collection arrangements, leaving them to be agreed between the solicitor and the client. That gives room for a client’s preferences to be accommodated. Perhaps the client would want to pay in cash, in person, or they might ask the solicitor to accept two instalments in one, to allow them to pay for another emergency. If SLAB were to be responsible for collecting all contributions, it is unlikely that it would be able to be as flexible with clients. A more structured and prescribed process would need to be put in place, and the client would have the additional burden of setting up a payment method with SLAB.

I think that it would be unworkable for the board both to assess contributions and collect them. If the board needs more information from the client, is the solicitor to act as an intermediary, passing on requests from SLAB and then returning to SLAB whatever the client provides? How would that be an efficient use of the solicitor’s resources?

I realise that there is some misunderstanding around the responsibilities of the PDSO, as I have mentioned. Getting back to what John Finnie said, I will be happy to discuss the issue with SLAB and, indeed, solicitors. I think that there is good reason why it is dealt with there, but I do not rule anything out. Getting the board to collect all contributions would substantially reduce the level of savings to the taxpayers’ purse. I have made it clear that I am happy to discuss both the threshold and collection, but savings have to be made to avoid the situation that is playing out south of the border. Some actions have to be taken by those responsible for providing criminal legal aid.

During my time in practice—I have not practised for 13 years—I remember one of my partners representing somebody who was paying their council house. My partner took from them my fee for representing them in a criminal matter—a charge on petition. They were perfectly capable of paying the fee. We must be able to look at such scenarios.

The Convener: Just for clarification, I want to ask about whether, in the open discussions with the Law Society and the Scottish Legal Aid Board, the matter of civil contributions will be raised.

Kenny MacAskill: Absolutely. I am happy to give you an assurance to discuss that with them.
The Convener: Thank you. I ask Margaret Mitchell whether she wishes to press or withdraw amendment 14.

Margaret Mitchell: Can I comment on some of the points that have been raised?

The Convener: Of course. I beg your pardon. I got lost in the debate—another senior moment. That is two this fortnight. One a week is not bad.

Margaret Mitchell: On Roderick Campbell’s point, there may well be some firms that are able to collect contributions, but the exception does not prove the rule. The vast majority of solicitors have said loudly and clearly that what is proposed will cause them major problems, will lead to inevitable delays in the court system and raises serious issues about access to justice. The concern is that many of the solicitors who currently carry out legal aid work will simply vote with their feet.

On the cabinet secretary’s comments, I am advised that there may be a limited number of cases in which collection by solicitors may be necessary—for example, ABWOR cases in which advice is required to be provided relatively quickly—but such cases are rare. I was interested in the cabinet secretary’s comments on the PDSO, which seem to me to be a confirmation of double standards in the bill’s provisions, in that the PDSO will be expected to seek to collect contributions, but in the event that they do not succeed—if I understood the cabinet secretary correctly—SLAB will collect them. It therefore seems to me that the bill’s provisions will afford the PDSO a belt-and-braces approach that will not be afforded to solicitors.

It is a distinct possibility that if SLAB were responsible for all the contributions, that would impact on the savings. Equally, however, that should not deter the Government from doing what is right and ensuring that we have a justice system that is fair.

I press amendment 14.

The Convener: The question is, that amendment 14 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 14 disagreed to.

Section 19 agreed to.

The Convener: Cabinet secretary, I am aware that time is pressing, but can you sit there for a couple of minutes longer?

Kenny MacAskill: Certainly.

The Convener: How long have we got?

Kenny MacAskill: I probably need to be away by 12.

The Convener: We might manage to finish all the amendments by then. We have a large one coming up from Graeme Pearson, but the rest have all been debated. It would be kind of you if you could stay.

Section 20—Contributions for criminal legal aid

Amendment 43 moved—[Jenny Marra].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 5, Abstentions 1.

Amendment 43 disagreed to.

Amendment 44 moved—[Jenny Marra].

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Amendment 44 disagreed to.

Amendment 15 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is; For 3, Against 5, Abstentions 0.

Amendment 15 disagreed to.

Amendment 16 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 16 disagreed to.

Amendments 17 and 18 not moved.

Section 20 agreed to.

Section 21 agreed to.
and indignity of criminal proceedings will, to make matters worse, be out of pocket by the Crown’s actions.

During the stage 1 debate, the Cabinet Secretary for Justice said that the bill would “help to maintain a fair, consistent and generous legal aid scheme.”—[Official Report, 25 October 2012; c 12638.]

A range of witnesses, including those from the Faculty of Advocates and Scottish Women’s Aid and Dr Cyrus Tata of the University of Strathclyde, expressed concern about the lack of refunds in the bill. As the committee report says:

“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.”

The Church of Scotland shared that view.

The Scottish Government’s position on the matter is unconvincing. I note that the cabinet secretary failed to address the issue during the stage 1 debate. Instead, in his response to the committee’s stage 1 report, he said that refunds would be inappropriate because they would mean that legal aid victims were treated more favourably than those who paid privately, who would, of course, not be subject to refunds on acquittal. That argument amounts to two wrongs making a right. More to the point, the overwhelming objective must be to ensure that the vulnerable are protected.

The Government also argues that refunds would reduce the savings that are made under the bill. Although that may well be the case, it is not a sustainable argument for introducing a system that is unfair. Rather, it is yet further evidence that the Government, having decided to cut the legal aid bill by £10 million next year and a further £10 million in 2014-15, has worked back from that to try to come up with a system to fund those savings.

According to the latest custodial statistics, nearly 90 per cent of criminal cases result in a guilty verdict, which means that refunds would apply only to a small minority of cases.

The amendment would allow for refunds of all contributions that are made except where an accused person is found guilty. Refunds will therefore be given in all not guilty and not proven cases, as well as in other cases of acquittal, such as, for example, when the Crown accepts a plea of not guilty.

Amendment 45, in the name of Graeme Pearson, also attempts to introduce refunds of contributions. However, I am unable to support it as it would allow refunds only in cases of acquittal where “the court considers that it is in the interests of justice for the contribution to be refunded.”

My concern is that that could send out the message that those who are refused refunds, despite being acquitted, are somehow considered guilty. Our judicial system is rightly based on the principle that individuals are innocent until proven guilty, with the burden of proof rightly lying with the Crown prosecution. Amendment 45 therefore challenges that basic tenet of Scots law.

I also have concerns about how courts would determine when it would be in the interests of justice to refund. I believe that the amendment would introduce subjectivity, even though the principle applies to all cases of non-guilt verdicts—in which case, refunds should be given in all cases.

The Convener: I was concerned about this issue, too. I would look at the principle that is in operation, which is that, in civil litigation, someone who is successful may or may not get an award of their judicial expenses—again, the court has discretion about how to award those expenses; people do not always get all their judicial costs back. There has to be judicial discretion. I am not attracted by the amendment in Margaret Mitchell’s name, as it contains no judicial discretion, which I think is terribly important. To some extent, the situation parallels what happens in civil cases.

The problem for me with Graeme Pearson’s amendment concerns the fact that the principle that is in operation is that, in order to apply fairness, we would have to have some system whereby the private client, as well as the legally aided client, would be entitled to a return of some of their costs. We are not talking about a refund; we are talking about something like an award of expenses in criminal proceedings.

As Graeme Pearson’s amendment deals only with those on legal aid, I cannot accept it. It is all very well for pragmatic arguments to be made, but we ought to work on principle. If it is appropriate that the court considers that it is in the interests of justice for a contribution—or, to use my word, the costs—to be refunded, that must surely apply to people who, while they are not necessarily rich, happen to be above the level at which they have to pay their own costs and have no legal aid cover. That is the problem for me.

It would be worth the cabinet secretary’s time to consider the issue, but I think that, if we were to pass either of the amendments, there could be difficulties and unintended consequences.

I wanted to speak on this point because I think that there is an issue around exceptional circumstances in which the sheriff takes the view that the case ought never to have been brought before them in the first place. That is a really
narrow range of cases, because there are many reasons why evidence might need to be fully tested in order to establish that someone can be acquitted or have the case against them found to be not proven. Frankly, however, some cases should never be placed before the sheriff in the first place.

For those reasons, I think that Margaret Mitchell’s amendment is far too broad and that Graeme Pearson’s amendment does not serve those who pay privately for their defence, to whom we must also be fair.

Roderick Campbell: I will be brief, convener, because you have put forward most of the arguments that I would have made. I have a great deal of sympathy with Graeme Pearson’s amendment, but we must be fair to those who are paying privately, however small those numbers and however few of them are acquitted. However, I do not want the issue to die a death, and it should be kept under debate.

Sandra White (Glasgow Kelvin) (SNP): I also have a great deal of sympathy with Graeme Pearson’s amendment, and I have spoken to him about it, but I take on board what Roderick Campbell says with regard to private clients.

Perhaps, as Roderick Campbell implied, the cabinet secretary could look at the issue as he has very generously offered to do on two previous occasions. The issue should not be left to lie—we need to take it a wee bit further.

Margaret Mitchell: In response to some of the comments, it is important to emphasise that amendment 23 would ensure that the most vulnerable would be protected and—crucially—would have access to justice. It is as simple as that.

Kenny MacAskill: With regard to many of the points from the convener and other members, the devil is in the detail. The difficulty with Graeme Pearson’s amendment is the question of what happens if the case is deserted. A whole variety of matters are involved, and the issue is not simple.

I understand why the committee has raised those concerns, and I have already discussed those matters informally with the Crown. I accept the convener’s logic that, if we are to have a principle, it should apply to those who pay a fee, whether that is paid through a legal aid contribution or as a private client.

We should remember that in Scotland—unlike south of the border—there is no concept that anyone, no matter how guilty or immoral they may be, will ever be asked for court expenses. Whether the case involves a corporate offence or someone who is accused of breaching the peace on a Friday night, court expenses are not added.

I am happy to undertake to engage with the Crown and with defence agents. However, it seems that the convener’s logic is correct: if the principle is to be followed, it must apply across the board. Equally, if it applies across the board, the law of unintended consequences will mean that it would apply to someone whose case is deserted by the procurator fiscal halfway through rather continued until they are formally found not guilty. That would raise the question of why we are giving people who get off—perhaps on a technicality—money back, and not seeking expenses.

My discussions with the Crown so far have been based on the principle that the situation is vastly different north and south of the border. There is no question of anyone being asked for expenses following a successful prosecution in Scotland. I am happy to re-engage on that issue.

Graeme Pearson: I acknowledge that amendment 45 is couched in language that, given the overall nature of the bill, relates primarily to legal aid.

I recognise the reservations that the convener and Roderick Campbell have raised, and I am grateful that the cabinet secretary is willing to consider those issues further. No matter what the unintended consequences may be, if the judge makes comments at the conclusion of a case to indicate that, in his or her view, the prosecution was ill advised and ill considered, we have a responsibility to reimburse. I acknowledge that that should be the case whether legal aid or private funding is involved.

In the event that the cabinet secretary is willing to take that matter forward with some energy, I am happy to leave the amendment.

The Convener: Do you want to withdraw the amendment?

Graeme Pearson: Yes.

Amendment 45, by agreement, withdrawn.

Section 22—Regulations about contributions for criminal legal assistance

Amendment 19 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 19 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 19 disagreed to.

Amendment 20 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 20 disagreed to.

11:45

The Convener: Amendment 22, in the name of Margaret Mitchell, has been debated with amendment 14. I call Margaret Mitchell to move or—I beg your pardon.

Margaret Mitchell: We are on amendment 21.

The Convener: See, I knew I would do that. You are quite right—I am going too fast. I have overtaken myself, which is not an easy thing to do.

Amendment 21 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 22 disagreed to.

Amendment 23 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 23 disagreed to.

Section 22 agreed to.

Section 23 agreed to.

Before section 24

The Convener: Amendment 24, in the name of Margaret Mitchell, is in a group on its own. I call Margaret Mitchell to speak to and move the amendment.

Margaret Mitchell: Amendment 24 would insert a review clause into part 2. It would require the Scottish ministers to lay before Parliament a report
on the operation and effect of part 2. It is framed in such a way that the period begins on the day on which the first provision of part 2 comes into force.

The review clause will give Parliament the opportunity to consider the wider implications of the bill. Given the concerns that have been expressed at stage 1 and again today over the introduction of contributions and the way in which those contributions are to be collected, it does not seem unreasonable to require ministers to consider the effect of the change.

In addition, the significance of part 2 should not be underestimated. It will establish the presumption that those who can afford to pay for criminal legal representation should do so. The effect of the bill’s provisions on access to justice and the efficiency of our criminal justice system could therefore be profound. Amendment 24 was drafted with the optimistic but, I realise, unrealistic hope that my earlier amendments would be accepted. However, I contend that the fact that they were not accepted makes the review all the more necessary.

The amendment states that “the 3 year period” begins when the first provision of part 2 is implemented, rather than when part 2 is fully implemented. Perhaps the cabinet secretary will take this opportunity to clarify whether he envisages all the provisions in part 2 being implemented simultaneously.

I move amendment 24.

Roderick Campbell: Given the ramifications, I hope that the cabinet secretary and the Government will take a close interest in how the policy develops. I do not disagree massively with Margaret Mitchell, but I do not think that we really need the formality of a review.

The Convener: I, too, am very sympathetic to the amendment, but I do not think that we need a formal report. The committee can, at any time, consider the implementation of any piece of legislation and do post-legislative scrutiny. I have no doubt that, if there are issues with the legislation, our emails will tell us. We will be able to bring the cabinet secretary to the committee to talk to us about anything that has happened as a result of the bill, should it proceed in a certain form.

Kenny MacAskill: That echoes my views. I understand the intention behind the amendment, but I do not necessarily agree that we need a legislative requirement to do the job. There is a risk that what we consider to be the key areas of importance at this stage will not be of concern in three years. It would also be difficult to tie down a timeframe. Some flexibility in timing might be necessary to include developing issues that are unknown at the moment, or because adjustments have been made through regulations that need to be made.

As we have heard, the board continuously reviews practice and policies to ensure that the legal aid system works as efficiently as possible. I expect the impact of the proposals to be kept under similar and constant review, and swiftly adjusted if necessary. The bill provides the Scottish ministers with the ability to adjust details through regulations, and we expect that Government officials will keep under review how those parts of the bill operate. I have committed to conducting a review of the impact of the proposals within three years, and I will present the outcome of that review to Parliament.

I do not think that the requirement needs to be enshrined in primary legislation. Given all the other checks and balances, and my assurances about what I intend to do, I suggest that amendment 24 is unnecessary, although, like the convener, I see where Margaret Mitchell is coming from.

Margaret Mitchell: Given the cabinet secretary’s unwillingness and refusal to accept any of the amendments that would have provided the checks and balances to which he refers, I consider it all the more important that such a review be carried out. I press amendment 24.

The Convener: The question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 24 disagreed to.
Sections 24 to 26 agreed to.
Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the cabinet secretary for staying on and the committee for being so good, even if I was trying to go more quickly than usual and making mistakes.

11:51
Meeting continued in private until 12:53.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS AMENDED AT STAGE 2]

CONTENTS

Section

PART 1
SCOTTISH CIVIL JUSTICE COUNCIL

Establishment
1 Establishment of the Scottish Civil Justice Council

Functions and powers
2 Functions of the Council
3 Powers of the Council
4 Court of Session to consider rules
5 Annual programme and report

Membership
6 Composition of the Council
7 Lord President appointment process
8 Tenure
9 Disqualification and removal from office
10 Expenses and remuneration

Operation
11 Chairing of the Council
12 Proceedings
13 Committees

General
14 Dissolution of existing rules councils
15 Modification of enactments
16 Interpretation of Part 1

PART 2
CRIMINAL LEGAL ASSISTANCE

Contributions in respect of automatically available criminal advice and assistance
17 Contributions in respect of automatically available criminal advice and assistance

Assistance by way of representation in relation to criminal matters
18 Availability of criminal assistance by way of representation
Clients’ contributions for criminal assistance by way of representation

**Contributions for criminal legal aid**

Contributions for criminal legal aid

**Contributions for appeals where appellant deceased**

Contributions for appeals where appellant deceased

**General**

Regulations about contributions for criminal legal assistance

Consequential modifications

**PART 3**

**GENERAL**

Ancillary provision

Commencement

Short title
Scottish Civil Justice Council and Criminal Legal Assistance Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

PART 1

SCOTTISH CIVIL JUSTICE COUNCIL

Establishment

1 Establishment of the Scottish Civil Justice Council

There is to be a body to be known as the Scottish Civil Justice Council (“the Council”).

Functions and powers

2 Functions of the Council

(1) The functions of the Council 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.

(2) In carrying out its functions under this Act, the Council must have regard to—

(a) the principles in subsection (3), and
(b) any guidance issued by the Lord President.

(3) The principles are—

(a) the civil justice system should be fair, accessible and efficient,
rules relating to practice and procedure should be as clear and easy to understand as possible,
practice and procedure should, where appropriate, be similar in all civil courts, and
methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

For the purposes of this Part, “draft civil procedure rules” are draft rules which relate to a matter in subsection (5).

Those matters are—

any matter relating to a court within the remit of the Council which the Court of Session may regulate by act of sederunt,
any matter relating to a court within the remit of the Council in anticipation of the Court of Session being given power to regulate the matter by act of sederunt, or
any matter relating to a proposed court in anticipation of—
(i) the court being established and added to the remit of the Council, and
(ii) the Court of Session being given power to regulate the matter by act of sederunt.

The courts within the remit of the Council are—

the Court of Session, and
the sheriff court.

Powers of the Council

The Council may take such action as it considers necessary or desirable in pursuance of its functions.

In particular, the Council may—

have regard to proposals for legislative reform which may affect the civil justice system,
have regard to the criminal justice system and its effects on the civil justice system,
consult such persons as it considers appropriate,
co-operate with, and seek the assistance and advice of, such persons as it considers appropriate,
make proposals for research into the civil justice system,
provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system, and
publish any recommendation it makes.

The Court of Session must consider any draft civil procedure rules submitted to it by the Council and may—

approve the rules,
Part 1—Scottish Civil Justice Council

(b) approve the rules with such modifications as it considers appropriate, or
(c) reject the rules.

(2) Where the Court of Session approves draft civil procedure rules (with or without modification) it must embody the approved rules in an act of sederunt.

5 (3) Nothing in this Part affects the powers of the Court of Session to prepare or make rules which relate to a matter in section 2(5).

5 Annual programme and report

(1) The Council must prepare an annual plan setting out its objectives and priorities for each yearly period beginning on 1 April before the start of that period (“the programme”).

10 (2) The Council must prepare an annual report on its activities as soon as reasonably practicable after the end of each yearly period ending on 31 March (“the report”).

(3) The report must include a summary of the recommendations made (if any) by the Council during the period covered by the report.

(4) The Council must lay a copy of the programme and the report before the Scottish Parliament.

15 (5) In complying with the duty in subsection (4), the Council may combine the programme for the coming year with the report for the ending year.

6 Composition of the Council

20 (1) The Council is to have not more than 20 members and is to be comprised of—

(a) the Lord President,

(b) the Chief Executive of the Scottish Court Service,

(c) the principal officer of the Scottish Legal Aid Board,

(d) 1 member appointed by the Scottish Ministers under subsection (2),

(e) at least 4 judges (“judicial members”), including a minimum of—

(i) 1 judge of the Court of Session, and

(ii) 1 sheriff principal or sheriff,

(f) at least 2 practising advocates (“advocate members”),

(g) at least 2 practising solicitors (“solicitor members”),

(h) at least 2 persons (“consumer representative members”) who, between them, appear to the Lord President to have—

(i) experience and knowledge of consumer affairs,

(ii) knowledge of the non-commercial legal advice sector, and

(iii) an awareness of the interests of litigants in the civil courts, and

30 (i) up to 6 other persons considered by the Lord President to be suitable to be members of the Council (“LP members”).
(2) The Scottish Ministers must appoint as a member a person who is a member of staff of the Scottish Government and whom they consider to be suitable to be a member of the Council.

(3) The Scottish Ministers may by order amend subsection (1) by substituting for the number of members (or the minimum number in a category of membership) for the time being specified there such other number as they think fit.

(4) Before making an order under subsection (3) the Scottish Ministers must consult the Lord President.

(5) The power to make an order under subsection (3) includes power to make such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

(6) But such power does not include power to modify the description of a category of membership described in subsection (1) or to add a category of membership.

(7) Orders under subsection (3) are subject to the affirmative procedure.

7 Lord President appointment process

(1) The Lord President must appoint persons to be members of the Council in respect of the categories of membership described in section 6(1)(e) to (i) and ensure that the number of members in each such category of membership is maintained at the required level.

(2) The Lord President must prepare and publish a statement of appointment practice setting out the process which the Lord President will follow for appointing—

(a) advocate members,

(b) solicitor members,

(c) consumer representative members, and

(d) LP members.

(2A) In preparing the statement of appointment practice the Lord President must have regard to the principles in subsection (2B).

(2B) The principles are—

(a) appointments to the Council should be made fairly and openly, and

(b) so far as reasonably practicable, all eligible persons should be afforded an opportunity to be considered for appointment.

(3) The statement of appointment practice must include a requirement for the Lord President to consult—

(a) the Faculty of Advocates before appointing an advocate member,

(b) the Council of the Law Society of Scotland before appointing a solicitor member,

(c) the Scottish Ministers before appointing—

(i) a consumer representative member, or

(ii) a LP member.
8 **Tenure**

(1) The Lord President, the Chief Executive of the Scottish Court Service and the principal officer of the Scottish Legal Aid Board are members of the Council by virtue of holding their respective offices.

(2) A member appointed by the Scottish Ministers holds office until such time as the Scottish Ministers appoint a replacement member.

(3) A judicial member holds office for a period of 3 years unless, prior to the expiry of that period, the Lord President replaces the member with another judicial member or requires the member to leave office.

(4) Any other member holds office for a period of 3 years.

(5) A member appointed under section 7(1) ceases to hold office—
   (a) at the end of a period of appointment,
   (b) upon giving written notice of resignation to the Lord President,
   (c) on becoming disqualified from holding office as a member or on being removed from such office (see section 9),
   (d) on ceasing to fall within the category of membership in respect of which the member was appointed.

(6) For the purposes of subsection (5)(d), a LP member ceases to fall within that category of membership where, in the opinion of the Lord President, the basis of the LP member’s appointment has materially changed.

(7) A person who is or has been a member of the Council may be reappointed (whether in respect of the same or a different category of membership) for further periods.

9 **Disqualification and removal from office**

(1) A person is disqualified from appointment under section 7(1) as a member of the Council, and from holding office as such a member, if the person is or becomes—
   (a) a member of the Scottish Parliament,
   (b) a member of the House of Commons,
   (c) a member of the European Parliament,
   (d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994,
   (e) a member of the Scottish Government, or
   (f) a Minister of the Crown.

(2) The Lord President may, by notice in writing, remove any member appointed under section 7(1) if satisfied that the member—
   (a) is unfit to be a member by reason of inability, neglect of duty or misbehaviour, or
   (b) is otherwise unsuitable to continue as a member.

(3) The Lord President must consult the Scottish Ministers before removing—
   (a) a consumer representative member, or
   (b) a LP member.
10 Expenses and remuneration

(1) The Scottish Court Service may pay such expenses as it thinks fit to—
   (a) a member of the Council, and
   (b) a person appointed under section 13(2) as a member of a committee of the Council.

(2) The Scottish Court Service may pay such remuneration as it thinks fit to—
   (a) an advocate member,
   (b) a solicitor member,
   (c) a consumer representative member,
   (d) a LP member, and
   (e) a person (other than one mentioned in subsection (3)) appointed under section 13(2) as a member of a committee of the Council.

(3) Remuneration is not to be paid under subsection (2) to a person who is—
   (a) a member of staff of the Scottish Legal Aid Board, or
   (b) a member of staff of the Scottish Administration.

Operation

11 Chairing of the Council

(1) It is for the Lord President to determine who is to be chair of the Council.

(2) The only persons who may be chair are—
   (a) the Lord President (but see also section 12(5)), or
   (b) a judicial member holding the office of judge of the Court of Session.

(3) A person ceases to be chair when—
   (a) if applicable, the judicial member ceases to be a member of the Council, or
   (b) the Lord President determines that someone else is to be chair under subsection (1).

(4) Members of the Council must elect a member to act as deputy to the chair.

12 Proceedings

(1) The Lord President may determine the number of members required to constitute a quorum for meetings of the Council.

(2) The Lord President may determine different numbers of members to constitute a quorum for different purposes.

(3) The Council may otherwise determine—
   (a) its own procedure, and
   (b) the procedure of any committees established by it.

(4) The validity of any proceedings or actings of the Council is not affected by—
(a) any vacancy in the membership of the Council (even if that vacancy creates a
deficiency in one of the categories of membership),
(b) any defect in the appointment of a member of the Council,
(c) disqualification of any individual from holding office as a member of the Council.

(5) The Lord President may nominate the Lord Justice Clerk to attend and participate in
meetings of the Council on behalf of the Lord President (which participation includes,
where the Lord President is acting as chair under section 11(1), chairing the meeting).

(6) The Chief Executive of the Scottish Court Service may nominate a member of staff of
the Scottish Court Service to attend and participate in meetings of the Council on behalf
of the Chief Executive.

(7) The principal officer of the Scottish Legal Aid Board may nominate a member of staff
of the Scottish Legal Aid Board to attend and participate in meetings of the Council on behalf
of the principal officer.

(8) The Scottish Ministers may nominate another member of staff of the Scottish
Government who they consider would be suitable to be a member of the Council to
attend and participate on behalf of the member appointed by them under section 6(2).

13 Committees

(1) The Council may establish committees.

(2) A person who is not a member of the Council may be appointed to be a member of any
committee established by it.

General

14 Dissolution of existing rules councils

(1) The Court of Session Rules Council established under section 18 of the Administration
of Justice (Scotland) Act 1933 (c. 41) (and continued under section 8 of the Court of
Session Act 1988 (c. 36)) is dissolved.

(2) Section 8 of the Court of Session Act 1988 is repealed.

(3) The Sheriff Court Rules Council is dissolved.

(4) Sections 33 and 34 of the Sheriff Courts (Scotland) Act 1971 (c. 58) are repealed.

15 Modification of enactments

(1) In section 38(3) of the Legal Aid (Scotland) Act 1986 (c. 47) (rules of court), after
“consult” insert “the Scottish Civil Justice Council,”.

(2) In section 32(3) of the Sheriff Courts (Scotland) Act 1971 (c. 58) (power of Court of
Session to regulate civil procedure in sheriff court), for “Sheriff Court Rules Council
under section 34 of this Act” substitute “Scottish Civil Justice Council”.

(3) In section 62 of the Judiciary and Courts (Scotland) Act 2008 (asp 6) (administrative
support for other persons), in subsection (1)—
(a) after paragraph (d) insert—
“(ea) the Scottish Civil Justice Council,”, and
(b) paragraphs (e) and (g) are repealed.
16 **Interpretation of Part 1**

In this Part—

“advocate” means a member of the Faculty of Advocates,

“draft civil procedure rules” has the meaning given in section 2(4),

“solicitor” means a person qualified to practise as solicitor under section 4 of the Solicitors (Scotland) Act 1980 (c. 46),

“the Chief Executive of the Scottish Court Service” means the chief executive appointed under paragraph 14(1) of Schedule 3 to the Judiciary and Courts (Scotland) Act 2008 (asp 6),

“the Lord Justice Clerk” means the Lord Justice Clerk of the Court of Session,

“the Lord President” means the Lord President of the Court of Session,

“the principal officer of the Scottish Legal Aid Board” means the principal officer appointed under paragraph 7(1) of Schedule 1 to the Legal Aid (Scotland) Act 1986 (c. 47).

---

17 **Contributions in respect of automatically available criminal advice and assistance**

In the Legal Aid (Scotland) Act 1986 (c. 47) (“the 1986 Act”), in section 8A (criminal advice and assistance: automatic availability in certain circumstances)—

(a) after subsection (1) insert—

“(1A) Regulations under subsection (1) may also provide that, in such circumstances as may be prescribed in the regulations, section 11(2) is not to apply in respect of advice and assistance made available to a relevant client.”,

(b) in subsection (2), for “subsection (1)” insert “subsections (1) and (1A)”.

---

18 **Availability of criminal assistance by way of representation**

(1) In section 9(2) of the 1986 Act (regulations may apply Part 2 to representation), after paragraph (dd), insert—

“(dda) provide that, in relation to assistance by way of representation which relates to such criminal proceedings as may be prescribed, sections 9A and 11A are to apply instead of sections 8 and 11;”.

(2) After section 9 of the 1986 Act insert—

“9A **Availability of specified criminal assistance by way of representation**

(1) Assistance by way of representation to which this section applies by virtue of regulations made under section 9(1) is to be available to a client where—

(a) the solicitor—
(i) has considered the financial circumstances of the client, and
(ii) is satisfied as to the criteria mentioned in subsection (2), or
(b) the Board has approved the provision of the assistance.

(2) The criteria are—

(a) the scheme of eligibility provides that the fees and outlays of the assistance cannot be met without undue hardship to the client or the dependants of the client, and
(b) any further criterion prescribed in pursuance of section 9(2)(c).

(3) The Board must establish a procedure for a client to apply to the Board for approval under subsection (1)(b) in circumstances where assistance by way of representation has not been made available under subsection (1)(a).

(4) For the purposes of this section, “scheme of eligibility” means a scheme approved under section 9B(3).

(5) This section is subject to any provision made in regulations under section 8A(1).

9B Scheme of eligibility

(1) The Board must, for the purposes of section 9A, prepare and publish a scheme of eligibility setting out financial circumstances in which the Board considers that paying the fees and outlays in respect of assistance by way of representation will result in undue hardship for a client or the dependants of a client.

(2) Before publishing a scheme of eligibility the Board must submit the scheme to the Scottish Ministers for approval.

(3) The Scottish Ministers may approve a scheme of eligibility submitted to them under subsection (2) with or without modification.

(4) The Scottish Ministers may at any time—

(a) approve a modification of an approved scheme of eligibility proposed by the Board or withdraw approval of such a scheme or modification,
(b) require the Board to prepare and publish a scheme under subsection (1).

(5) In preparing and publishing the scheme of eligibility under subsection (1) the Board must comply with any direction given by the Scottish Ministers.

(6) A scheme of eligibility may make different provision for different cases or classes of case.

19 Clients’ contributions for criminal assistance by way of representation

(1) In section 11(1) of the 1986 Act (clients’ contributions), after “below” insert “or, where applicable, section 11A”.

(2) The title of section 11 becomes “Clients’ contributions: general”.

(3) After section 11 insert—

“11A Clients’ contributions: specified criminal assistance by way of representation
(1) This section applies where—
   (a) assistance by way of representation has been made available to a client
       under section 9A(1) (“the assistance”), and
   (b) the client—
       (i) has disposable income of, or exceeding, £68 per week and is not
           (directly or indirectly) in receipt of any of the benefits mentioned
           in section 11(2)(b), or
       (ii) has disposable capital of, or exceeding, £750.

(2) The client is liable to pay a contribution in respect of the assistance provided of
   up to, but not in aggregate exceeding, such amount as may be prescribed by
   regulations made under section 33ZA(1).

(3) Except where regulations made under section 33ZA(1) otherwise provide—
   (a) in a case where the assistance is being provided—
       (i) by a solicitor employed by the Board by virtue of sections 26 and
           27 or, as the case may be, section 28A, or
       (ii) by counsel instructed by such a solicitor,
           it is for the Board to determine the amount of and collect any
           contribution payable by the client under subsection (2), and
   (b) in any other case, it is for the solicitor to determine the amount of and
       collect any contribution payable by the client under subsection (2).

(4) A contribution collected by the solicitor is to be treated as payment of a fee or
   outlay properly chargeable (in accordance with section 33).

Contributions for criminal legal aid

After section 25AB of the 1986 Act insert—

“25AC  Legal aid: contributions

(1) A person (A) is not to be required to pay any sums in respect of criminal legal
   aid received in pursuance of this Part except in accordance with subsection (3)
   or section 25AA(5).

(2) Subsection (3) applies where—
   (a) the legal aid is not being provided in any of the circumstances described
       in section 22(1) or under section 23(1), and
   (b) A—
       (i) has disposable income of, or exceeding, £68 a week and is not
           (directly or indirectly) in receipt of any of the benefits mentioned
           in section 11(2)(b), or
       (ii) has disposable capital of, or exceeding, £750.

(3) A is liable to pay a contribution in respect of the criminal legal aid provided of
   up to, but not in aggregate exceeding, such amount as may be prescribed by
   regulations made under section 33ZA(1).
(4) Except where regulations made under section 33ZA(1) otherwise provide—
   (a) in a case where the criminal legal aid is being provided—
       (i) in relation to solemn proceedings, proceedings relating to an
           appeal or proceedings relating to the Supreme Court,
       (ii) by a solicitor employed by the Board by virtue of sections 26 and
           27 or, as the case may be, section 28A, or
       (iii) by counsel instructed by such a solicitor,
           it is for the Board to collect any contribution payable by A under
           subsection (3), and
   (b) in any other case, it is for the solicitor to collect any contribution payable
       by A under subsection (3).

(5) A contribution collected by the solicitor is to be treated as payment of a fee or
outlay properly chargeable (in accordance with section 33).

(6) For the purposes of subsections (4)(b) and (5), “the solicitor” means the
solicitor by whom any criminal legal aid is being provided or, where it is
provided by counsel, the solicitor on whose instruction counsel provides it.

25AD Payment of fees or outlays otherwise than through contributions

(1) Except in so far as regulations made by the Scottish Ministers under this
section or section 33ZA(1) otherwise provide, any fees and outlays payable to
the solicitor in respect of criminal legal aid are to be paid as follows—
   (a) first, out of any contribution payable by the person receiving the criminal
       legal aid in accordance with section 25AA(5) or section 25AC(3),
   (b) second, in priority to all other debts, out of any expenses which by virtue
       of an order of a criminal court are payable to that person by any other
       person in respect of the matter in connection with which the criminal
       legal aid was given, and
   (c) third, by the Board out of the Fund, following receipt by it of a claim
       submitted by the solicitor.

(2) In subsection (1), the reference to fees and outlays is a reference to any fees
and outlays properly chargeable (in accordance with section 33) in respect of
criminal legal aid given to a person under this Part (but does not include the
salary payable to a solicitor employed by the Board under sections 26 and 27
or section 28A)).

(3) For the purposes of this section, “the solicitor” means the solicitor by whom
any criminal legal aid is being provided or, where it is provided by counsel, the
solicitor on whose instruction counsel provides it.”.

Contributions for appeals where appellant deceased

In section 25AA of the 1986 Act (legal aid in respect of appeals under section 303A of
the Criminal Procedure (Scotland) Act 1995), after subsection (4) insert—
“(5) Where legal aid is being made available to an authorised person under this section (in either of the circumstances described in subsection (2) or (3)), the Board may require the payment of a contribution in respect of the expenses of the criminal legal aid of such amount as the Board may determine.

(6) The Board may require the contribution to be paid from the estate of the deceased person or by the authorised person.

(7) The amount determined by the Board under subsection (5) must not exceed the whole expenses of the criminal legal aid provided.

(8) The Board must take into account any contribution made by the deceased person prior to death in assessing the amount of contribution payable.”.

General

22 Regulations about contributions for criminal legal assistance

After section 33 of the 1986 Act insert—

“33ZA Regulations about contributions for criminal legal assistance

(1) The Scottish Ministers may by regulations make provision in connection with the amount, determination and collection of any contribution payable under section 11 (in so far as relating to criminal matters) or section 11A, 25AA or 25AC.

(2) Regulations made under subsection (1) may, in particular—

(a) make provision permitting a lower contribution to be payable where otherwise the person liable to pay the contribution, or the dependants of such person, would suffer undue hardship,

(b) make provision for determining appropriate contributions where the person is in receipt of criminal legal assistance in respect of two or more distinct proceedings,

(c) specify whether it is for the Board or the solicitor providing the assistance to determine the amount of, or collect, a contribution,

(d) specify how a person’s contributions are to be transferred or accounted for in relation to proceedings which are—

(i) instituted by way of summary complaint but which are subsequently dealt with under solemn procedure, or

(ii) instituted by way of indictment but which are subsequently dealt under summary procedure,

(e) make provision about the payment of contributions by instalments.

(3) Regulations made under subsection (1) may provide for different provision in relation to different cases or classes of case.

(4) In this section “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.”.

23 Consequential modifications

(1) The 1986 Act is amended as follows.
(2) In section 4(3)(aa) (Scottish Legal Aid Fund), after “11” insert “, 11A, 25AA or 25AC”.

(3) In section 8 (availability of advice & assistance), after “8A(1)” insert “or 9(1)”.

(4) In section 8A(1) (criminal advice and assistance: automatic availability in certain circumstances)—

(a) the words “the financial limits in section 8” become paragraph (a),

(b) after that paragraph insert “; or—

(b) the criteria mentioned in section 9A(2)”.

(5) In section 9(2) (regulations may apply Part 2 to representation), in paragraph (de), after “11(2)” insert or “11A”.

(6) In section 11 (clients’ contributions)—

(a) in subsection (1)—

(i) after “(2)” insert “or”,

(ii) the words “or (3)” are repealed,

(b) in subsection (2A)—

(i) for the words from “criminal” where it first occurs to “assistance” where it third occurs substitute “advice and assistance (other than assistance by way of representation to which section 9A applies)”;

(ii) after “27” insert “or section 28A”,

(c) in subsection (3A), after “27” insert “or section 28A”, and

(d) subsections (3) and (4) are repealed.

(7) In section 12(3) (payment of fees and outlays otherwise than through clients’ contributions), in paragraph (a), after “11(2)” insert “or, as the case may be, section 11A(2)”.

(8) In section 33A(5)(a) (contracts for the provision of criminal legal assistance), after “11(2)” insert “, 11A(2), 25AA(5) or 25AC(3)”.

(9) In section 36(2) (regulations)—

(a) in paragraph (b)—

(i) after “11(2),” insert “11A(1),”;

(ii) for “and 17(2)” substitute “, 17(2) and 25AC(2)”,

(iii) for “amount specified in section 10(2)” substitute “amounts specified in sections 10(2), 11A(1) and 25AC(2) and, in so far as relating to criminal matters, sections 8 and 11(2)”.

(10) In section 37(2) (parliamentary procedure) after “24(4)” insert “, 33ZA(1)”.
PART 3
GENERAL

24 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) The power of Scottish Ministers to make an order under subsection (1) includes power to make different provision for different purposes.

(3) An order under subsection (1) may modify this or any other enactment.

(4) Subject to subsection (5), an order under subsection (1) is subject to the negative procedure.

(5) An order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is subject to the affirmative procedure.

25 Commencement

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under this section may include transitional, transitory or saving provision.

26 Short title

The short title of this Act is the Scottish Civil Justice Council and Criminal Legal Assistance Act 2012.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

Introduced by: Kenny MacAskill
On: 2 May 2012
Bill type: Government Bill
SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

REVISED EXPLANATORY NOTES

CONTENTS
1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Scottish Civil Justice Council and Criminal Legal Assistance Bill (introduced in the Scottish Parliament on 2 May 2012) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION
2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW
4. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as priorities:
   - the establishment of a Scottish Civil Justice Council to replace the Sheriff Court Rules Council and the Court of Session Rules Council. It will also have a new, wider, role to advise and make recommendations on improving the civil justice system in Scotland.
   - introducing financial contributions in criminal legal aid thereby ensuring that those who are able to pay towards the cost of their defence do so. The Bill will also make changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.
CRIMINAL LEGAL ASSISTANCE – OVERVIEW

5. In order to further assist the reader and to help inform debate on part 2 of the Bill in particular, an overview is provided below of the current criminal legal assistance scheme in Scotland, including in which circumstances, and how, financial contributions are required, and how part 2 of the Bill proposes to change this.

6. Publicly funded legal assistance in Scotland is potentially available for virtually all types of criminal cases, as it is for virtually all types of civil disputes. Eligibility for both civil and criminal legal assistance is controlled by tests set out in the Scottish legal assistance legislation. There are various forms of criminal legal assistance provision currently available, appropriate for different situations and cases. These forms of criminal legal assistance as they currently operate are described below.

Advice and Assistance

7. The advice and assistance (A&A) scheme allows a client to receive publicly funded preliminary advice and assistance from a solicitor on a criminal matter. It does not provide for representation of the client by the solicitor. The solicitor is responsible for determining whether the client is eligible for A&A, the test for which is financial and is set out in section 8 of the Legal Aid (Scotland) Act 1986 ("the 1986 Act"). The client may have to pay a contribution towards the cost of the advice and assistance. Again, it is up to the solicitor to determine the level of the contribution and to collect it from the client. The levels of contributions are prescribed in Regulations, the most recent of which are the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011.

8. In order to allow the solicitor to calculate any contribution due, or in fact to assess whether an individual is eligible for A&A, the solicitor uses guidance from the Scottish Legal Aid Board ("the Board"), called a keycard which is published on the website of the Board.¹

9. Where A&A is provided at a police station, A&A will be given without reference to the financial limits set out in section 8 of the 1986 Act, although a contribution may still be due.

10. The Bill makes no changes to the A&A scheme as it is described here. However, section 17 of the Bill allows Scottish Ministers to bring forward regulations to remove the requirement to pay a contribution to the costs of A&A when it is provided in certain circumstances, such as at a police station.

Assistance by Way of Representation

11. Assistance by Way of Representation (ABWOR) is an extension of the A&A scheme, which is used when the solicitor is required to take any step on behalf of their client in instituting, conducting or defending certain proceedings. In criminal cases ABWOR is most commonly used where a client is pleading guilty. Again, in respect of ABWOR it is the solicitor

¹ www.slab.org.uk
who applies the eligibility test (which is financial) and it is the solicitor who calculates and collects any contribution which may be due from the client.

12. In certain proceedings, the eligibility test may be both based on the financial means of the client and whether it is in the interests of justice that ABWOR be granted, and the solicitor must determine this.

Summary Criminal Legal Aid

13. Summary criminal legal aid is used following a plea of not guilty in custody and cited cases. Summary criminal legal aid is used for less serious criminal offences, such as road traffic matters, breach of the peace and some assaults, which are prosecuted in the district or sheriff courts. Unlike for A&A and ABWOR, it is the Board which assesses applications for summary criminal legal aid for eligibility. The Board assesses both whether paying the full costs of the case would cause undue hardship to the applicant and whether it is in the interests of justice to make legal aid available.

14. In deciding what would be undue hardship in a case, the Board looks at an applicant’s and their dependants’ unique circumstances. The Board publishes full guidance on its website on how it carries out the “undue hardship” test.  

15. When assessing whether it is in the interests of justice to make summary criminal legal aid available the Board is required to consider a number of factors, including:
   - the likelihood of a sentence which would deprive the applicant of liberty or livelihood,
   - any complexities involved in the case,
   - the ability of the applicant to understand the proceedings,
   - the possible interests of third parties, and
   - whether the applicant has a defence to the charge.

16. At present, if an applicant has been found eligible to receive summary criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

Solemn Criminal Legal Aid

17. The responsibility for granting solemn criminal legal aid in most cases transferred from the courts to the Board on 25 November 2010. The test the Board applies to determine whether an applicant is financially eligible for solemn criminal legal aid is the same undue hardship test as is used in part for summary criminal legal aid. For solemn criminal legal aid, however, the Board does not determine what would be in the interests of justice.

---

18. At present, if a client has been found eligible to receive solemn criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

**Court Grants of Legal Aid**

19. The courts still retain the power to grant legal aid in the following circumstances:
   - Under section 23(1)(b) of the 1986 Act, in summary cases, where following conviction a first custodial sentence is being considered,
   - Under section 30(1) of the 1986 Act in contempt of court cases.

20. No contributions to the costs of legal aid are currently payable in these cases and the Bill makes no proposals to change this.

**Automatic Criminal Legal Aid**

21. Criminal legal aid is automatically available to an accused person in certain situations. It is available without application and without enquiry as to the accused’s financial means. The situations in which automatic criminal legal aid is available are set out in section 22 of the 1986 Act. In summary, they are:
   - Representation at an identification parade;
   - Certain proceedings under solemn or summary procedure where the accused has been taken into custody;
   - Cases involving insanity, including an examination of facts;
   - Sexual offences;
   - Trials in absence (in solemn and summary cases) and
   - Cases where on appeal the High Court has granted authority for a new prosecution for the same or similar offence.

22. Contributions are not currently due where an accused is in receipt of automatic criminal legal aid and the Bill makes no changes in this respect.

**Criminal appeals**

23. Most appeals go through a “sift” process, which is a court procedure to identify cases where it is considered there is merit to proceed to a full appeal hearing. Legal aid may be available for appeal cases. The Board only assesses these applications by looking at the financial means of the applicant and whether undue hardship would be caused. The Board is not required to consider whether the interests of justice mean that the applicant should receive the legal aid. If legal aid had been granted for the case at first instance, the undue hardship test of the applicant’s financial means is not required to determine the application for legal aid for the appeal.
24. For other appeals such as petitions to the nobile officium, or applications for special leave to appeal to the Supreme Court, the Board requires to apply both the undue hardship test as regards the applicant’s financial means and the interests of justice test to these applications.

**Introducing financial contributions in criminal legal aid**

25. As described above, currently recipients of criminal legal aid are not required to pay a contribution towards the cost of their case even if they could afford to do so. The Bill will amend this by introducing the requirement, with some exceptions, to pay a contribution in summary and solemn criminal legal aid first instance cases and in criminal appeals. This will ensure that there is as much consistency as is practicable across all of the various forms of criminal legal assistance, with contributions being required for A&A, ABWOR and criminal legal aid.

**Changes to financial eligibility**

26. In order to take forward further the principle of consistency described above, the Bill also aligns the eligibility test of the applicant’s financial means across the various forms of criminal legal assistance. At present, the eligibility test for criminal legal aid is the undue hardship test described above. The eligibility test for ABWOR on the other hand is based on the guidance as set out in the Board’s keycard. These different tests mean that some people would be eligible for one type of criminal legal assistance and would not be eligible for the other. The Bill will change this, by moving to a single undue hardship test for all types of criminal legal assistance (in which the financial means of the applicant must be considered).

**COMMENTARY ON SECTIONS**

**Part 1 - Scottish Civil Justice Council**

**Section 2 – Functions of the Council**

27. This section sets out what the functions of the Council are. In carrying out its functions the Council must have regard to the principles set out in subsection (3) and any guidance issued by the Lord President.

28. Whereas the functions in subsections (1)(b) and (c) relate to the rules of civil procedure, (continuing the broad remit of the existing rules councils) three of the functions (1)(a), (d) and (e) specifically relate to the wider “civil justice system”. This is intended to bear its ordinary meaning, and would include matters such as arrangements for the administration of the courts by the Scottish Court Service, the availability of legal assistance in pursuing disputes, and the law governing civil procedure in the courts.

29. Subsection 2(1)(c) provides that the Council is to prepare and submit draft civil procedure rules to the Court of Session. “Civil procedure rules” are defined at subsection (4), by reference to subsections (5) and (6). Subsection (5)(c) makes it clear that in addition to preparing draft procedure rules and submitting them to the Court of Session, the Council may also draft rules in relation to a proposed court in anticipation of that court being established; and in anticipation of the Court of Session being given the power to make rules for that court.
30. Subsection (3) sets out the principles which the Council must have regard to in carrying out its functions. Subsection (3)(c) provides that one of the principles is that, where appropriate, practice and procedure should be as similar as possible in all civil courts. This recognises that there may be instances where a distinct procedure is necessary, for example, where legislation provides that a case must be raised in a particular court.

31. The principle at subsection (3)(d) - that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted - would include methods such as arbitration, mediation or adjudication.

Section 3 – Powers of the Council as amended at Stage 2

32. Subsection (1) makes it clear that the Council may take any action it considers necessary or desirable in pursuance of its functions. Subsection (2) sets out specific actions that the Council may take.

33. Subsection (2)(a) enables the Council to take into account proposals for future legislation which might affect the civil justice system.

34. Under subsection 2(c) the Council will be able to take into account the civil justice system’s interaction with the criminal justice system.

35. Under subsections (2)(d), (e) and (ea), the Council may consult and work with other persons in order to carry out its functions. These provisions will enable the Council to, for example, seek the views of and commission non-governmental organisations to carry out research on matters relating to the civil justice system.

36. Subsection (2)(f) makes it clear that the Council may make recommendations for change to the Scottish Ministers, for example, if it considered primary legislation was necessary.

37. The Council must publish a summary of any recommendations it makes under subsection (2)(f) by including these in its annual report, provided for at section 5. It may however, publish any (and all) of its recommendations under subsection (2)(g).

Section 4 – Court of Session to consider rules

38. This section provides that any draft civil procedural rules submitted by the Council must be considered by the Court of Session. The Court of Session may approve (with or without modification) or reject the draft rules, and if it approves them must embody them in an act of sederunt. The Bill does not however affect the ability of the Court of Session to prepare or make civil procedure rules of its own initiative, or under any other enactment.

Section 5 – Annual programme and report

39. This section provides that the Council must, before 1 April each year, prepare a programme which sets out its objectives and priorities for the following year. As soon as is reasonably practicable after 31 March each year it must also prepare a report on its activities for the preceding year.
40. Subsection (4) requires the Council to lay a copy of its programme and report before the Scottish Parliament. Under subsection (5) the documents can be combined when doing so. The programme and report may therefore be laid before Parliament after 31 March each year, once the Council’s report is prepared.

Section 6 – Composition of the Council

41. Section 6 makes provision for the composition of the Council, setting the maximum number of members at 20 and the minimum at 14. The section is to be read in conjunction with sections 7 (Lord President appointment process), 8 (Tenure), 9 (Disqualification and removal from office), 10 (Expenses and remuneration) and 16 (Interpretation of Part 1).

42. The section provides for the following types of member who, with the exception of the office holder members (listed in subsection (1)(a) to (c)) and the Scottish Ministers’ appointee (appointed under subsection (2)), are all appointed by the Lord President.

- **Office holder members:** these are set out at subsection (1)(a) to (c) and are: the Lord President, the Chief Executive of the Scottish Court Service and the principal officer (who is the Chief Executive) of the Scottish Legal Aid Board (“the Board”). Each of these offices is defined at section 16. Section 8(1) provides that these individuals are members by virtue of their office and therefore are not appointed for any fixed period. These members are not eligible for remuneration for time served on the Council or any of its committees, as provided for by subsection 10(2). Sections 12(6) and 12(7) (Proceedings) allow the Chief Executive of the Scottish Court Service and the principal officer of the Board to send representatives to Council meetings in their place.

- **Judicial members:** under subsection (1)(e), the Council is to include at least four judges as members, including at least one judge of the Court of Session and at least one Sheriff Principal or sheriff. Section 8(3) provides that judicial members are to be appointed for three years, unless replaced, or unless removed under that section. These members are not eligible for remuneration, as provided for by section 10(2).

- **Advocate members:** under subsection (1)(f), the Council is to include at least two practising advocates as members. An advocate is defined at section 16 as a member of the Faculty of Advocates. The statement of appointment practice to be prepared under subsection 7(2) will provide that the Lord President must consult the Faculty of Advocates before appointing advocate members. Advocate members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **Solicitor members:** under subsection (1)(g), the Council is to include at least two practising solicitors as members. A “solicitor” is defined at section 16 as a person qualified to practise as a solicitor under section 4 of the Solicitors (Scotland) Act 1980 and includes solicitor advocates. The statement of appointment practice to be prepared (under section 7(2)) will provide that the Lord President must consult the Law Society of Scotland before appointing solicitor members. Solicitor members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill as amended at Stage 2 (SP Bill 13A)

- **Consumer representative members:** the Council is to include at least two individuals who, in the Lord President’s opinion, between them, fulfil the criteria set out at subsection (1)(h)(i) to (iii). Persons with knowledge of the non-commercial advice sector include both lawyers and non-lawyers with knowledge of the not-for-profit provision of legal advice and services. The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing a consumer representative member. Consumer representative members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **LP members:** the Lord President may appoint up to a further six persons as members of the Council under subsection (1)(i). The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing LP members. LP members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2), unless they fall within the categories set out at section 10(3).

- **Scottish Ministers’ appointee:** under subsection (2), the Scottish Ministers must appoint a Scottish Government member of staff to the Council. Under section 8(2), the Scottish Ministers’ appointee holds office until such time as a replacement member is appointed. Section 10(2) excludes the member appointed by the Scottish Ministers from being eligible for remuneration. Subsection 12(8) allows the Scottish Ministers to send another member of Scottish Government staff to representative to attend Council meetings in place of that member.

43. Under subsection (3), the Scottish Ministers have power, after consulting the Lord President, to amend the overall number of Council members and the numbers referred to in each category of membership. This would allow Ministers to alter the composition of the Council but, as specified at subsection (6), would not allow Ministers to modify the description of a category of membership (including the repeal of a category).

**Section 7 – Lord President appointment process**

44. This section places a duty on the Lord President to appoint the members in section 6(1)(e) to (i). That is, all members other than the office holders (referred to under section 6(1)(a) to (c) and the Scottish Ministers’ appointee (appointed under section 6(2)). The Lord President must also ensure the number of members in section 6(1)(e) to (i) stays at the required level.

45. Subsection (2) requires the Lord President to publish a statement of appointment practice which sets out the process which will be followed in appointing the advocate, solicitor, consumer representative and LP members. Subsections (2A) and (2B) require the Lord President, when preparing the statement of appointment practice, to have regard to the principles that appointments should be made fairly and openly; and that so far as reasonably practicable, all eligible persons should have the opportunity to be considered for appointment.

46. Subsection (3) specifies which bodies and persons the Lord President must consult before appointing certain members.
Section 8 - Tenure

47. This section should be read with section 9 (Disqualification and removal from office). It provides that all members, except the Scottish Ministers’ appointee and office holder members, hold office for a period of three years. It also deals with various circumstances in which members cease to hold office.

48. Judicial members hold office for three years unless either replaced, or removed by the Lord President under subsection (3).

49. Under subsections (5)(d) and (6), a LP member ceases to hold office if, in the Lord President’s opinion, the basis of their appointment has materially changed. This might occur where, for example, the person had been appointed on account of holding a post in a representative body and, since appointment, had stepped down from that post.

50. Subsection (7) provides that members are eligible for reappointment.

Section 9 – Disqualification and removal from office

51. Subsection (1) sets out certain categories of persons who are disqualified from being appointed as Council members. Subsection (2) provides for the circumstances in which persons appointed by the Lord President (under section 6(1)(e) to (i)) may be removed.

Section 10 – Expenses and remuneration

52. This section makes provision for expenses and remuneration. It provides that the Scottish Court Service (“the SCS”) may, but need not, remunerate certain specified types of Council members or persons appointed as a member of a committee of the Council. Section 10(3) provides that members of staff of the Scottish Administration are not eligible for remuneration. This would exclude, for example, court clerks from remuneration as well as any Scottish Government staff.

53. All Council members and persons serving on committees (whether or not they are a Council member) are eligible to be paid such expenses as the SCS thinks fit.

Section 11 – Chairing of the Council

54. Under subsections 11 (1) and (2) the Lord President may appoint as chair of the Council the Lord President or any Senator member of the Council.

55. Subsection (4) provides that members must elect one of their number as deputy to the chair.

Section 12 – Proceedings

56. Except for subsections (1) and (2) under which the Lord President may specify the number of members which constitutes a quorum for Council meetings, section 12 provides that the Council may determine its own procedure and the procedure of any committees established by it.
57. Subsections (5) to (7) enable the office holder members to nominate persons to attend and participate in meetings on their behalf. Similarly, the Scottish Ministers may appoint an alternative member of Scottish Government staff to attend meetings in place of their appointed member. Under subsection (5) in particular, the Lord Justice Clerk may attend meetings on behalf of the Lord President, including as chair, whether or not the Lord Justice Clerk is a member of the Council.

Section 13 – Committees

58. This section makes provision for the establishment of committees. Under section 13(2), individuals may be appointed to committees although they are not Council members.

Section 14 – Dissolution of existing rules councils

59. Section 14 provides for the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council and the repeal of the relevant statutory provisions under which those bodies were established.

Section 15 – Modification of enactments

60. Section 15 provides for various statutory amendments arising from the establishment of the Scottish Civil Justice Council and the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council.

61. Subsection (1) makes amendment to the Legal Aid (Scotland) Act 1986 which makes clear that the Court of Session is to consult the Scottish Civil Justice Council before making procedural rules in relation to legal aid and assistance.

62. Subsection (2) makes an amendment to the Sheriff Courts (Scotland) Act 1971 to provide that the Court of Session must consult the Council before making rules of civil procedure in the sheriff court, except where those rules were submitted by the Council.

63. Subsection (3) makes an amendment to the Judiciary and Courts (Scotland) Act 2008 which provides that the Scottish Court Service has the function of providing administrative support for the Council.

Part 2 – Criminal Legal Assistance

Section 17 – Contributions in respect of automatically available criminal advice and assistance

64. Section 17 inserts a new subsection (1A) in section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 8A was introduced following the decision of the Supreme Court in Cadder v HMA by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Section 8A currently provides that Scottish Ministers may make regulations prescribing the circumstances in which A&A in relation to criminal matters can be provided without reference to the financial limits in section 8. Section 8 prescribes the eligibility test for A&A which is based on a person’s financial circumstances.
65. The new subsection allows regulations to prescribe the circumstances in which A&A in relation to criminal matters may be provided without payment of a contribution in terms of section 11 of the 1986 Act.

Section 18 – Availability of criminal assistance by way of representation

66. Section 18 amends provisions in Part II of the 1986 Act about the availability of criminal A&A. Specifically, section 18 inserts a new paragraph (dda) in section 9(2) and inserts sections 9A and 9B. A consequential modification to section 9(2)(de) is made in section 23.

67. Section 9 of the 1986 Act provides that Scottish Ministers may make regulations in relation to the availability of assistance by way of representation (“ABWOR”) under Part II of the 1986 Act. Section 9(2)(de) provides that regulations can prescribe the proceedings at which ABWOR is available without contributions being levied under section 11 of the 1986 Act. Under section 11 a person may have to pay a contribution towards the A&A received where the person’s disposable income is over a certain specified limit or where the person is in receipt of certain benefits.

68. A related amendment to section 9 is in section 23(5) of the Bill which amends section 9(2)(de) of the 1986 Act to include reference to the new section 11A (which is inserted by section 19 of the Bill). As a result of the amendment the Scottish Ministers will have power under section 9(2)(de) to prescribe the proceedings at which ABWOR is available without being subject to contributions under section 11 or contributions for criminal ABWOR under section 11A.

69. Section 18 inserts a new paragraph (dda) into section 9(2) of the 1986 Act. This new paragraph provides that regulations can prescribe the criminal proceedings to which the new sections 9A and 11A are to apply instead of sections 8 and 11 in relation to criminal ABWOR.

70. Section 18 inserts a new section 9A into the 1986 Act. Section 8 of the 1986 Act provides the current eligibility test which determines whether A&A can be provided to a person. A&A can include ABWOR. The section 8 test is based on the financial circumstances of the applicant: whether the person has disposable income or capital exceeding certain amounts or whether the person is in receipt of certain benefits.

71. The new section 9A(1), inserted by section 18, sets out a new eligibility test for criminal ABWOR. The proceedings in respect of which criminal ABWOR may be provided will be prescribed by regulations made under section 9(2)(dda). The solicitor must consider the financial circumstances of the applicant, under section 9A(1)(a)(i), and must be satisfied that the criteria in section 9A(2) are met before criminal ABWOR can be provided to the person. The criteria in subsection (2) are that the scheme of eligibility (set out in section 9B) provides that the fees and outlays of the assistance cannot be met without causing undue hardship to the person or his/her dependants, and any other criteria that are prescribed by Scottish Ministers under section 9(2)(c) of the 1986 Act.

72. Separately, under section 9A(1)(b), criminal ABWOR can be provided to a person where the Board has approved the grant of ABWOR to that person. In addition, a person can ask the
Board to consider his/her application under the procedure created by the Board under section 9A(3).

73. Once criminal ABWOR has been granted under section 9A it is intended that the client will be obliged to alert his/her solicitor to a change in his/her financial circumstances, in order to ensure that the client is still eligible for criminal ABWOR. This obligation will be set out in regulations made under the existing powers in section 36(1) of the 1986 Act.

74. The “scheme of eligibility” is defined in subsection (4) for the purposes of the references to it in sections 9A and 9B to mean any scheme which has been approved by Scottish Ministers, or any part or modification of such a scheme.

75. Section 9A(5) provides that the availability of criminal ABWOR in terms of section 9A may be subject, by means of regulations, to the provisions of section 8A(1). Section 8A allows for criminal A&A to be made automatically availability in certain circumstances.

76. Section 9B, also inserted by section 18 of the Bill, makes provision about the scheme of eligibility referred to in section 9A. Under subsection (1), it is for the Board to prepare and publish the scheme of eligibility. The Board must submit the draft scheme, under subsection (2), for approval by the Scottish Ministers. The Scottish Ministers may, by virtue of subsection (3), modify or approve the draft scheme. Under subsection (4) the Scottish Ministers have power to approve the scheme (including a modification of a scheme) or withdraw approval of a scheme or a modification, and to require the Board to prepare and publish a scheme under subsection (1). Under subsection (5), the Board must comply with any directions given by Scottish Ministers when preparing and publishing a scheme. Subsection (6) allows the scheme to make different provisions for different cases or classes of case.

Section 19 – Clients’ contributions for criminal legal assistance by way of representation

77. Section 19 amends section 11 of the 1986 Act. Section 11 of the 1986 Act provides for the levying of contributions in respect of A&A, which currently includes criminal ABWOR. Section 11(1) provides that a person is not liable to pay a contribution where the person does not meet the test in section 11(2) of having disposable income or capital of a certain amount, or where the person is in receipt of certain benefits. Section 19(1) amends section 11(1) to refer to the new section 11A and subsection (2) changes the title of section 11. The effect of the amendments is that a person is not required to pay a contribution under section 11 in respect of A&A (excluding criminal ABWOR) or a contribution under section 11A in respect of criminal ABWOR unless the test in section 11(2) or 11A(1) is met.

78. Section 19(3) inserts section 11A which makes provision about contributions due in respect of criminal ABWOR. The proceedings to which section 11A will apply can be prescribed by regulations made under section 9(2)(dda) of the 1986 Act, as inserted by section 18 of the Bill. A contribution is due where a person has disposable income over a certain prescribed amount and is not in receipt of certain benefits or capital, above a prescribed amount as provided for in section 11A(1). Section 11A(2) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers can, under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill), specify by regulations the amount payable by way of contribution and the maximum amount payable.
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill as amended at Stage 2 (SP Bill 13A)

79. Section 11A(3) provides that, unless regulations prescribe otherwise, where criminal ABWOR is provided by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to determine the amount of the contribution under subsection (2) and to collect it. In all other situations, the contribution for ABWOR due under subsection (2) will be determined, and collected, by the solicitor. Section 11A(4) provides that a contribution collected by the solicitor is treated as a contribution towards fees or outlays properly incurred by the solicitor.

Section 20 – Contributions for criminal legal aid

80. Section 20 inserts a new section 25AC into the 1986 Act in respect of contributions for criminal legal aid. Section 25AC(1) provides that contributions are only due for criminal legal aid by virtue of subsection (3) or section 25AA(5) (which makes provision in respect of appeals under section 303A of the Criminal Procedure (Scotland) Act 1995).

81. Section 25AC(2)(a) provides that no contribution will be payable where a person is in receipt of legal aid under section 22(1) or section 23(1) of the 1986 Act. Section 22 concerns the automatic availability of criminal legal aid in certain circumstances and section 23(1) provides for the court to grant criminal legal aid in certain circumstances.

82. In proceedings where a contribution is due, a person is only liable to pay a contribution where, under section 25AC(2)(b), he or she has income above a certain prescribed amount and is not in receipt of certain benefits or capital above a prescribed amount.

83. Section 25AC(3) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers have power under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill) to specify by regulations the amount of contribution due and the maximum amount payable.

84. Section 25AC(4) makes provision about who collects the contribution. Unless otherwise provided for by regulations, where criminal legal aid is provided in connection with solemn or appeal proceedings, or by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to collect the contribution. In all other cases, the solicitor collects the contribution due.

85. Section 25AC(5) provides that a contribution collected by the solicitor is to be treated as a contribution towards any fees or outlays incurred by the solicitor.

86. “The solicitor” as referred to in section 25AC is defined in subsection (6) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

87. Section 20 of the Bill also inserts new section 25AD into the 1986 Act. Section 25AD sets out how the fees and outlays of a solicitor who has provided criminal legal aid are to be paid. Under subsection (1), unless regulations provide otherwise, the order of payment should be, first, from any contribution due, second, (in priority to all other debts) from any expenses payable by order of a criminal court and third, by the Board from the legal aid Fund.
88. Subsection (2) of section 25AD provides that the fees and outlays referred to in subsection (1) are those properly chargeable in accordance with section 33 of the 1986 Act, but do not include a salary payable to a solicitor employed under section 26, 27 or 28A of the 1986 Act. “The solicitor” as referred to in section 25AD is defined in subsection (3) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

Section 21 – Contributions for appeals where appellant is deceased

89. Section 21 of the Bill inserts additional subsections into section 25AA of the 1986 Act. Section 303A of the Criminal Procedure (Scotland) Act 1995 makes provision about the transfer of the rights of a deceased person to an authorised person. The authorised person is the deceased’s executor or a person the court considers has a legitimate interest. Section 25AA of the 1986 Act sets out the circumstances where criminal legal aid is available to the authorised person to institute or continue with such an appeal.

90. Subsection (5) of section 25AA, as inserted by section 21 of the Bill, provides that the Board may require the payment of a contribution, determined by the Board, for the criminal legal aid provided. Subsection (6) provides that either the estate of the deceased or the authorised person may be liable to pay the contribution, and subsection (7) provides that the contribution determined by the Board cannot exceed the whole expenses of the criminal legal aid being provided. Subsection (8) provides that the Board, when determining the contribution due, must take into account any contribution paid by the deceased prior to his or her death.

Section 22 – Regulations about contributions for criminal legal assistance

91. Section 22 inserts a new section 33ZA into the 1986 Act. This section gives the Scottish Ministers power to make regulations in connection with the amount, determination and collection of contributions (in relation to criminal legal assistance) due under sections 11 (only insofar as relating to criminal matters), 11A, 25AA or 25AC. Particular types of regulations which may be made under subsection (1) are listed in subsection (2). These are as follows: under subsection (2)(a) making provision to allow a lesser contribution to be levied where it can be shown that to levy such a contribution would result in undue hardship to the person or his/her dependants; under subsection (2)(b), making provision about determining contributions where a person is in receipt of criminal legal assistance for two or more distinct proceedings; under subsection (2)(c) specifying whether the Board or the solicitor determines or collects a contribution; under subsection (2)(d) specifying how contributions are to be transferred or accounted for where the contribution is in respect of proceedings which, whilst still live, change procedure; and under subsection (2)(e) making provisions about payment of contributions by instalments.

92. In terms of subsection (3), any regulations made under subsection (1) can make different provision for different cases or classes of case. “The solicitor” as referred to in section 33ZA is defined in subsection (4) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.
Section 23 – Consequential modifications

93. Section 23 makes consequential modifications to the 1986 Act as a result of the amendments and insertions made in sections 17 to 21 of the Bill. Subsection (2) amends section 4 of the 1986 Act to allow contributions paid to the Board in respect of criminal legal assistance to be paid into the legal aid fund.

94. Subsection (5) amends section 9(2)(de) to provide that section 11A shall not apply as respects ABWOR received in relation to such proceedings as Scottish Ministers may prescribe under section 9(1).

95. Subsection (6) amends section 11 of the 1986 Act to reflect changes made both by previous legislation to the legal status of solicitors employed by the Board under sections 26, 27 and 28A of the 1986 Act, and by Part 2 of this Bill.

96. Subsection (9) amends section 36(2)(b) of the 1986 Act to provide that regulations can be made to substitute different amounts for the amounts referred to in all the sections concerning criminal legal assistance (as currently provided for in the 1986 Act and as inserted by the Bill). The amendments also allow regulations to prescribe different amounts for different cases or classes of case in respect of all the current and inserted provisions.

97. Subsection (10) amends section 37(2) of the 1986 Act to provide that any regulations made under section 33ZA(1) will be subject to the affirmative resolution of the Parliament.

Part 3 – General

Section 24 – Ancillary provisions

98. This section provides ancillary order making powers for Scottish Ministers. Exercise of the powers will be subject to negative procedure, unless an order adds to, replaces or omits any part of the text of an Act in which case the order would be subject to affirmative procedure.

Section 25 – Commencement

99. This section deals with the date of commencement. Different elements of the Bill may be commenced at different times.

Section 26 – Short title

100. This section deals with the short title.
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Cabinet Secretary for Justice to the Convener

During the Justice Committee’s Stage 2 consideration of the Scottish Civil Justice Council and Criminal Legal Assistance Bill on 13 November, I committed to discuss a number of points raised by the Committee with the Law Society of Scotland. These included consideration of the threshold level, collection of contributions and parity with civil legal aid. I am writing to update the Committee on the progress of these discussions and inform you of the plans in place to respond to the recent decisions by the profession to take industrial action.

I met the Law Society on 20 November to further discuss the proposed changes to the legal aid system, hear their views and jointly consider whether there are any potential solutions which could be found to allay some of the concerns expressed by the legal profession. I enclose a copy of my letter to the Law Society of 21 November, which outlines our discussion on the Bill’s proposals. I am waiting to hear from the Law Society as to how they would like to proceed.

As the Committee will no doubt be aware, solicitors boycotted Edinburgh Custody court on Monday 19 November. As notice was not given to the Sheriff Clerk in advance of the action, plans to ameliorate the impact needed to be put into place very quickly. It is my understanding that minimum disruption was caused as a result.

Though no formal notification has taken place, I also understand that solicitors have voted to take further industrial action. It seems to be the stated intention of solicitors that there will be no such formal notification. Officials have met with the Association of Chief Police Officers (ACPOS), the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Court Service (SCS), the Scottish Prisons Service (SPS) and the Scottish Legal Aid Board (SLAB) to discuss ways in which we might minimise disruption to the courts in the event of future action and avoid clients being disadvantaged. This was a very productive meeting at which it was agreed the various agencies would work together to share intelligence to both prepare for future action and minimise impact if that action materialises. I am also writing to the Lord President on these matters.

I hope you will find this helpful. I will continue to write to the Committee to provide updates on progress.

Kenny MacAskill MSP
Cabinet Secretary for Justice
22 November 2012
Letter from the Cabinet Secretary for Justice to the President of the Law Society of Scotland

It was good to meet you last night and discuss remaining issues around the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Bill.

You clarified that the fundamental issue of concern for the profession is the collection of contributions for criminal legal aid. You confirmed that while the principle of solicitors collecting contributions remains as set out in the Bill, and unchanged in Stage 2, the society has not been in a position to discuss some of the requirements already proposed by the Scottish Government and the Scottish Legal Aid Board which might help with the collection of fees.

While you have some concerns around eligibility levels, these are based on the information currently available and you took the view that further discussions may be useful. I can confirm that I am willing to put forward an amendment to increase the financial threshold but this must be across civil and criminal business and will require to be paid for by other savings to the legal aid fund.

On collection of fees, I confirmed my continued position that it is not unreasonable to expect solicitors to collect their fees from their clients. It is entirely in line with current practice when dealing with private clients, Advice and Assistance and ABWOR and with other professions who do not receive Scottish Government support to collect fees, even where those fees are partly subsidised from public funds. Given the likely high proportion of smaller contributions in summary business, it would not be cost effective for the Scottish Legal Aid Board to take on this task and I believe solicitors are best placed to ensure that clients make their contribution.

I accept that collection of fees in these cases represents a change for the profession and while I do not intend to make any fundamental change to the provisions of the Bill, which have been approved by the Justice Committee, I am prepared to discuss any practical proposals which might help firms in their collection, for example in higher cost cases.

In addition to removing the requirement to collect contributions in police station interviews, I also offered to explore instructing the Scottish Legal Aid Board to provide a service for those solicitors who wish it to try to collect unpaid fees on a commercial basis, with a suitable fee being charged for that service. I believe this is the only viable way in which the Board could be the collecting body whilst also achieving the necessary savings to the legal aid fund.

There may be other options you can propose which I would be happy for you to explore with Scottish Government officials and the Board, although I repeat that the basic principle of the profession being responsible for collection in summary cases is not one I can concede.

I also indicated that on this occasion only was I prepared to accede to your request for this meeting to be held without representatives of the Board. I believe it is essential, as has been the case previously, that the Board are represented at meetings with me or my officials which concern legal aid.
We agreed that I would confirm this position in writing and I hope it is helpful to you. I look forward to your response.

Kenny MacAskill MSP
Cabinet Secretary for Justice
November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from Edinburgh Bar Association

We notice that the Justice Secretary wrote to you on 22/11/2012 indicating that despite his attempts to discuss the contentious issues raised by the Bill in its current form with our representatives, solicitors intend to stage protest action in courts across Scotland and that disruption to the courts is expected. We write to advise the Committee that it is with sadness that faculties from across Scotland are in agreement that protest action is the only course open to us following the Government's approach to our concerns.

We note with interest the terms of the Cabinet Secretary's letter to the President of the Law Society of Scotland, received the day after talks and, of course, following a press release issued on 20th November immediately after his meeting with our President. That release gave the impression, as does the Cabinet Secretary's letter to you, that the profession were to be given at least the hope of persuading him that the changes proposed should be modified so as to prevent damage to not only solicitors firms but to the smooth running of the Justice System itself.

The true position is, as ever, to be found in the detail, such as the omission of the word "unpaid" from the press release when referring to SLAB collecting contributions. That word appears in the Cabinet Secretary's letter however. The significance of this is that sections of the media, including the Scotsman Newspaper, reported on Wednesday that the Government had conceded that SLAB were to collect contributions.

The truth of the Government's offer is that, as we understand the President of the Law Society was told on Tuesday, solicitors would continue to be expected to attempt to collect contributions (except those arising for police station interviews - a fraction of the total affected cases), but in cases where they have exhausted all "reasonable steps" to collect and have failed, the Board may offer to attempt to collect in return for the payment of a commercial fee. It is not clear whether it is envisaged that these steps should include the raising of small claims actions against our clients. Therefore, not only would solicitors have to take a cut in fees for work which, in many cases will already have been carried out, but they would have to pay for the privilege of doing so!

Secondly, on the subject of levels of contribution, an offer to increase eligibility levels was made across civil and criminal cases (criminal only in the press release) but it was made clear that this would require to be "paid for" from elsewhere in the legal aid fund. In the absence of any indication of the likely level of increase to the £68 threshold which has concerned the profession and charities alike, this offer is meaningless.

Lastly, not for the first time, the total figure for legal aid expenditure and the need to reduce it was included in the release as being the rationale behind these proposals which are targeted at the criminal legal aid budget only. Neither the release not the
Cabinet Secretary’s letter made reference to the fact that this total figure includes VAT, nor that SLAB’s annual report published on 7th November, confirmed that the criminal legal aid budget had been reduced by £12 million in the last 5 years including a 5.8% decrease in the last year, whilst civil legal aid expenditure had risen by 36% in the same period.

It is against this background that Heads of Faculty from across Scotland met on Wednesday past and decided that the profession cannot absorb the further cuts which are intended through the proposed changes to legal aid contained within the Bill as it stands. The profession finds it difficult to understand why the Government is intent on putting obstacles in our way as we attempt to facilitate the smooth running of court business. Taking the collection of contributions out of the frontline of service provision (in England the equivalent of SLAB has responsibility for collection of all contributions) removes the potential for disruption to court business and losses for firms.

Unfortunately, despite the professions efforts, the Government have failed to engage in any meaningful discussions and it is with regret that we have decided that the withdrawal of labour must follow in protest.

Cameron Tait, President
Mark Harrower, Vice President
23 November 2012
I would like to clarify two issues raised at the Justice Committee meeting on 13 November 2012 and would be grateful if you could pass this information to Committee members.

According to the Official Report of the meeting at column 2019-2020, it is stated that “the Government’s claim that 82 per cent of clients will not have to make any contributions is based on modelling of only four medium sized firms, which is just not extensive or representative enough to be relied on.”

That basis of this statement is incorrect. The Board’s analysis that 82% of applicants will not be assessed with a contribution was not based on the modelling of four firms. We analysed over 65,000 recent applications from the whole population of criminal legal aid applications and modelled the effect of the Bill provisions on applicants for ABWOR, summary and solemn criminal legal aid. From that, we assessed that 82% of applicants would be assessed as eligible without a contribution. This is outlined in the Policy Memorandum to the Bill.

The case studies of four firms we sent to the Committee on 14 September 2012 were given as case studies only of the effect on those firms of the collection of summary criminal legal aid contributions. The analysis of the four firms was not linked to the number of people we have modelled who will not pay contributions under the provisions in the Bill and was not the source of that analysis of 65,000 applications.

In addition, it is stated at column 2021 that: “…but when I was speaking to the solicitor out front the issue of the £600,000 figure given previously for the collection of fees was raised. I realise that this is literally a back-of-a-piece-of paper calculation.”

To give the Committee reassurance, the Board’s calculation of the additional cost of £600,000 was based on our assessment of the number of staff required to process and collect the likely number of contributions. It is based on known staff costs and is therefore an informed estimate of the administrative cost to the Board of collecting the likely level of ABWOR, summary and solemn criminal legal aid contributions.

Marie-Louise Fox
Director of Operations
Scottish Legal Aid Board
23 November 2012
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill – Part 2
(Contributions)

Letter from the Law Society of Scotland to the Committee

We have read a number of statements about the Bill which do not provide a fully rounded picture of the changes in criminal legal assistance that will be brought about by the contributions system. This letter attempts to clarify the position in respect of these matters. We would also like to provide details of our negotiating position in relation to the cost of transferring the responsibility of collecting contributions to the Scottish Legal Aid Board (SLAB).

Collection of contributions

Volume
- In 2011-2012, solicitors were expected to collect **£154,000** under criminal ABWOR.¹
- Under the proposed system solicitors will be expected to collect around **£2,722,000** in summary criminal legal aid and criminal ABWOR cases in the first year.²
- In financial terms, solicitors will be expected to collect around **18 times** the amount of contributions that they are required to collect at present.
- Without a central collection system it will not be possible to monitor the proportion of the £2,722,000 which has been paid by clients. Therefore, it will not be possible to review the contributions system.

England and Wales
- There is a central collection system in England and Wales which means that the contributions system can be monitored.³ This also means that non-payment of contributions in England and Wales does not cause delays in the court system or increase the number of unrepresented accused in court.

Cost of collection
- SLAB will spend **£103,008** out of its Grant in Aid funding on staff costs to collect around **£645,000** of solemn contributions.⁴
- The profession will receive no funding to collect over **£2.7 million** of summary legal aid and ABWOR contributions.

¹ Evidence from Scottish Legal Aid Board, Official Report of the Justice Committee, 11 September 2012
² Financial Memorandum, paragraph 153 – (Summary + ABWOR savings from contributions)
³ Legal Services Commission Legal Aid Manual
⁴ Policy Memorandum, paragraph 167 and Financial Memorandum, paragraph 153
It would cost SLAB £600,000 to set up an administration system to collect the £2.7 million of summary legal aid and ABWOR contributions.\(^5\)

**Cost of collection - our negotiating position**

- If SLAB collected the summary and ABWOR contributions centrally, the Government would make savings to the legal aid fund unless SLAB recovered only £600,000 or less out of the £2.7 million (approximately 20%).

- On 31 October, at a meeting with the Government and SLAB, the Society offered to explore with the profession the possibility of the profession funding the administration of the SLAB collection service. The proposal was made to ensure that savings were made to the fund, albeit potentially less than the target amount depending on collection rates. The proposal to consider this as an option was rejected by the Government and by SLAB.

**Number of clients affected by contributions**

The Policy Memorandum states that 82% of clients will not have to pay a contribution. This is based on an analysis of all the cases which SLAB dealt with in the year up to November 2011.\(^6\)

Those cases could not have fully reflected the levels of outgoings of clients.\(^7\) The figure of 82% could only have been based on assumptions made in relation to the levels of outgoings data and those assumptions could be inaccurate.

**Contribution levels - Summary Criminal Legal Aid**

**Average amounts**

- The average contribution amount which will be payable out of income in contributions cases has been estimated by the Government to be £179, almost £40 more than the existing maximum contribution payable under ABWOR.\(^8\)

- The average contribution amount which will be payable out of capital in contributions cases has been estimated by the Government to be £216.\(^9\)

- The fixed fee is currently £485. Where the contribution payable out of income is assessed at £179 (the average amount), SLAB will only pay £306 of the fixed fee to the solicitor. The solicitor would be expected to collect the remainder (£179) from the client.

- Where a contribution out of income is the average amount (£179) the client would have a disposable income of around £118.50 per week.\(^10\) He or she

---

5 Evidence from Scottish Legal Aid Board to Justice Committee, Official Report of 25th Meeting 2012 (Session 4) Tuesday 11 September, Official Report - page 1677
6 Policy Memorandum, paragraph 66
7 Financial Memorandum, paragraph 161
8 Financial Memorandum, paragraph 157 and SLAB Keycard 2012
9 Financial Memorandum, paragraph 157
10 Policy Memorandum, paragraph 60
would not be able to afford the full amount in a single payment and so an instalment system would have to be set up. Unlike SLAB, many criminal legal aid solicitors do not have such systems in place.11

- The average level of contribution payable out of income is £179 but the amount can go up to £1118 depending on the disposable income of the client.12

**How contribution levels correspond with disposable income**

To provide a better understanding of contribution levels in summary legal aid we attach a graph which shows how they correspond with disposable incomes of clients.

**Impact on solicitor firms**

The impact on solicitor firms will vary from firm to firm. Given the figures in the Policy Memorandum, it is clear that the modelling provided by SLAB in supplementary evidence to the Justice Committee does not include firms that will be impacted severely by the contributions system.13

Oliver Adair
Legal Aid Convener
Law Society of Scotland
29 November 2012

---

11 Law Society of Scotland Survey on ABWOR collection reported that over 70% of respondent firms either never or rarely collect in ABWOR with many firms citing lack of collection systems as one of the reasons.
12 Policy Memorandum, paragraph 60
13 The modelling showed that less than 18% of the client base of each of the modelled firms would have an assessed contribution. If the 82% figure in the Policy Memorandum is correct there must be firms that have not been modelled with higher percentages of affected clients.
**Sheriff Court - Summary Criminal Contributions**

**Assessed Contribution**

**Weekly Disposable Income (£)**

**Fixed Fee (£485)**

**Weekly Disposable Income**
**Where the Assessed Contribution is in Excess of the Defence Costs**

Some of the levels of contributions payable will be greater than the defence costs. In these circumstances, it is suggested in the Policy Memorandum that the client will have to pay the full cost of the defence case rather than the assessed contribution (paragraph 60). In other words, in a case where the solicitor would claim the fixed fee and the contribution assessed is greater than £485, the legally aided client will have his or her contribution restricted to £485 and receive no legal aid funding whatsoever.

If the accused person pleads not guilty and goes to trial, the case is likely to become more expensive and he or she will therefore have to pay up to the full contribution amount which could be as much as £1118 depending on his or her disposable income.

This could lead to a perverse incentive which could undermine the just disposal of the case as clients might be inclined to plead guilty simply to avoid paying the assessed contribution amount.
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Cabinet Secretary for Justice to the Convener

During Stage 2 consideration of the above Bill I made a commitment\(^1\) to consider further the threshold above which a person would be asked to make a contribution to their criminal legal aid fees. As you know, the Bill provisions set out that those with a disposable income above £68 per week will be expected to make a contribution. This has been a subject of considerable debate throughout. As you recall, amendments were tabled at Stage 2 to remove the reference from the face of the Bill, but not supported. No amendments were tabled to amend the figure itself, and the threshold in the Bill remained unchanged.

Nonetheless, in the light of concerns expressed in evidence to the Committee and elsewhere, including by the Law Society of Scotland, I have continued to consider the appropriate thresholds. I have taken account of impending changes to welfare benefits and the likelihood that income support levels will increase in the near future. I have concluded that, notwithstanding the great pressures on the legal aid budget, it is right to increase the threshold at which people will begin to pay contributions.

I therefore set out to Parliament on 4 December, in a response to a question from Lewis MacDonald, that I was minded to increase the threshold from £68 to £82. As you know, that figure is one which has previously been proposed by the Law Society to the Committee.

I confirmed this at a meeting with the Law Society and Bar Associations on 5 December. I also reaffirmed my view that any change to the threshold should be carried across to civil and children’s legal aid, since a broad parity between different types of legal aid is an important principle underpinning the Bill.

Current calculations suggest that increasing the threshold to £82 across criminal, civil and children’s legal aid would cost around £1.16m. I have invited the Law Society to hold detailed discussions with Government officials and the Scottish Legal Aid Board about how best to meet this additional cost within the draft budget plans for legal aid expenditure which are being considered by Parliament. I will keep the Committee informed of the outcome of those discussions.

Finally, I am aware of the recent letter that has been sent to the Committee from the Law Society. I have a number of comments I would wish to make in relation to some of the assertions in that letter and will write to the Committee separately on those matters.

I hope the Committee finds this update helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
6 December 2012

\(^1\) Justice Committee Official Report, 13 November 2012, col. 2017
Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Letter from the Cabinet Secretary for Justice to the Convener

The Law Society of Scotland wrote to the Committee on 29 November seeking to clarify its position in relation to the contributions system for criminal legal assistance and the cost of transferring the responsibility of collecting contributions to the Scottish Legal Aid Board (SLAB). There are a number of points of clarification I wish to make in response to that letter, and some of the other claims that have been made in respect of this legislation. I would also like to take this opportunity to update the Committee on the impact thus far of the attempted disruption of the courts by some defence solicitors.

I would particularly like to refute any suggestion that the Law Society have put forward alternative proposals under which the profession would meet the costs of SLAB taking over responsibility for collection of contributions in summary cases.

At a meeting with officials on 31 October, the Law Society indicated that they might be prepared to explore how such a proposal might be made, if it were of interest to the profession and likely to receive sympathetic consideration by the Government. The Government’s position was set out then and remains that, while it is happy to consider any specific proposals from the Law Society, it regards it as right in principle and in practice that solicitors should collect contributions in summary cases. Furthermore, the Government felt it unlikely that a practicable model could be found of funding the significant costs involved which would not be paid for by savings which are already in contemplation to meet the wider funding challenges of legal aid.

At that point, as officials noted in a letter to the Law Society on 7 November: “The Negotiating Team’s response was that it was opposed to the principle of collecting contributions and it was not in a position to negotiate any proposals which would be predicated on accepting that underlying principle while the matter was still before Parliament.”

In referring to that letter when writing to me on 16 November, the Society did not raise this as being an inaccurate representation of the Society’s position.

When meeting me following Stage 2, the Society again made no proposal on how the cost should be met. While the Law Society has written to say it would discuss my proposals from that meeting (sent to the Committee on 22 November) with local faculties and bar associations, no definitive response to them has yet been provided.

I must be clear on this: no specific proposition has been put to the Scottish Government by the Law Society on how the cost of SLAB collecting contributions in summary cases would be met. The Scottish Government maintains that it will look at any proposition but the Society has not set out specifically how it would expect to find the savings.
Further, much of the numerical information provided by the Law Society was inaccurate and I have therefore provided further, more detailed information to address this at Annex A.

Discussions with the Law Society

The development of the Bill was discussed with a range of partners, including the Law Society, and as a result I agreed that contributions should be classed as fees, and that the Board would collect contributions in solemn cases. The provisions in the Bill were therefore developed in good faith and with the full involvement of the Law Society whom we believed to be solicitors’ representative and negotiation body. It was not until introduction of the Bill in May that the Law Society informed us of the position not to support collection by solicitors in summary cases. It is therefore disappointing that we have reached this impasse at this stage.

I am still pursuing discussions with the Law Society, as per my commitment to the Committee at Stage 2, and met with the Society and representatives of local faculties and bar associations on 5 December. This continues long engagement with the Society on the proposals throughout the passage of the Bill, including meetings with officials in June and October as well as with me on 20 November. Following recent correspondence, officials are arranging for further discussions to take place next week between the Society’s Legal Aid Negotiating Team, the Government and SLAB.

I note that the Law Society has referred a number of times in the press to repeated cuts to defence solicitors’ fees in recent years. This is a partial and selective account of the situation. While it is undoubtedly the case that some fee levels were unsustainably high some years ago, the current fee regime cannot be directly compared with the one in place at that time. In 2008 fees were completely restructured, in agreement with the Law Society, as part of summary justice reform. We moved to a system where the basic block fee was the same whether the client pled guilty early on or not, reducing any financial incentive to encourage a client to plead not guilty and change the plea at the last minute. The fee for an early guilty plea used to be £70 and is now £485. Given that the great majority of clients ultimately plead guilty, that is a significant benefit. Published independent research shows that the total number of guilty pleas did not increase but early guilty pleas increased substantially as expected. Had the feeing regime not been changed as part of summary reform, solicitors’ incomes from criminal legal aid would have fallen markedly because of the reduction in criminal cases going through the courts as a result of the summary justice reforms.

Impact of disruptive action by solicitors

Police have advised that the strike has had no impact on the number of arrests. I am not aware of evidence of the police changing their approach in direct response to the strike action. The police already consider alternatives to custody where appropriate, in accordance with existing Lord Advocate guidelines. I can provide further detail of the numbers with comparisons should the Committee wish.
The Crown Office and Procurator Fiscal Service (COPFS) has confirmed that no accused individuals have been liberated as a result of the action taken by Scottish solicitors. On any day across Scotland, there will be a proportion of those individuals reported to the Procurator Fiscal in custody that is liberated for a variety of reasons. The most common reasons are that there is insufficient evidence to prosecute or that the case does not comply with the Lord Advocate’s guidelines to the police. Any action taken by solicitors will not affect this decision making in any way.

The courts affected have tended to sit for only slightly longer than normal as a direct consequence of the action. There have been delays and late sittings of a number of our biggest custody courts across the country but these have been caused by technology problems being experienced by the Crown as opposed to the action.

I have previously expressed my concern that clients have been appearing in court without legal representation during disruptive action by solicitors, especially because the services of a duty solicitor have been available. In a normal setting it would be highly unusual, in fact probably exceptional, for a person to appear from custody and not be represented by a solicitor.

The following table sets out the numbers of people appearing from custody unrepresented at courts affected by action on 3 December (provided by the Scottish Court Service) and the time at which those courts closed on that day (provided by COPFS).

<table>
<thead>
<tr>
<th>Court</th>
<th>Unrepresented accused</th>
<th>Closing time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aberdeen</td>
<td>7</td>
<td>15:45</td>
</tr>
<tr>
<td>Alloa</td>
<td>0</td>
<td>15:45</td>
</tr>
<tr>
<td>Arbroath</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>There was only one custody and this was dealt with during the court day, so there is no separate custody court finishing time</td>
</tr>
<tr>
<td>Dundee</td>
<td>2</td>
<td>16:15</td>
</tr>
<tr>
<td>Dunfermline</td>
<td>6</td>
<td>16:05</td>
</tr>
<tr>
<td>Falkirk</td>
<td>6</td>
<td>16:45</td>
</tr>
<tr>
<td>Kirkcaldy</td>
<td>16</td>
<td>16:50</td>
</tr>
<tr>
<td>Perth</td>
<td>2</td>
<td>16:50</td>
</tr>
</tbody>
</table>

I hope the information I have provided is of use to the Committee.

Kenny MacAskill
Cabinet Secretary for Justice
11 December 2012
ANNEX A: Detailed response to the Law Society of Scotland’s submission to the Committee on 29 November 2012

Volume of contributions for collection

The Law Society raised a number of concerns around the volume of contributions solicitors would be expected to collect. While I have always accepted that the provisions around collection of contributions represent a change in current arrangements, I still do not accept that this is an unreasonable position.

As discussed with the Committee, solicitors already collect contributions from clients for criminal advice and assistance and ABWOR cases. Solicitors’ firms already collect contributions for civil and children’s advice and assistance and ABWOR cases as well, at about £500,000 per year, not to mention their private fees. The estimated £2,722,000 in criminal contributions that solicitors firms would be expected to collect quoted by the Law Society is about ten and half times what firms currently collect in respect of criminal A&A/ABWOR, (about £260,000) and approximately 3.3 times what firms currently collect in A&A/ABWOR across criminal, civil and children’s cases (about £824,000). It is therefore not 18 times the amount of contributions that solicitors are required to collect at present, as asserted by the Law Society.

Solicitors are private, independent firms and not employees of SLAB. Depending on the client’s financial circumstances, legal aid subsidises or pays in full the cost of solicitors’ fees thereby supporting clients to access legal advice. SLAB is therefore responsible for paying the balance of fees due to solicitors once a client contribution to the solicitor’s fees has been assessed.

Collection system in England and Wales

The Law Society has drawn attention to the central system of collections as it operates in England and Wales. Direct comparisons with England and Wales are difficult as the means assessment and contribution systems in place there are very different to those contained in the Bill. However, it is worth noting that the contribution system in England and Wales only applies to Crown Court cases – the equivalent of solemn cases, for which SLAB will collect contributions – and not to the lower courts, where clients are not in receipt of legal aid above the threshold at all. Those clients in the lower courts above the threshold will therefore be private fee paying clients and, as such, settle their whole bill directly with the solicitor.

I disagree that the lack of a central collection system could mean delays in the court system or increase the number of unrepresented accused in court, which the Law Society seems to suggest in its letter. Courts are very unlikely to adjourn cases solely for the reason of non-payment of the contribution to a solicitor. Indeed, I would be interested in the Law Society’s view as to whether this currently happens in relation to privately funded cases, and in what circumstances.

Cost of collection

In arguing for SLAB to collect contributions in summary cases, the Law Society is looking for SLAB to collect solicitors’ fees. SLAB is a non-departmental body funded
to manage the Legal Aid system in Scotland. It is not a representative body or management service for solicitors.

As discussed at committee, it is true that SLAB collects contributions to civil legal aid, and that the Bill does propose that SLAB share in the responsibility for collection of contributions by collecting them in solemn and appeals cases. However, the repeated assertion by the Law Society that we are asking solicitors to be ‘unpaid debt collectors on behalf of the state’ is manifestly inaccurate.

Solicitors are self-employed private businesses and should take responsibility for collecting their fees from their clients. There are almost 340,000 small and medium sized businesses in Scotland all responsible for their own income generation and managing payment of fees by clients. They do not expect public bodies to collect their fees or other income, and nor should they. Solicitors should do the same. Other professions who also receive state funding to subsidise their fees are responsible for collecting payments from the recipients of services, such as NHS dentists.

Nevertheless, I have confirmed to the Law Society that I am happy for my officials and SLAB to explore with them a range of ways in which the burden of collection by solicitors, particularly in high cost cases or with problem clients, could be alleviated. A number of suggestions have already been made for example in relation to high cost summary cases, and changes to the way that fees are apportioned amongst the solicitors where legal aid is transferred from one solicitor to another.

The Law Society stated in its letter that £103,008 would be spent by SLAB on staff costs to collect solemn contributions. This is inaccurate. In the Bill’s Financial Memorandum, the cost of collection was estimated at £51,504, which is the salary and employer’s costs of the two additional collections officers needed for this. The costs of £103,008, quoted in the Financial Memorandum also included the two extra assessment officers the Board will require to assess summary and solemn criminal contributions, and check the calculations done by solicitors in the Criminal ABWOR cases. If SLAB also needed to assess the summary and solemn contributions as SLAB would need to pay for two additional assessment officers (i.e. a further £51,504).

Contributions: clients affected and average amounts

The Law Society has made a number of assertions on this issue.

The first is that the 82% of clients who will not have to pay a contribution as set out in the Policy Memorandum could not have fully reflected the levels of outgoings of clients and could only have been based on assumptions made in relation to the levels of outgoings data, which could be inaccurate.

The figure of 82% of clients not having to pay a contribution as set out in the Policy Memorandum (87,466 cases out of 105,917 cases analysed) was a conservative estimate based on SLAB’s existing criminal data, which does not always contain full details of all clients’ household outgoings where this does not make a difference to their current eligibility for legal aid. The original estimate of the number of people potentially paying contributions did not assume any additional level of outgoings.
beyond that reported by applicants. The figure of 82% was therefore the minimum proportion of applicants who would have no contribution to pay: any ‘under-reporting’ of outgoings would therefore increase this number and reduce the number of people likely to be required to pay a contribution. The percentage of clients without a contribution to pay is therefore likely to be higher than 82%. It should be noted that the savings estimates included in the Financial Memorandum did, however, take account of possible ‘under-reporting’, ensuring that the information provided in support of the Bill did not overstate the likely savings.

The Law Society also state that the estimated average contribution of £179 which will be payable out of income in contributions cases is almost £40 more than the existing maximum contribution payable under ABWOR. In fact, £179 is only £34 over the current maximum contribution payable under Criminal Advice and Assistance, with £142 being the maximum contribution for police station advice under A&A. It is estimated that 44% of the proposed contribution payments would be below the £142 figure.

In addition, the Law Society makes reference to the fixed fee of £485. Although the single disposal fee in Sheriff Court ABWOR and Summary Criminal cases is £485, the average payments made in 2011/12 were £506 for ABWOR and £632 for summary criminal. Therefore, in cases with the average summary contribution from income (£179), the solicitor would be paid on average £327 by SLAB for ABWOR cases and £452 for Summary Criminal cases, not £306 as stated by the Society.

Figures above on the percentage of clients who would not have to pay a contribution (82%) and the estimated average contribution amount payable out of income in contributions cases (£179) are of course based on the original disposable income threshold of £68 per week, not on the raising of the threshold to £82 that I have offered to the Law Society. This will reduce further the percentage of clients paying contributions, and make it even more likely that those who do pay contributions are both able to do so, and will choose to do so rather than risk losing their chosen legal representative. SLAB is currently analysing these figures and will provide updated figures using data up to November 2012.

**Impact on solicitor firms**

The Law Society states that, because the percentage of the client base of each of the firms in the modelling provided by SLAB in supplementary evidence to the Committee is less than 18%, SLAB’s modelling must therefore not include firms that will be impacted severely by the contributions system, assuming the Policy Memorandum’s figure of 82% clients not having to pay a contribution is correct.

The four firms used by SLAB were from Edinburgh, Glasgow, Aberdeen and Lanarkshire to represent a geographical split around the country and firms who are likely to have clients from different social backgrounds. The range of clients with a contribution to pay in these firms was from 8.5% to 17.6%. As described earlier in this letter, the 18% figure made no adjustment for the ‘under-reporting’ of household outgoings. The more detailed analysis required to produce the firm-level case studies did include a conservative adjustment where outgoings appeared to be under-reported, meaning that the range shown in the case studies is in fact broadly
representative. Again, an increased threshold of £82 would see the percentage of clients in each of these firms paying a contribution reduce further.
I am writing to update the Committee on protest action by solicitors in response to some of the provisions in the above Bill.

As the Committee is likely already aware, criminal defence solicitors again boycotted custody courts yesterday. Further, members of Edinburgh Bar Association (EBA) wrote to the Scottish Legal Aid Board (SLAB) on 14 December to withdraw from the Police Station Duty Plan for Edinburgh Sheriff Court.

Since I have already agreed to increase the disposable income threshold at which contributions are payable in the Bill to that suggested by the Law Society of Scotland (£82), it is clear that the only issue in dispute is the unwillingness of some in the profession to collect a small proportion of their fees from their clients. Recent estimates from SLAB show that, as a result of the change in the disposable income threshold I have agreed to put before Parliament, only 12% of clients receiving criminal legal assistance would be required to pay a contribution. This is a significant reduction to the estimate of 18% set out in the Bill’s Financial Memorandum. I therefore find it astonishing, not only that EBA has chosen to escalate action, but has been quoted in the press as saying this proposal to increase the threshold is “irrelevant”. Despite EBA previously voicing concern about those at the lower end of the income scale, its position on the threshold and escalation in action seem to suggest otherwise.

In that context, I am extremely disappointed to note that the Edinburgh Bar Association has issued a press release which knowingly misrepresents the impact of the scheme. It alleges that ‘those who have a disposable income of £68 (possibly now rising £82) a week or savings of £750 [are] potentially liable for the entire £485 cost of their defence.’ As has been pointed out repeatedly to solicitors, that is completely untrue. A person will be assessed on the income above the threshold – so a person with a disposable income of £82 will pay nothing. A person with an income slightly over that will pay a few pounds. This is just one of the many inaccuracies which those opposed to the proposals continue to peddle. Officials wrote to the President of the Law Society pointing this out and included information on the correct levels of contribution payable. It is disappointing that this information is not being used.

I have also recently received correspondence from the President of the Law Society regarding the Society’s current position, in which I was disappointed to see that the Society does not agree that a raise in the threshold for criminal legal contributions should be matched by an increase in the civil threshold, as has been discussed with the Committee during the passage of the Bill. Further, the Society states it would rather see the legislation as a whole reconsidered if its demands are not met, even though the Bill was agreed in principle unanimously by the Parliament at Stage 1.
EBA’s move to withdraw from the Police Station Duty Scheme is particularly concerning, given that I have already agreed that contributions will not be required in this scheme. In other words, a scheme that is not affected by the proposals in the Bill is being targeted.

Whatever the assertions of the EBA, there is no war against the profession and no threat to the independent criminal bar. Among a range of inaccurate and misleading statements, EBA has claimed that SLAB has somehow started to apply the provisions of the Bill before it has been enacted – this is simply not the case. SLAB has been applying the arrangements implemented as part of the Summary Justice Reforms in 2008 and deducts, quite properly, Advice and Assistance contributions from the case disposal fee paid following any associated subsequent grant of summary criminal legal aid. The evidence used by the EBA to try to support this is an invoice produced for this purpose and those involved in criminal legal aid ought to have known that – it features in Q&A guidance produced by SLAB in 2008. The matter was also discussed at a meeting between the Board and the Law Society in April 2010 where the position was explained. They ought also to have known that using the information in this way would have the effect of manipulating the facts for spurious purposes.

Furthermore, the number of independent defence solicitors in the legal aid scheme has, in fact, increased substantially in recent years and there has been no significant expansion of the Public Defence Solicitors’ Office (PDSO) to date other than an increase in their role on the court duty plans, which was negotiated and agreed with the Law Society as part of a legal aid savings package to minimise the proposed reductions in criminal fees. There are currently only 22 PDSO solicitors as opposed to 1,390 solicitors registered to provide criminal legal aid services. As I stated in my letter to the Committee last week, officials are meeting the Law Society again this week and I consider continuing disruption entirely premature while such discussion are still taking place.

As Cabinet Secretary for Justice, I have a duty both to meet the pressures imposed by the available budget and to ensure that the justice system continues to function, even in the face of disruptive action. I would like to assure the Committee in the strongest terms that I take these responsibilities very seriously and will instruct SLAB to take the necessary action to keep the system fully operational in the interests of victims, accused persons and the courts. This will include requiring SLAB to expand its use of employed solicitors and other approaches as appropriate in areas where there is proposed or actual disruption to the justice system.

Kenny MacAskill
Cabinet Secretary for Justice
18 December 2012
Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 26 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 2

Jenny Marra

9 In section 2, page 1, line 18, at end insert—

<(< ) to provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system,

( ) to provide such advice on matters relating to the civil justice system as may be requested by the Scottish Ministers, and

( ) to consider how to make the civil justice system more accessible, fair and efficient.>}

Jenny Marra

10 In section 2, page 1, leave out line 23

Jenny Marra

11 In section 2, page 2, line 6, at end insert—

<(< ) Before preparing draft rules under subsection (1)(c) the Council must consult such persons as it considers appropriate.>}

Section 3

Jenny Marra

12 In section 3, page 2, leave out lines 33 and 34

Section 6

Jenny Marra

13 In section 6, page 3, line 25, after <least> insert <2 and not more than>
In section 6, page 3, line 28, leave out <at least>

In section 6, page 3, line 29, leave out <at least>

In section 6, page 3, leave out lines 30 to 36 and insert—

<at least 8 and not more than 10 persons ("LP members") who are not judges, practising advocates or practising solicitors, and who include—

(i) at least 2 persons with experience and knowledge of consumer affairs,

(ii) persons with knowledge of the non-commercial legal advice sector, and

(iii) persons able to represent the interests of different categories of litigant.>

Section 7

In section 7, page 4, line 18, at end insert—

In appointing persons to be members of the Council, the Lord President must ensure that the proportion of both men and women appointed is at least 40 per cent of the membership.>

In section 7, page 4, leave out line 23

In section 7, page 4, leave out line 36

Section 9

In section 9, page 5, leave out line 38

Section 10

In section 10, page 6, leave out line 9
Section 12

Jenny Marra

22 In section 12, page 6, line 34, at end insert—

<(3A) The Council must ensure that its proceedings and those of any committees and sub-committees established by it are held in public.

(3B) Despite sub-section (3A), the Council or, as the case may be, any of its committees or sub-committees may decide to hold all or part of any proceedings in private.

(3C) The Council must publish—

(a) agendas for its proceedings and those of its committees and sub-committees,

(b) the papers relating to those proceedings,

(c) such reports of those proceedings as it thinks fit.

(3D) Despite sub-section (3C), the Council may decide that all or part of any agenda, paper or report need not be published.

(3E) The Council must publish a statement setting out—

(a) the circumstances in which its proceedings and those of its committees and sub-committees may be held in private, and

(b) the circumstances in which agendas, papers and reports need not be published.>

Section 19

Kenny MacAskill

1 In section 19, page 10, line 5, leave out £68> and insert £82>

Section 20

Kenny MacAskill

2 In section 20, page 10, line 34, leave out £68> and insert £82>

Kenny MacAskill

3 In section 20, page 11, line 22, leave out <section 25AA(5) or>

Kenny MacAskill

4 In section 20, page 11, line 33, at end insert—

<(b) the reference to a contribution payable by the person receiving criminal legal aid does not include a contribution which it is for the Board to collect (whether under section 25AC(4)(a) or any regulations made under section 33ZA(1)).>
Section 21

Kenny MacAskill

5 In section 21, page 12, line 10, at end insert—

<(9) It is for the Board to collect any contribution payable under subsection (5).” >

After section 21

Graeme Pearson

23 After section 21, insert—

<Refund of contributions for criminal legal assistance in certain circumstances

Refund of contributions for criminal legal assistance in certain circumstances

After section 25AD of the 1986 Act, inserted by section 20, insert—

“25AE Refund of contributions for criminal legal assistance in certain circumstances

At the conclusion of the proceedings, the court in which those proceedings are concluded may order any contribution for criminal legal assistance due or paid by virtue of this Act to be remitted or refunded to the person from or by whom, or in respect of whom, the contribution was due or paid if—

(a) the person has been acquitted of an offence, and

(b) the court considers that it is in the interests of justice for the contribution to be refunded.”>

Section 22

Kenny MacAskill

6 In section 22, page 12, line 26, at beginning insert <except in relation to section 25AA.>

Kenny MacAskill

7 In section 22, page 12, line 34, at end insert—

<(f) make provision requiring the Board to make arrangements to provide to solicitors a service of collecting contributions payable to solicitors on their behalf.

(2A) Regulations made under subsection (1) containing provision made in pursuance of subsection (2)(f) may include provision about the operation of the service, including provision—

(a) regulating the arrangements for remitting to a solicitor the amount of a contribution (or an instalment of a contribution) following its collection,

(b) enabling or requiring, or, where enabled or required, regulating, the imposition by the Board of charges for the recovery of any reasonable costs the Board incurs in connection with the provision of the service to a solicitor.>
Lewis Macdonald

7A As an amendment to amendment 7, line 11, leave out from <charges> to end of line 13 and insert <a fee in connection with the provision of the service to solicitors.>

(2B) Regulations made under subsection (1) containing provisions made in pursuance of subsection (2)(f) must not enable or require the Board to impose a fee which exceeds an amount which would recover to the Board the reasonable costs the Board incurs in connection with the provision of the service to solicitors.>

Margaret Mitchell

24 In section 22, page 12, line 36, at end insert—

<(3A) Where regulations under subsection (1) include provision relating to the assessment of disposable income for the purpose of determining the amount of any contribution of a person who is in receipt of criminal legal assistance and who is a member of a couple, the regulations must not provide for—

(a) the resources of the other member of the couple to be taken into account,

(b) essential expenses incurred by the couple to be disregarded except to the extent that those expenses are met by the person.

(3B) For the purposes of subsection (3A)(a), where the members of a couple each have a beneficial interest in a capital asset, those members are to be treated, in the absence of any evidence to the contrary, as if they were each entitled to an equal share in the whole of that beneficial interest.

(3C) In this section “couple” means—

(a) a man and woman who are married to each other and are members of the same household,

(b) a man and woman who are not married to each other but are living together as husband and wife,

(c) two people of the same sex who are civil partners of each other and are members of the same household,

(d) two people of the same sex who are not civil partners of each other but are living together as civil partners.>

Margaret Mitchell

25 In section 22, page 12, line 39, at end insert—

<33ZB Regulations about refunding contributions in certain circumstances

The Scottish Ministers must by regulations make arrangements for any contribution for criminal legal assistance due or paid by virtue of this Act to be remitted or refunded in a case where proceedings are concluded without the person from whom, or in respect of whom, the contribution was due or paid, being convicted.”.>
After section 22

Margaret Mitchell

26 After section 22, insert—

<Reports on arrangements for collection of contributions
After section 33ZA of the 1986 Act, inserted by section 22, insert—

“33ZB Reports on arrangements for collection of contributions

(1) In accordance with this section, the Scottish Ministers must lay before the Parliament reports about the impact on solicitors of provisions made by regulations under section 33ZA for the collection of contributions.

(2) The first report is to be laid no later than 1 year after the date on which such regulations come into force.

(3) A second report is to be laid no later than 3 years after the date on which such regulations come into force.

(4) A report must, in particular, contain an assessment of the effects of the arrangements on—

(a) collection rates of contributions during the reporting period, and

(b) the income of solicitors during the reporting period.

(5) In preparing reports under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

(6) The Scottish Ministers must, as soon as practicable after a report has been laid before the Parliament, publish the report in such manner as they consider appropriate.

(7) In this section “reporting period” means—

(a) in the case of the first report, the period of time from the date on which the relevant regulations under section 33ZA come into force until the time on which the report is laid,

(b) in the case of the second report, the period of time from the date on which the first report is laid until the date on which the second report is laid.”>

Section 23

Kenny MacAskill

8 In section 23, page 13, line 21, leave out subsections (7) and (8) and insert—

<( ) In section 12 (payment of fees and outlays otherwise than through clients’ contributions)—

(a) in subsection (3)(a), after “11(2)” insert “or, as the case may be, section 11A(2)”, and

(b) after subsection (3), insert—
“(4) In subsection (3), the reference to an amount payable by the client does not include an amount which it is for the Board to collect (whether under section 11A(3) or any regulations made under section 33ZA(1)).”.

( ) In section 33A (contracts for the provision of criminal legal assistance)—
(a) in subsection (5)(a), after “11(2)” insert “, 11A(2) or 25AC(3)”, and
(b) after subsection (5), insert—
“(5A) In subsection (5), the reference to an amount payable by the client does not include an amount which it is for the Board to collect (whether under section 11A(3), section 25AC(4)(a), or any regulations made under section 33ZA(1)).”.

After section 23

Margaret Mitchell

27 After section 23, insert—

<Reports on Part 2: general

(1) In accordance with this section, the Scottish Ministers must lay before the Parliament reports about the operation and effect of Part 2 of this Act.

(2) The first report is to be laid no later than 3 years after the date on which the provisions in Part 2 come into force.

(3) Each subsequent report is to be laid no later than 3 years after the previous report is laid.

(4) A report must, in particular, contain information about the effect that the operation of Part 2 has had on—

(a) the efficient and effective functioning of the criminal justice system during the reporting period, and

(b) access to justice, having particular regard to access to justice for persons living in rural areas, during the reporting period.

(5) The Scottish Ministers must, as soon as practicable after a report has been laid before the Parliament, publish the report in such manner as they consider appropriate.

(6) In this section “reporting period” means—

(a) in the case of the first report, the period of time from the date on which the provisions of Part 2 come into force until the time on which the report is laid,

(b) in the case of a subsequent report, the period of time from the date on which the previous report was laid until the date on which the subsequent report is laid.”>
Scottish Civil Justice Council and Criminal Legal Assistance Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

**Groupings of amendments**

**Note:** The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Role of Council**

9, 10, 12

**Group 2: Preparation of rules by Council**

11

**Group 3: Composition of Council**

13, 14, 15, 16, 17, 18, 19, 20, 21

**Group 4: Council proceedings in public**

22

**Debate to end no later than 40 minutes after proceedings begin**

**Group 5: Determining liability for contributions**

1, 2, 24

**Group 6: Collection and treatment of contributions**

3, 4, 5, 6, 7, 7A, 8
Group 7: Refund of contributions
23, 25

Group 8: Reports on effects of Part 2
26, 27

Debate to end no later than 1 hour 40 minutes after proceedings begin
Note: (DT) signifies a decision taken at Decision Time.

**Business Motion:** Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-05505—That the Parliament agrees that, during stage 3 of the Scottish Civil Justice Council and Criminal Legal Assistance Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

- Groups 1 to 4: 40 minutes
- Groups 5 to 8: 1 hour 40 minutes

The motion was agreed to.

**Scottish Civil Justice Council and Criminal Legal Assistance Bill - Stage 3:** The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7 and 8.

The following amendments were disagreed to (by division)—

- 9 (For 41, Against 77, Abstentions 0)
- 10 (For 42, Against 78, Abstentions 0)
- 11 (For 42, Against 78, Abstentions 0)
- 13 (For 44, Against 75, Abstentions 0)
- 14 (For 41, Against 75, Abstentions 0)
- 15 (For 43, Against 76, Abstentions 0)
- 16 (For 44, Against 75, Abstentions 0)
- 17 (For 42, Against 77, Abstentions 0)
- 22 (For 54, Against 65, Abstentions 0)
- 23 (For 40, Against 65, Abstentions 11)
- 7A (For 53, Against 63, Abstentions 0)
- 24 (For 51, Against 62, Abstentions 1)
- 25 (For 14, Against 66, Abstentions 35)
- 26 (For 50, Against 65, Abstentions 0)
- 27 (For 50, Against 65, Abstentions 0).

The following amendments were not moved: 12, 18, 19, 20 and 21.

The Deputy Presiding Officer extended the time-limits under Rule 9.8.4A(c).
Scottish Civil Justice Council and Criminal Legal Assistance Bill - Stage 3: The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-05479—That the Parliament agrees that the Scottish Civil Justice Council and Criminal Legal Assistance Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 62, Against 53, Abstentions 0).
The next item of business is stage 3 proceedings on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. In dealing with the amendments, members should have before them the bill as amended at stage 2, which is SP bill 13A; the marshalled list, which is SP bill 13A-ML; and the groupings list, which is SP bill 13A-G1.

The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate.

Members who wish to speak in the debate on any group of amendments should press their request-to-speak button as soon as possible after I call the group.

Section 2—Functions of the Council

The Deputy Presiding Officer: Amendment 9, in the name of Jenny Marra, is grouped with amendments 10 and 12.

Jenny Marra (North East Scotland) (Lab): Amendment 9 is grouped with consequential amendments 10 and 12. Members will be aware that I lodged an identical amendment at stage 2. Part of amendment 9 seeks to ensure that the Scottish ministers are the recipients of Scottish civil justice council recommendations for the development of the civil justice system and that ministers, as well as the Lord President, can request the council to provide advice on civil justice matters of its choosing.

As I said at stage 2, the crux of the issue, as it has been put by eminent public law professors in Scotland, is that the council will have the duty to recommend changes to the civil justice system to the Lord President, as head of the council, but not to the Scottish ministers, who have ultimate responsibility for civil justice policy.

The professors’ main concern is that that power is wide ranging and open to interpretation. We share that concern and do not want a situation to arise in which recommendations for civil justice reforms are contained in the council because there is no duty to involve ministers, and therefore parliamentary scrutiny, in that process.

At stage 2, the cabinet secretary stated that the amendment was “unnecessary”, as the council’s
duty to advise the Lord President should be understood in the context of

"the Lord President's statutory functions ... 'for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts.'"—[Official Report, Justice Committee, 13 November 2012; c 1991.]

However, those statutory functions in themselves do little to clarify the uncertainty that the bill creates.

We believe that, by placing the obligation of the council to the Scottish ministers on an equal footing with its obligation to the Lord President, we can ensure that the bill maintains the principle that civil justice policy is the privilege of ministers to make and Parliament to scrutinise.

The second part of the amendment puts a duty on the council to actively consider how to make the civil justice system in Scotland fairer, more accessible and more efficient.

Throughout the evidence-taking sessions, the committee found that accessibility and fairness are still major barriers that are experienced by those entering or operating in the civil justice system. It is only right, therefore, that we use the opportunity, with the creation of the new council, to put accessibility and fairness at the forefront of its considerations. It is, after all, court users who are paying for the council through an increase in their fees.

To sum up, amendments 9, 10 and 12 will remove much of the uncertainty that the bill creates in relation to responsibility for the civil justice system and will ensure that court users are at the forefront of the work that the council undertakes.

I move amendment 9.

Annabel Goldie (West Scotland) (Con): I should explain to the chamber that my colleague Margaret Mitchell has been involved in all the proceedings on the bill. Sadly, her mother died recently and she is unable to take part in the debate today. That might ensure that my contributions are marked by brevity.

We are not without sympathy for the amendments in the name of Jenny Marra. I note in particular her desire, in amendment 9, to compel the Scottish civil justice council to provide advice to ministers. That is the nub of the issue. To me, it would be much more interesting to compel the advice not to be given but to be taken. However, no statute is ever going to achieve that.

We should accept that the body, as constituted, is a responsible body. We feel that the proposal in amendment 9 would introduce an unwelcome encumbrance and an additional obligation that we think is unnecessary, as other sections of the bill seek to cover the issues that Jenny Marra is concerned about. For those reasons, we will not support her amendment.

The Cabinet Secretary for Justice (Kenny MacAskill): Jenny Marra raises an important constitutional issue, and I appreciate her desire to ensure that the Parliament and Government remain the determinants of civil justice policy. However, the council will be predominantly an advisory body that will advise the Lord President on improvements to the civil justice system to assist him in the discharge of the statutory responsibilities that he already has. The council will also assist the Court of Session by preparing draft rules of court. The bill provides that the council “may” advise ministers, and I see no need to compel it to do so. Parliament and ministers can take the council’s advice into account if we so wish.

As I stated during the stage 2 proceedings, when similar amendments by Jenny Marra were considered, nothing in the bill will affect the capacity of the executive, the legislature and the judiciary to continue to make those decisions that appropriately rest with them. I understand that the Lord President also made that clear when he appeared before the Justice Committee to discuss the bill. Therefore, I hope that the Parliament will be reassured that, upon the creation of the council, the Government will remain the body responsible—and responsible to Parliament—for the development of wider justice policy. Ms Marra has said previously that the bill should be beyond interpretation on that matter; I believe that it is and that it is appropriate that responsibility for the council rests with the Lord President, as is provided for in the bill.

At stage 2, Margaret Mitchell moved an amendment with the purpose of clarifying that the bill will not require ministers to consult the council on policy matters. That amendment was withdrawn following my assurances that nothing in the bill will interfere with the powers of ministers or Parliament. I submit that Ms Marra’s amendments, which would require the council to advise ministers at their request, would in fact introduce an element of doubt by suggesting that the council must consider matters that properly sit with ministers or Parliament.

With regard to Jenny Marra’s proposal to place a duty on the council “to consider how to make the civil justice system more accessible, fair and efficient”, the bill already provides that the council must have regard to the principle that “the civil justice system should be fair, accessible and efficient”. That guiding principle, I believe, goes further than the provision in Jenny Marra’s amendment 9.
Therefore, I urge Jenny Marra to withdraw amendment 9 and not to move amendments 10 and 12.

**Jenny Marra:** It is for the avoidance of doubt and for further clarification that I have lodged the amendments.

For the reasons that I explained in my opening remarks, I intend to press amendment 9.

**The Deputy Presiding Officer:** The question is, that amendment 9 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division. As this is the first division, I will suspend the meeting for five minutes.

14:57

**Meeting suspended.**

15:02

**On resuming—**

**The Deputy Presiding Officer:** We will now proceed with the division on amendment 9.

**For**

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

**Against**

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Finnis, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamiie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Smith, Drew (Glasgow) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Pentland, John (Motherwell and Wishaw) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
McTaggart, Anne (Glasgow) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McKellar, Alastair (North East Scotland) (SNP)
Marra, Jenny (North East Scotland) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 41, Against 77, Abstentions 0.

Amendment 9 disagreed to.

Amendment 10 moved—[Jenny Marra].

The Deputy Presiding Officer: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmor, Alex (Aberdeenshire East) (SNP)
Scalan, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 42, Against 78, Abstentions 0. Amendment 10 disagreed to.

The Deputy Presiding Officer: Group 2 is on the preparation of rules by the council. Amendment 11, in the name of Jenny Marra, is the only amendment in the group.

Jenny Marra: Amendment 11 would oblige the council to consult on changes to the rules of court. I pressed a similar amendment at stage 2 and move amendment 11 today because I have not heard convincing arguments from the Scottish Government as to why the council should not be obliged to consult.

As I said at stage 2, several organisations that represent court users in Scotland, such as Scottish Women’s Aid, have said that the opportunity to engage on the proposed changes would ensure that those changes provide a better service. Similarly, I argued that the council would benefit from a wider range of views on proposed changes, as it would be able to make more informed decisions.

In response, the cabinet secretary stated that, in many cases, rules make technical changes to give effect to subordinate or primary legislation and, for that reason, it is undesirable to consult. However, the rules of court can make substantive changes to the advice and assistance that organisations give to court users and, too often, such organisations feel that they have not had the opportunity to engage with the process.

Labour members still believe that a statutory obligation to consult would ensure that the council is as open and transparent as it can be, making much easier a job that is often difficult for organisations such as Women’s Aid.

I move amendment 11.

Kenny MacAskill: Amendment 11 would place a duty on the council to consult. The bill currently gives the council flexibility in that regard. The council will have broad powers to consult on any issue within its remit.

Consultation is not an unknown practice to the existing rules councils, but the new council, with new functions and powers, will operate in a more inclusive manner. I reassure members that the council will not operate as a closed shop. Indeed, I do not think that the bill, which opens up the current arrangements significantly, would allow that to happen. Therefore, it would be disproportionate and undesirable to require the council to consult prior to preparing every set of rules.

In many cases, rules will introduce technical changes purely to give effect to primary or subordinate legislation, the subject matter of which may already have been subject to extensive consultation and will already have been considered by the Parliament. Occasionally, rules may need to be changed urgently to correct some defect that has become apparent, perhaps by a judicial ruling.

I assure the Parliament that there will be scope for all kinds of individuals and organisations to contribute to the council’s work through its committees, through consultation and, indeed, by carrying out research. The power to commission research was the subject of an amendment in the name of Jenny Marra at stage 2. That power will aid the council in its role of reviewing, and advising on improvements to, the civil justice system. Those are exactly the types of organisation that I expect will field candidates for membership of the council and with which the council will wish to engage.

I assure the Parliament that the council will depend heavily on its membership of the council and with which the council will wish to engage.

I urge Jenny Marra to withdraw amendment 11.

Jenny Marra: We are keen to have the statutory duties to which the cabinet secretary refers because they offer the public the most protection. He talks about last-minute changes to the rules, but it is exactly such changes that can lead to unintended consequences. I urge him to reconsider and support amendment 11 to make the consultation process fair and transparent.

I press amendment 11.
The Deputy Presiding Officer: The question is, that amendment 11 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Edie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Mcintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roger (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing,ergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamiie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen South) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Barnsley and Dulwich) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 42, Against 78, Abstentions 0.

Amendment 11 disagreed to.
Section 3—Powers of the Council
Amendment 12 not moved.

Section 6—Composition of the Council

The Deputy Presiding Officer: Group 3 is on the composition of the council. Amendment 13, in the name of Jenny Marra, is grouped with amendments 14 to 21.

Jenny Marra: With the exception of amendment 17, the amendments in this group seek to open up the council’s main decision-making body to increased lay representation.

Amendment 13 affords the council at least two but not more than four judicial members, and amendments 14 and 15 settle the number of advocate and solicitor members of the council to two each, instead of “at least” two. Those amendments make way for amendment 16, which significantly bolsters lay representation on the council to include those who have

“experience and knowledge of consumer affairs ... persons with knowledge of the non-commercial legal advice sector, and persons able to represent the interests of different categories of litigant.”

Amendments 18 to 21 are technical.

As was mentioned at stage 2, we have the opportunity to open up our judicial decision-making structures to a significant number of different parties that cannot currently contribute in as meaningful a way as they would like. As members of the Justice Committee discovered while we were taking evidence, many organisations work directly with litigants and are constantly frustrated by the way in which decision-making councils create rules that do not fully consider the needs of litigants when implemented. It is our belief that amendments 13 to 16 and 18 to 21 provide a reasonable compromise between the need for legal expertise on the one hand and the need for expertise in a significant number of related fields on the other.

In relation to the concern that increasing lay representation would put technical rule changes at risk of not being fully understood, I argued at stage 2 that lay organisations have legally trained staff who can bring the suitable legal knowledge and insight to make a valuable contribution. In response, the cabinet secretary said he would reflect on that point, but unfortunately it appears that there is no willingness to take action. I encourage him to reflect further today.

Amendment 17 seeks to ensure that the gender balance of the council is equitable. I have heard no good reason why we should not take action to rectify a legal system whose decision-making bodies are intrinsically skewed in their gender balance. As I stated at stage 2, the Scottish Law Commission board comprises 80 per cent men, the Judicial Appointments Board for Scotland comprises 70 per cent men, and the Scottish Court Service board is 68 per cent male. It simply is not good enough to pay lip service to the need for greater gender parity and then sit back in the face of such facts without doing what we can—-and what we can do quite simply—to rectify the situation.

In many instances, our courts and justice system have a wider and more disproportionate impact on women. I believe that it would show foresight on behalf of the Scottish Government if we could finally recognise the part that we have in ensuring that the burden is made easier.

I move amendment 13.

15:15

Annabel Goldie: I have listened with care to Jenny Marra but find it difficult to support what she is seeking to achieve. However well intended, her amendments become restrictive and introduce inflexibility and, given that they are all roughly in the same vein, my party is not minded to support any of them.

Although I have every sympathy with what Jenny Marra is trying to achieve with her amendments on a gender quota, I simply do not think that that is an appropriate measure to introduce with regard to the council. Female talent in Scotland, particularly in the legal profession, is manifest. I am sure that that will become obvious and that the Lord President will be particularly mindful of his obligation to ensure true representation on the council.

Alison McInnes (North East Scotland) (LD): When the Justice Committee took evidence on the council’s membership, the Lord President assured members that a wide range of interests and users would be represented via his own LP appointment. Although I do not doubt that, I would prefer that the council had from the outset a diverse range of members that properly reflected end users and therefore share Jenny Marra’s desire for greater lay representation.

I do not accept the view expressed, at least in committee, that we need a two-stage process for the council in which full lay membership would be drawn in only later. I therefore think that amendment 16 would bring a reasonable balance to the membership and we will support it.

I also support the intention behind amendment 17, which relates to gender balance. Members will know that until recently I have been very reluctant to argue for quotas but it is very clear that voluntary action is not working. If we considered
taking this small step forward whenever we set up new bodies, we might finally make some progress.

Roderick Campbell (North East Fife) (SNP): Although a number of organisations believe that they should have a mandatory position on the council, including the Association of British Insurers and the Forum of Scottish Claims Managers, with which I have dealings, we will get into problems if we start to specify one over the other. As we know, the Lord President believes that initially a key role of the council will be technical drafting and I believe that it is right to give him flexibility and not preclude him from appointing whomever he wants to take on this early task. As has been suggested, we can change the mandatory appointments by statutory instrument and, declaring an interest as a member of the Faculty of Advocates, I think that it is right that advocates and solicitors are not precluded from any of the LP appointments.

Kenny MacAskill: I will first address Jenny Marra's amendments on the categories and levels of membership, which would fundamentally alter the council's membership by increasing the mandatory minimum membership from 14 to 18 and seek to provide that none of the Lord President's discretionary appointments may be judges or practising solicitors and advocates. At stage 2, Jenny Marra said:

"many organisations with legally trained personnel would bring both the necessary ... knowledge and insight ... to the council."—[Official Report, Justice Committee, 13 November 2012; c 1997.]

I agree, but her amendments would mean that a large number of very suitable candidates including lawyers working for voluntary organisations or consumer bodies or academics who also practise could not sit on the council. Although members of the profession, such individuals would not be able to sit on the body as its representatives.

The issue was the subject of some discussion at stage 2 and having reflected on the matter, as I undertook to do, I remain of the view that the bill with its provision for flexible appointments strikes the right balance and will allow the council to take account of the range of interests in civil justice and technical expertise for its detailed work without creating an unduly large and unwieldy body.

Civil justice issues are important to many different people and organisations across Scotland and I have been contacted by a range of groups, including the judiciary, the legal profession and the insurance industry, that wish to be better represented on the council. Indeed, I recall David McLetchie at stage 1 questioning whether there should be more solicitor members.

I agree that benefits to court users and the public should be core to the council's work, and I welcome and encourage lay input. The bill guarantees that representatives on the council will have "experience and knowledge of consumer affairs ... and ... awareness of the interests of litigants"; furthermore, the bill now allows for a lay deputy chair.

The council will initially be responsible for implementing the many procedural changes that will be required to effect civil courts reform. It will later focus on reviewing and developing the civil justice system. Its membership must be able to reflect both roles. As a result, the bill provides for an appropriate balance of expertise on both court rules and policy issues. It also allows the council to evolve over time as it moves from its rule-drafting focus. If that evolution does not occur, ministers will be able, with Parliament's approval, to amend the membership levels.

It is simply not possible to give a seat on the council to all those who wish one. It would be unrealistic to do so and to expect the council to function effectively. However, I have discussed the fact that membership of the council is not the only means by which someone can have a voice in its activities. I take the view that the lack of consensus around the issue indicates the need for flexibility, and believe that that is achieved by allowing the Lord President the discretion that is provided for. The amendments would deprive the council of the flexibility and capability that are necessary for it to carry out its functions effectively.

The subject matter of amendment 17 has been debated previously in relation to the council and other bodies. I remain of the view that equality of opportunity for women, men and other groups must be addressed, but I am not persuaded that quotas for specialist expert bodies are the right approach.

At stage 1, both Alison McInnes and Malcolm Chisholm asked that I consider the issue of transparency in appointments. Having reflected at stage 2, I proposed to insert the principles that appointments are to be made fairly and are to be open to all eligible persons, and the Justice Committee agreed with that. I hope that that will go some way to addressing some of Ms Marra's concerns.

I urge Ms Marra to withdraw amendment 13 and not to move amendments 14 to 21.

Jenny Marra: I feel quite strongly that exactly the same principle is at stake in respect of the amendments relating to the council's composition and the amendment that relates to gender. To date, such flexible appointments have favoured the status quo. It is our role as legislators to allow
everyone to be represented on such councils and
to ensure a fair balance of gender representation
in our public bodies, which are in charge of
decisions that affect everyone in Scotland. It is our
job as legislators to be progressive. The measures are
simple. They are not difficult for the Scottish
Government to implement, and they would be
progressive.

On the gender amendment, as I have said
before in the chamber, the Scottish National Party
is very willing to talk the talk on being progressive,
but it is very reluctant to walk the walk.

I ask the cabinet secretary to reconsider his
position on the amendments.

The Deputy Presiding Officer (John Scott):
Are you pressing amendment 13?

Jenny Marra: Yes.

The Deputy Presiding Officer: The question is,
that amendment 13 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a
division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Gray, lain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Liam (Orkney Islands) (LD)
McDougal, Peter (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahum, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aleene (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Forthshire South and Kinross-
shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Ferguson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and
Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Midlothian South, Tweeddale and
Lauderdale) (SNP)
McLeod, Aileen (Eastwood) (SNP)
McLeod, Ruth (Glasgow) (Lab)
McIvor, Drew (Glasgow) (Lab)
McKee, David (Highlands and Islands) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)
Amendment 14 moved—[Jenny Marra].

The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Ferguson (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Edinburgh) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Mile, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)

The Deputy Presiding Officer: The result of the division is: For 44, Against 75, Abstentions 0.
The Deputy Presiding Officer: The result of the division is: For 41, Against 75, Abstentions 0.

Amendment 14 disagreed to.

Amendment 15 moved—[Jenny Marra].

The Deputy Presiding Officer: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, Jan, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Heburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paton, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire East) (SNP)
Thomson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine)
The Deputy Presiding Officer: The result of the division is: For 43, Against 76, Abstentions 0.

Amendment 15 disagreed to.

Amendment 16 moved—[Jenny Marra].

The Deputy Presiding Officer: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baille, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
Mcinnnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
Millan, Stuart (West Scotland) (SNP)
Milk, Nanette (North East Scotland) (Con)
Neill, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
The Deputy Presiding Officer: The result of the division is: For 44, Against 75, Abstentions 0.

Amendment 16 disagreed to.

Section 7—Lord President appointment process

Amendment 17 moved—[Jenny Marra].

The Deputy Presiding Officer: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (East Renfrewshire) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Joan (Greenock and Inverclyde) (Lab)
McCallum, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Bob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graeme, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)

McLeod, Alasdair (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Mile, Nanette (North East Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 42, Against 77, Abstentions 0.
Amendment 17 disagreed to.
Amendments 18 and 19 not moved.

Section 9—Disqualification and removal from office
Amendment 20 not moved.

Section 10—Expenses and remuneration
Amendment 21 not moved.

Section 12—Proceedings
The Deputy Presiding Officer: We move to group 4, on council proceedings in public. Amendment 22, in the name of Jenny Marra, is the only amendment in the group.

Jenny Marra: Amendment 22 would ensure that the meetings of the council and its committees are held in public, with agendas, papers and reports being published for public view. I pressed the amendment at stage 2 and was urged by Kenny MacAskill to reject it on the grounds that a room might not be available in our court service to facilitate public access to such meetings and that the council is merely advisory.

Unfortunately, I see those arguments as incredibly weak and they do not stack up. On the practicality, I do not believe that the Scottish Court Service would have a problem finding a room for public access to these meetings; and if there is concern about holding open and frank discussions in the way that advisory bodies often have to do, those fears are allayed by subsection (3B) in amendment 22, which affords the council the option of holding proceedings in private in such situations.

Holding our institutions to the highest standard of public scrutiny is an aim that we should all be united behind and that we should actively promote in our legislation. Putting in place these measures would ensure that lay organisations, litigants and the wider public were more informed about proposed changes to our civil justice system. I see no reason why the amendment should not be accepted by the Scottish Government.

I move amendment 22.

15:30

The Deputy Presiding Officer: As we have reached the agreed time limit, under Rule 9.8.4A, I consider it necessary to allow the debate on this group to continue beyond the limit in order to avoid the debate being unreasonably curtailed.

Annabel Goldie: It is only right that Jenny Marra’s persistence, tenacity and fortitude be rewarded, so it is with pleasure that I intimate that my party will support amendment 22.

Jenny Marra makes a good point. As far as I can see, the thrust of part 1 of the bill is about transparency, openness and involving other people. If it is the case that the Scottish Government’s excuse in not accepting that is a lack of accommodation, that seems less than lame. Bring the council here—it would be lovely to have it and we could all watch the proceedings.

Kenny MacAskill: Jenny Marra is correct that certain public bodies should hold proceedings publicly. Nevertheless, I am not persuaded that the council must do so.

The council, which is essentially advisory in nature, differs from bodies that are required to hold proceedings in public. As explained to the Justice Committee at stage 2, local police or fire boards, for example, have different purposes and functions from those of the proposed council. Where bodies are responsible for service delivery or the allocation of public funds, a right of access is appropriate. Although the council will consider important issues, it is not a final decision maker.

That said, I have taken care to ensure that appropriate transparency and accountability apply to council proceedings. The council will lay annual reports and business plans before Parliament; if Parliament wishes to consider publicly any of the issues raised, it will. Court rules are already laid before Parliament and published, and Parliament’s consideration of rules is a matter of public record.

Although the existing councils do not meet in public, they publish minutes of their proceedings online. The Lord President has assured me that he intends the new council to be more proactive in that regard. More important, freedom of information coverage will be extended to both the new council and the Criminal Court Rules Council. Subordinate legislation will soon be brought to Parliament in that regard and will provide for more robust arrangements, as the discretion in Ms Marra’s amendment will not apply.

The issues with regard to practicality are not insignificant. Suitable arrangements, particularly for potentially costly accommodation, would need to be put in place. That said, the council may hold public meetings if it wishes to do so. Those who have called for greater accountability are, I imagine, exactly those people who might become council or committee members. I therefore hope that members will agree that the matter can be left to the council to decide.
I urge Jenny Marra to withdraw her amendment.

**Jenny Marra:** The cabinet secretary said that it should be left to the council to decide, but it is our role in Parliament to make the best legislation that we possibly can and to put down rules that will go beyond the tenure of any Lord President.

It is the sign of a strong Government that it welcomes scrutiny and transparency. The Scottish Government’s unwillingness to accept amendment 22 is part of a growing trend for the SNP to move not only an increasing amount of committee business into private session, but an increasing amount of business into private session in councils across the country.

I press amendment 22.

**The Deputy Presiding Officer:** The question is, that amendment 22 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

**For**
- Baillie, Jackie (Dumbarton) (Lab)
- Baker, Claire (Mid Scotland and Fife) (Lab)
- Baker, Richard (North East Scotland) (Lab)
- Baxter, Jayne (Mid Scotland and Fife) (Lab)
- Beamish, Claudia (South Scotland) (Lab)
- Bibby, Neil (West Scotland) (Lab)
- Boyack, Sarah (Lothian) (Lab)
- Brown, Gavin (Lothian) (Con)
- Carlaw, Jackson (West Scotland) (Con)
- Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
- Davidson, Ruth (Glasgow) (Con)
- Dugdale, Kezia (Lothian) (Lab)
- Eadie, Helen (Cowdenbeath) (Lab)
- Fee, Mary (West Scotland) (Lab)
- Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
- Ferguson, Alex (Galloway and West Dumfries) (Con)
- Findlay, Neil (Lothian) (Lab)
- Fraser, Murdo (Mid Scotland and Fife) (Con)
- Goldie, Annabel (West Scotland) (Con)
- Grant, Rhoda (Highlands and Islands) (Lab)
- Gray, Iain (East Lothian) (Lab)
- Griffin, Mark (Central Scotland) (Lab)
- Harvie, Patrick (Glasgow) (Green)
- Henry, Hugh (Renfrewshire South) (Lab)
- Hume, Jim (South Scotland) (LD)
- Johnstone, Alex (North East Scotland) (Con)
- Johnstone, Alison (Lothian) (Green)
- Kelly, James (Rutherglen) (Lab)
- Lamont, Johann (Glasgow Pollok) (Lab)
- Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
- Macdonald, Lewis (North East Scotland) (Lab)
- Macintosh, Ken (Eastwood) (Lab)
- Malik, Hanzala (Glasgow) (Lab)
- Marra, Jenny (North East Scotland) (Lab)
- Martin, Paul (Glasgow Provan) (Lab)
- McArthur, Liam (Orkney Islands) (LD)
- McCulloch, Margaret (Central Scotland) (Lab)
- McDougall, Margaret (West Scotland) (Lab)
- McGrigor, Jamie (Highlands and Islands) (Con)
- McInnes, Alison (North East Scotland) (LD)
- McMahon, Michael (Uddingston and Bellshill) (Lab)
- McMahon, Siobhan (Central Scotland) (Lab)
- McNeil, Duncan (Greenock and Inverclyde) (Lab)
- McTaggart, Anne (Glasgow) (Lab)
- Milne, Nanette (North East Scotland) (Con)
- Murray, Elaine (Dumfriesshire) (Lab)
- Pearson, Graeme (South Scotland) (Lab)
- Pentland, John (Motherwell and Wishaw) (Lab)
- Rennie, Willie (Mid Scotland and Fife) (LD)
- Scanlon, Mary (Highlands and Islands) (Con)
- Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
- Smith, Drew (Glasgow) (Lab)
- Smith, Liz (Mid Scotland and Fife) (Con)
- Stewart, David (Highlands and Islands) (Lab)

**Against**
- Adam, George (Paisley) (SNP)
- Adamson, Clare (Central Scotland) (SNP)
- Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- Biagi, Marco (Edinburgh Central) (SNP)
- Brodie, Chic (South Scotland) (SNP)
- Brown, Keith (Clackmannanshire and Dunblane) (SNP)
- Burgess, Margaret (Cunninghame South) (SNP)
- Campbell, Aileen (Clydesdale) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
- Conservativestance, Angela (Almond Valley) (SNP)
- Crawford, Bruce (Stirling) (SNP)
- Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
- Dey, Graeme (Angus South) (SNP)
- Don, Nigel (Angus North and Mearns) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Dornan, James (Glasgow Cathcart) (SNP)
- Eadie, Jim (Edinburgh Southern) (SNP)
- Ewing, Annabelle (Mid Scotland and Fife) (SNP)
- Ewing, Fergus (Inverness and Nairn) (SNP)
- Fabiani, Linda (East Kilbride) (SNP)
- Finnie, John (Highlands and Islands) (Ind)
- FitzPatrick, Joe (Dundece City West) (SNP)
- Gibson, Kenneth (Cunninghame North) (SNP)
- Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
- Hyslop, Fiona (Linlithgow) (SNP)
- Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
- Keir, Colin (Edinburgh Western) (SNP)
- Kidd, Bill (Glasgow Anniesland) (SNP)
- Lochhead, Richard (Moray) (SNP)
- Lyle, Richard (Central Scotland) (SNP)
- MacAskill, Kenny (Edinburgh Eastern) (SNP)
- MacDonald, Angus (Falkirk East) (SNP)
- McDonald, Gordon (Edinburgh Pentlands) (SNP)
- Mackay, Derek (Renfrewshire North and West) (SNP)
- MacKenzie, Mike (Highlands and Islands) (SNP)
- Mason, John (Glasgow Shettleston) (SNP)
- Matheson, Michael (Falkirk West) (SNP)
- Maxwell, Stewart (West Scotland) (SNP)
- McAlpine, Joan (South Scotland) (SNP)
- McDonald, Mark (North East Scotland) (SNP)
- McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
- McLeod, Aileen (South Scotland) (SNP)
- McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
- McMillan, Stuart (West Scotland) (SNP)
- Neil, Alex (Airdrie and Shotts) (SNP)
- Paterson, Gill (Clydebank and Milngavie) (SNP)
- Robertson, Dennis (Aberdeenshire West) (SNP)
- Russell, Michael (Argyll and Bute) (SNP)
- Salmond, Alex (Aberdeenshire East) (SNP)
- Stewart, Ewan (Banffshire and Buchan Coast) (SNP)
- Stewart, Kevin (Aberdeen Central) (SNP)
- Sturgeon, Nicola (Glasgow Southside) (SNP)
Amendment 24 would amend the planned arrangements for dealing with the income and expenditure of partners when assessing a person’s contribution. It would supplement provision in the 1986 act for how disposable income and disposable capital should be determined.

Our detailed proposals for how disposable income and disposable capital should be determined were set out in the draft regulations that we provided to the Justice Committee before stage 2. The approach mirrors the approach that is used for advice and assistance in civil legal aid. The proper place for such detail is in regulations, which can be adapted and improved, in line with emerging needs. Of course, future changes to regulations are subject to the parliamentary process.

The provisions in the current draft regulations allow for spousal or partner income to be considered as part of the contributions assessment; the provisions also allow for appropriate discounting of relevant income and the disregard of appropriate expenditure. Allowances are available for a spouse or partner and dependent children. In addition, there will be no consideration of spousal or partner income if any of the following apply: the spouse or partner has “a contrary interest” in the matter for which criminal legal aid is sought; the spouses or partners are “living separate and apart”; or it would be “inequitable or impractical” to consider spousal or partner income.

In determining disposable capital, the draft regulations disregard such things as the value of the home, furniture and furnishings, which tend to be couples’ main capital assets. The draft regulations provide for a fair and equitable means of assessing what should be considered. The partner of a person who is charged with domestic abuse should not and will not have their resources taken into account in assessing a criminal legal aid contribution.

There is a degree of flexibility and pragmatism in the draft regulations, which is not reflected in amendment 24. That reinforces the point that such matters are best dealt with in regulations, not primary legislation. I ask members to support amendments 1 and 2, in my name, and to oppose amendment 24.

I move amendment 1.

The Deputy Presiding Officer: Margaret Mitchell is not in the chamber, for understandable reasons. However, I understand that Annabel Goldie intends to move the amendments in Margaret Mitchell’s name.
Annabel Goldie: I will speak to the minister’s amendments 1 and 2 and speak to and move Margaret Mitchell’s amendment 24.

First, on amendments 1 and 2, I am glad that the cabinet secretary has yielded to his metaphorical beating over the head and made what was a poor situation somewhat better. My party will support those two amendments.

Amendment 24 seeks to protect individuals on low incomes who happen to have a spouse or partner. The policy memorandum to the bill makes it clear that the resources of spouses and partners will be taken into account when financial eligibility is assessed, in most cases. As the minister said, there will be exceptions where the spouse or partner has a contrary interest in the case—they could be a co-accused or a witness—or where they are living separately and apart. However, any practising solicitor will tell us that ascertaining a spouse’s or partner’s income accurately and swiftly can present formidable problems.

My colleague Margaret Mitchell’s amendment prohibits regulations that would allow a spouse’s or partner’s income to be taken into account when disposable income is calculated, thereby simplifying the process for any accused who seeks criminal legal aid.

Lewis Macdonald (North East Scotland) (Lab): The amendments in the group take us to the heart of the weaknesses of part 2 of the bill, and particularly the reasons why we saw industrial action in our courts over the Christmas period. I am pleased that the justice secretary has told us today that he has conceded the point that the threshold that he initially set was far too low and that he has adjusted it upwards. When we considered the bill at stages 1 and 2, we did not dispute the principle that contributions should be made by those who can afford them; what we disputed was the impact on the poorest people in society. The removal of the estimated 6,000 people whose disposable income is between £68 and £82 is clearly welcome, so we will vote for amendments 1 and 2.

However, the justice secretary said that the cost of meeting that increased threshold is to be borne by those at the upper end of the criminal legal aid spectrum—people whose disposable income is still around £11,000 or £12,000 a year. Those are not wealthy people but the working poor, and they will bear the burden. I would be interested to hear from the minister when he sums up what he anticipates the impact will be on the number of people for whom the legal aid that is available becomes such a token amount that it is easier for them to remove themselves from the legal aid system altogether.

Margaret Mitchell’s amendment 24 addresses another issue that existed in the bill as introduced. Under the current assistance by way of representation system, only the income of the legal aid applicant is considered. We believe that it would be wrong to change that in the way that the cabinet secretary proposes, and for that reason we will support amendment 24.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Clearly, £82 is a bit better than £68, but it is not much better. It is important to put that on the record in the context of this debate. We should remember what disposable income is; it is not for luxuries. It includes, for example, the money that people spend on food. If someone has a largish family, food can take up quite a lot, if not most, of that £82.

Today, once again, the cabinet secretary is making a great deal of the parallel between civil legal aid and criminal legal aid. He wants to align everything. The fact is that he is doing the opposite with the next group of amendments, on contributions, but I will leave that until we discuss them. He wants to have the same treatment for civil legal aid and criminal legal aid, and he has repeatedly—although thankfully not today—used the example of domestic abuse. That has been a good debating point for him, but he cannot build an argument on one example. I do not think that any woman who is a victim of domestic abuse or violence should have to pay any contributions, so I do not think that that is a valid argument for saying that civil legal aid is exactly the same as criminal legal aid.

The situation is different when the state is against the person, they have no choice and—crucially—they may well be innocent. In this argument, we are forgetting that many people who are accused end up being found to be innocent. That is relevant to Graeme Pearson’s amendment 23, which we will discuss later.

The problem with the bill is that it has been entirely driven by finance. We all understand the financial difficulties that the Government faces, but the sums of money in question are not enormous sums and they cannot override the paramount interests of justice. The cabinet secretary has been forced to modify a very bad bill so that it ends up as simply a bad bill, but that does not alter the fact that it is still bad.

15:45

Kenny MacAskill: I appreciate Ms Goldie’s points, but I do not believe that they are matters for the face of the bill. Historically, such matters have been dealt with by regulation.

Amendment 1 agreed to.
Service.

be passed on and the charge for providing the regulating how any contribution collected should provide a collection service on behalf of solicitors, the amendment that the board would be able to provide a with the board and the Law Society of Scotland contribution payable is included.

The amendments clarify that the ranking provisions apply only when the solicitor is paid the net fee from the Scottish legal aid fund; any contribution payable is not included. In those cases separately from the system in place in sections 19 and 20 for determining contributions for other criminal proceedings.

Appeals on behalf of deceased persons are very rare. It has always been the intention of the Scottish Government that the board would collect any such contributions. The bill does not expressly state that, and the opportunity has been taken to put the board’s responsibility beyond doubt by lodging amendment 5. Amendment 6 is consequential on amendment 5, preventing collection in the appeals being undone by regulations. Amendments 4 and 8 clarify the ranking provisions in the bill and those already in the Legal Aid (Scotland) Act 1986 about the order in which solicitors get paid. Amendment 3 reflects that, because contributions for appeals on the behalf of deceased persons are collected by the board, they do not fall into the ranking provisions. The amendments clarify that the ranking provisions apply only when the solicitor is responsible for collection. In those cases, the solicitor is paid the net fee from the Scottish legal aid fund; any contribution payable is not included. In cases where the board is responsible for collection, the fee payable is gross and the contribution payable is included.

Amendment 7 delivers the agreement made with the board and the Law Society of Scotland that the board would be able to provide a collection service for solicitors. The amendment gives ministers the power to require the board to provide a collection service on behalf of solicitors, regulating how any contribution collected should be passed on and the charge for providing the service.

Lewis Macdonald’s amendment 7A does indeed seek to amend amendment 7, in the name of Kenny MacAskill. It relates to the charges that can be imposed or the fees that can be set by the Scottish Legal Aid Board in return for collecting legal aid contributions on behalf of defence lawyers. This is not a matter of mere detail that should be left to the regulations or to future discussions. By suggesting that, I think that the cabinet secretary has put his finger on one of the fundamental flaws of the bill.

This is an extremely important piece of proposed legislation, as it will introduce the principle of contributions to criminal legal aid in a novel form. The bill should not simply give permission for regulations to be drawn up to address the details.

Although the Law Society of Scotland accepts the general propositions in amendment 7, many of the bar associations across Scotland do not. Many lawyers who are members of the Law Society and a bar association believe that the Scottish Legal Aid Board is best equipped to collect contributions to legal aid, given that it has years of experience of doing so on the civil side, as well as the infrastructure to do it.

The full cost recovery that is outlined in the Government’s amendment 7 is full cost recovery on a case-by-case basis. That will still leave individual lawyers exposed to the risk that clients will not pay their contributions and the risk that they will receive an open-ended bill from SLAB when collecting contributions racks up significant
costs. The board has estimated that it would cost £600,000 annually for it to take responsibility for the collection of contributions. If it can come up with a definite figure for the cost of its services to solicitors, it is surely reasonable that the legislation should reflect that, and that it does not create the risk that open-ended charges will be imposed on lawyers who use the board’s services.

Amendment 7A would simply manage the financial risk to law firms by creating a set fee for the collection service instead of unspecified charges. That flat fee would, of course, reflect the costs incurred by SLAB in collecting the fees, and it could be calculated on the basis of the figures that it has not brought forward. I know that a flat fee for the collection of legal aid contributions would be welcomed by many people who are concerned about the approach that has been taken.

It seems to me that none of what the cabinet secretary said—he talked about detail and regulation—explains why a charge should be recovered on a case-by-case basis instead of having a fee that would apply across the board.

Malcolm Chisholm: This is another area in which the cabinet secretary had to back down because he got things so badly wrong at the beginning. Part of the problem is that because the changes have been made so late, people do not yet know the detail of how the system will work in practice. That is why I support Lewis Macdonald’s amendment 7A. He is at least trying to provide some clarity and not leave things completely open ended.

Once again, we must state the fundamental objection to what is happening. I know that some members were a bit puzzled about my reference to the analogy between civil legal aid and criminal legal aid, but when I first read what was proposed, I wondered why on earth, when the Scottish Legal Aid Board collects—highly successfully—all the contributions for civil legal aid and has all the systems to do so, it should be treated completely differently when it comes to criminal legal aid. I have had no proper explanation of that, apart from the financial one.

Again, relatively small sums of money are involved, against which must be set the risks to the administration of justice. Some people might not be willing to pay for a lawyer, so they will not have one, and some lawyers might withdraw from the legal aid system because of the financial risk involved. Therefore, I think that there are still serious problems with the bill. It is clearly better than it was, but it is extremely important that we recognise that the alternative system that was proposed by the Opposition at the beginning of the process would have been a whole lot better.

Kenny MacAskill: Malcolm Chisholm did not have the benefit of hearing the answers that I gave, in committee, to the convener of the Justice Committee when I was asked whether such matters would be considered in respect of civil matters. I said that they would and that SLAB would be discussing them with the profession.

Given what amendment 7 says and the assurances that I have provided on what the “Scottish Public Finance Manual” states, I believe that amendment 7A is unnecessary.

Amendment 3 agreed to.

Amendment 4 moved—[Kenny MacAskill]—and agreed to.

Section 21—Contributions for appeals where appellant deceased

Amendment 5 moved—[Kenny MacAskill]—and agreed to.

After section 21

The Deputy Presiding Officer: Group 7 is on the refund of contributions. Amendment 23, in the name of Graeme Pearson, is grouped with amendment 25.

Graeme Pearson (South Scotland) (Lab): Amendment 23 would deal with an oversight in drafting and with an element of unfairness. We often spend our time in the chamber trying to deliver fairness on behalf of Scotland’s citizens. When an accused person has been through a trial process and has been found not guilty, and when the judge refers to circumstances that suggest reservations about the conception that lay behind the prosecution, the accused can be satisfied that they leave court with their character unstained. However, their bank book will probably have been severely damaged from paying contributions towards their defence.

In a progressive—and, some might think, radical—fashion, amendment 23 offers a valuable way forward to provide fairness in our system. When an accused person has faced due process and been found not guilty, and when the judge delivers the view that the prosecution was ill conceived, it should be in the judge’s power to suggest that the accused’s contributions should be reimbursed. I hope that members across the chamber will support the amendment.

I move amendment 23.

Annabel Goldie: I will speak to amendment 25, in the name of Margaret Mitchell, and briefly to amendment 23, in the name of Graeme Pearson. I have a lot of sympathy with what he is trying to achieve, but my reservation is that his amendment does not go far enough—certainly not as far as the
contribution by people who receive legal aid is a perfectly reasonable proposition that not be required to reimburse that cost. However, it afford to employ an expensive advocate, we will true in practice. We all accept that, if people can reimbursed. That might be true in logic, but it is not expensive advocates will also have to be reimbursed. Rich people who employ contributions by people who have modest incomes mistake that the state has made.

I know that the cabinet secretary will say that if contributions by people who have modest incomes are reimbursed, rich people who employ expensive advocates will also have to be reimbursed. That might be true in logic, but it is not true in practice. We all accept that, if people can afford to employ an expensive advocate, we will not be required to reimburse that cost. However, it is a perfectly reasonable proposition that contributions by people who receive legal aid should be reimbursed in most circumstances, if they are found innocent.

**Roderick Campbell:** I have a great deal of sympathy for Graeme Pearson’s amendment 23, but we must be fair to all private clients, so I disagree strongly with Malcolm Chisholm. A general principle is at stake.

The bill deals with legal aid on its own, so to support amendment 23 would be inappropriate. However, I would like—and hope that I will get—assurance from the cabinet secretary that the issue will be kept under review.

16:00

**Kenny MacAskill:** The subject of refunding legal aid contributions in the event of acquittal was raised during evidence sessions, and the Justice Committee asked that the issue be given further consideration. In my response to the committee’s stage 1 report, I set out the complexities involved and the wider range of perspectives that I had considered.

The committee considered two stage 2 amendments that sought to introduce refunding of legal aid contributions, and such amendments have been lodged for consideration again now. The subject was the subject of some discussion at committee but, in the end, neither amendment was supported; in fact, Graeme Pearson withdrew his amendment.

The discussion at stage 2 reflected the complexity of the issue, which I suggest is not one for this bill—not least because any provisions that are made here today could not apply to any privately funded clients. That would lead to a differentiated and therefore fundamentally unfair criminal justice system.

It should be stressed that the recovery of costs in defending criminal proceedings has never been a feature of the Scottish criminal justice system. In England and Wales, recovery-of-costs applications are made to the Crown, and can be made by legal-aided and privately funded accused persons. Recovery is of all defence costs and not just legal aid contributions. It cuts both ways—the Crown may recover costs from a convicted defendant.

Here, there is no system of costs in first-instance Scottish criminal courts, either for those who are acquitted or for those who are convicted. To change that would be a huge and fundamental step that should not be taken without the fullest consideration of the potential impact.

Prosecution is undertaken in the public interest, on the basis of the test that is outlined in the prosecution code: that there is sufficient admissible evidence and that it is in the public interest to take action. That decision is made on
the basis of information that the Crown receives from the police in the standard prosecution report and from witness statements. Sheriffs and justices of the peace do not see the information that the Crown receives from the police. That means that a case might appear on paper to be stronger than it does at an eventual trial.

An acquittal or conclusion of proceedings without conviction does not equate to a finding that it was not in the public interest to raise proceedings. The burden of proof on the Crown to succeed in criminal proceedings is rightly a high one—it is to establish proof beyond reasonable doubt. It would not be appropriate for costs to be a factor in the decision making of the Crown, or for such a perception to be possible.

Amendments 23 and 25 both seek to refund legal aid contributions, but seek to do so in different sets of circumstances. Amendment 23 would give the power for a court to order a refund or remission where a person has been acquitted, and where the court considers that to do so would be "in the interests of justice".

However, the amendment does not make clear the circumstances in which "the interests of justice" would merit the court using that discretion.

Amendment 25 would place a duty on the Scottish ministers to make regulations about arrangements for refunding or remitting a contribution that has been paid where proceedings do not conclude with a conviction.

I wish to highlight a number of practical difficulties with amendments 23 and 25. First, where there was judicial discretion, as per amendment 23, it is unclear what would happen in cases where a court chose not to refund on acquittal. Would the person be able to appeal the decision? Would they feel that their acquittal was being publicly doubted?

Secondly, where the refund could be made in any case where the accused was not convicted, as per amendment 25, there are many circumstances in which a case will conclude without a conviction. For example, a case may be deserted because of evidence coming to light during the trial. Where a case is dropped because a witness fails to attend, perhaps because they were intimidated or frightened by the prospect of giving evidence, the accused person would receive a refund. Are those the circumstances that amendment 25 envisages?

In respect of both amendments 23 and 25, it is unclear who would have responsibility for the refund. There is no scope under the bill to consider privately funded clients, who would not receive a refund under either amendment. Those points were raised during the stage 2 discussion, but it seems that neither has been addressed today.

Although I understand the concerns that have been expressed, I cannot support amendments 23 and 25. Even in their own terms, they raise many practical problems. They also risk making a fundamental change to the justice system in Scotland, with unclear consequences, and we surely cannot have a system where the many people who pay all their defence costs can have no expectation of reimbursement while those who pay only some of their costs are treated differently.

I invite members not to support amendments 23 or 25.

Graeme Pearson: The cabinet secretary mentioned differentiation in the way that justice is applied in Scotland. Throughout history, there has always been differentiation in the application of justice. In this chamber, we try to improve sections of our justice system and to develop it in a progressive and sometimes radical fashion, as I said earlier.

The argument that we have heard is that we will end up giving back money to people who, for some reason or other, might not justifiably receive cash at the end of their prosecution. Amendment 23 in my name indicates that that would be a matter for the discretion of the judge, who would have heard all the circumstances, would know the background and would, I suggest, decide that funds should be reimbursed in only extremely unusual circumstances.

Members should bear in mind that those who would be reimbursed would on many occasions be those who are in most need of the finance in their family budgets.

I agree that Margaret Mitchell's amendment 25 opens up a range of challenges and options that we do not fully understand at this time.

I hope that members will support amendment 23.

The Deputy Presiding Officer: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Doman, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Bob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Mid Scotland and Fife) (SNP)
Urguhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
Milne, Nanette (North East Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

The Deputy Presiding Officer: The result of the division is: For 40, Against 65, Abstentions 11.

Amendment 23 disagreed to.

Section 22—Regulations about contributions for criminal legal assistance

Amendment 6 moved—[Kenny MacAskill]—and agreed to.

Amendment 7 moved—[Kenny MacAskill].

Amendment 7A moved—[Lewis Macdonald].

The Deputy Presiding Officer: The question is, that amendment 7A be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (Mid Scotland and Fife) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffith, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahan, Siobhan (South Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Hamilton, Larkhall and Stonehouse) (Lab)
Milne, Nanette (North East Scotland) (Con)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

**Against**

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Braig, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

**The Deputy Presiding Officer:** The result of the division is: For 53, Against 63, Abstentions 0.

**Amendment 7A disagreed to.**

**Amendment 7 agreed to.**

**Amendment 24 moved—[Annabel Goldie].**

**The Deputy Presiding Officer:** The question is, that amendment 24 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

**For**

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Amendment 25 moved—[Annabel Goldie].

The question is,

**The Deputy Presiding Officer:** The result of the division is: For 51, Against 62, Abstentions 1.

**Amendment 24 disagreed to.**

**Amendment 25 moved—[Annabel Goldie].**

**The Deputy Presiding Officer:** The question is, that amendment 25 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

**For**

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (Mid Scotland and Fife) (SNP)
Gray, Paul (Glasgow Provan) (Lab)
Grigor, Jackie (Highlands and Islands) (Con)
Hendry, Richard (Mid Scotland and Fife) (SNP)
McDonald, Angus (Falkirk East) (SNP)
McDonald, Gordon (Edinburgh Pentland) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paton, Russell (Argyll and Bute) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swimney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, Dave (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

**Against**

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Hartle (Perthshire South) (SNP)
Dey, Graeme (Angus South) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Helen (Cowdenbeath) (Lab)
Ewing, Fergus (Inverness and Nairn) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunningham North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentland) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paton, Russell (Argyll and Bute) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swimney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, Dave (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

**Abstentions**

Murray, Elaine (Dumfries) (Lab)
Against

Adam, George (Paisley) (SNP)
Adamsen, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Donnan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing,ergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunningham North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Aileen (Carnick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDermott, Mark (North East Scotland) (SNP)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeen West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Bannffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thomson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

The Deputy Presiding Officer: The result of the division is: For 14, Against 66, Abstentions 35.

Amendment 25 disagreed to.

After section 22

The Deputy Presiding Officer: We move to group 8. Amendment 26, in the name of Margaret Mitchell, is grouped with amendment 27. I invite Annabel Goldie to speak to both amendments and to move amendment 26.

Annabel Goldie: By any measure—as has already emerged from today’s debates, in particular from Malcolm Chisholm’s speech—the bill is, at the very least, controversial. We know that it has raised passions outside Parliament and within it.

Amendment 26 seeks to require the Scottish ministers to lay before Parliament a report on the impact on solicitors of requiring them to collect contributions under the bill. Under the amendment, a first report would be required soon after the introduction of the requirement to collect contributions, with subsequent reports being required every three years.

Amendment 27 would introduce a second, wider review provision, which would require the Scottish ministers to lay before Parliament every three
Further, the Scottish Legal Aid Board has a statutory duty to monitor the accessibility and availability of legal services; the impact of the bill will be kept under review as part of that duty.

Also, the bill provides the Scottish ministers with the ability to seek by regulations swift adjustment of the details of the new process. I expect that Scottish Government and SLAB officials will liaise on how part 2 is operating and the need for any adjustments.

Although I understand the intention behind amendments 26 and 27, I do not agree that we need to legislate to achieve their aim. There is the risk that what we now consider to be the key areas of importance in the new process will not be areas of concern in the future. Amendment 26, which relates to regulations that will be made under proposed new section 33ZA of the Legal Aid (Scotland) Act 1986, would require the Scottish ministers to report on "collection rates of contributions" and "the income of solicitors". A large proportion of that information would be available to the Scottish ministers only at the discretion of firms. Moreover, a great many factors affect solicitors' income that are not attributable to the bill's provisions.

To tie down the timeframe would also present difficulties. Flexibility in the timing might be necessary, perhaps to include other developing issues, or because adjustments that are made through regulations need time to bed down. Moreover, in relation to provision in regulations about collections, it appears that amendment 26 would require reporting on two separate occasions for each set of regulations, which would be a rather onerous requirement. Amendment 27, which relates to part 2 as a whole, would require that a report be laid indefinitely every three years, which might prove to be disproportionate.

As was mentioned during consideration of similar amendments at stage 2, the Justice Committee can at any time consider the implementation of enacted legislation and carry out post-legislative scrutiny. Taking that into account, along with my commitment to carrying out a review, I am not of the view that reporting need be enshrined in primary legislation, so I invite members to oppose amendments 26 and 27.

Annabel Goldie: The cabinet secretary's response is predictable, but not persuasive. On his concern about the wider income of solicitors or firms of solicitors, amendment 26 is specific in that it is about collection of the contributions.

The cabinet secretary fails to understand the widespread disquiet that has surrounded the bill and the specific need to reassure not only solicitors who practise criminal law but broad sectors of civic society in Scotland, especially
people who may be victims of the proposed legislation when they find themselves as accused persons without the means of paying for their defence at the inception of proceedings—a critical time at which they need to do that.

The difference between accepting and rejecting amendments 26 and 27 is the difference between slamming the door shut on fresh air blowing through the process, and keeping the door open. I urge members to support the amendments and to keep the door open.

The Deputy Presiding Officer: The question is, that amendment 26 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Fergusson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Dorman, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Peterson, Gil (Clydebank and Milngavie) (SNP)
Roberts, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheehouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
The Deputy Presiding Officer: The result of the division is: For 50, Against 65, Abstentions 0.

Amendment 26 disagreed to.

Section 23—Consequential modifications

Amendment 8 moved—[Kenny MacAskill]—and agreed to.

After section 23

Amendment 27 moved—[Annabel Goldie].

The Deputy Presiding Officer: The question is, that amendment 27 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing,ergus, Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Scottish Civil Justice Council and Criminal Legal Assistance Bill

The Deputy Presiding Officer (John Scott): The next item of business is a debate on motion S4M-05479, in the name of Kenny MacAskill, on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

16:23

The Cabinet Secretary for Justice (Kenny MacAskill): I am pleased to open the debate on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

I thank the Justice Committee for its careful scrutiny of the bill during its progress through the Parliament, and the Finance Committee and Subordinate Legislation Committee for their reports on the bill. I am also grateful to the many individuals and organisations that took the time to respond to the two consultations on the bill and all those who gave oral and written evidence to the Parliament.

There is almost unanimous support for the creation of the Scottish civil justice council, but I will remind members why the new council and its functions are needed. The proposals are founded on the recommendation in Lord Gill’s wide-ranging review of the civil courts. Lord Gill concluded that far-reaching, structural and procedural reforms are necessary to ensure that Scotland’s civil justice system is fit for the 21st century.

The council will first take forward the many procedural changes that are necessary for the implementation of Lord Gill’s reforms and play a pivotal role in revitalising and modernising our system. Following extensive engagements with stakeholders, I will shortly consult on a draft bill that will be based on the wider recommendations of the Scottish civil courts review. The creation of the Scottish civil justice council will mark the first legislative step on the path to reform.

During the bill’s stages there has been constructive debate on the arrangements for the council, notably its membership and the extent of its role and function. On membership, one of the bill’s underlying principles has been to provide for flexibility, balance and—rightly—a degree of discretion to the Lord President. That will allow the council to concentrate on its first task: the technical rules revisions to support the much-needed civil court reforms. It will also allow the council to evolve over time to take on its policy functions. I firmly believe that the Lord President should be trusted to achieve the correct balance that is necessary for the council to be able to
assist him to carry out his statutory responsibilities and fulfil its duties in the most effective manner.

Of course, the Parliament’s scrutiny has helped to shape the proposals throughout the legislative process. Having listened carefully to the views of stakeholders and members of this Parliament, I introduced principles of openness and fairness to the appointment process. The importance of lay input to the council was discussed and the bill now provides that a layperson may be a deputy chair. Alison McInnes was keen to see that in the bill. The additional power to commission research, which Jenny Marra proposed, will assist the council in its function of reviewing and advising on improvements to the civil justice system.

With the Scottish civil justice council we will for the first time have a body with oversight of the entire civil justice system. The level of interest that has been expressed during the bill’s passage indicates how important and relevant civil justice matters are for people, families and businesses across Scotland. The council is the prelude to further reform and it is a necessary precursor to the reform that Lord Gill proposes.

I will now discuss part 2 of the bill. Contributions to criminal legal aid will allow us to continue to target legal aid to those who need it most by asking those who can afford it to pay towards the costs of their defence. To be clear, no one is being asked to pay the full cost of their defence; if they could do that, they would not be eligible for legal assistance. We are suggesting that when someone can afford to contribute to the cost they should be asked to do so. That principle was supported by not only this Parliament at stage 1, but the Law Society of Scotland and other key justice stakeholders.

I have listened closely to views expressed throughout the bill’s passage to make sure that we continue to protect the most vulnerable in our society. I have built on initial proposals to exempt those on passported benefits and for a graduated approach to contribution rates. Disability living allowance and war pensions, will now not be considered as income when eligibility for contribution is calculated. Imprisonment or being taken into custody can considerably change a person’s financial circumstances. Reassessment of eligibility when that happens will ensure that new circumstances can be taken into account. My proposal to raise the disposable income thresholds means that the estimated number of those who will be liable to pay contributions has now fallen by one third compared to the number under the original proposals. Those are all tangible improvements that demonstrate my commitment to ensuring that only those who can afford to pay a contribution will do so. They are also good examples of where we have addressed a range of issues that have been discussed with stakeholders.

It is unlikely to have escaped anyone’s notice that some in the profession are unhappy with the proposals in part 2 of the bill. I appreciate that many firms think that collecting some of the contributions will be a burden that is placed on them at a difficult time. Although I accept that concern, I do not think that the expectation is unreasonable or unfair. Discussions with the profession throughout the process have sought to address its concerns, including about how to ensure that the responsibility for collection is shared equitably. From the introduction of the bill, we proposed that the Scottish Legal Aid Board should share the burden by collecting in solemn and appeals cases, and that, to assist firms’ cash flow, summary contributions will be treated as fees.

In addition to responding to concerns about the disability living allowance and war pensions, regulations will provide that there will be no contributions payable towards criminal legal assistance at a police station. My proposal to raise the threshold from £68 to £82, which followed discussions with the profession after stage 2, will significantly reduce the number of accused from whom solicitors will have to collect. Further, where a case transfers from solemn to summary proceedings, the board will collect the contribution all the way through. Finally, I lodged an amendment to allow the board to provide a service to solicitors on payment of a fee to collect contributions on their behalf. All those proposals have been accepted by the Law Society of Scotland, which is the profession’s chosen representative body. Several other things that it has agreed to in principle will feature in draft regulations to come.

Lewis Macdonald (North East Scotland) (Lab): I accept the cabinet secretary’s point regarding his discussions with the Law Society of Scotland, but what has he to say about the continuing objections and views of the bar associations in Aberdeen, Edinburgh, Glasgow and many other places throughout the country?

Kenny MacAskill: I am aware of those objections, but I deal with the Law Society of Scotland, which is the body that is required to regulate and the body with which we negotiate. As I said, a decision has been made, and I welcome the contributions by the individuals who were involved in the legal aid negotiating team, who worked constructively with us.

Although I recognise that many in the profession have voiced their wish to have no responsibility for collection, practical steps are necessary. We must remember the many firms that already collect contributions from clients in criminal cases.
Collection should not be a significant problem for them.

Graeme Pearson (South Scotland) (Lab): The cabinet secretary mentioned that he is arranging for SLAB to make collections on behalf of solicitors on payment of a fee. Was he able to share with the Law Society the level that he expected that fee to be set at?

Kenny MacAskill: No, I cannot do that. That is a matter to be negotiated between the Law Society and the Scottish Legal Aid Board. I will leave it to them to deal with that.

We are now dealing with a legal aid bill in Scotland for 2011-12 that was the second highest on record. It will not reduce without action. The projections for legal aid still exceed the budget that was set out in the Scottish Government's 2011 spending review, and difficult decisions still need to be made.

I have not approached the challenge by making changes to the scope of legal aid. Wholesale reductions in its scope would have a damaging impact on access to justice, other parts of the justice system and society as a whole. My key priority has been maintaining access to justice, as it has been for many other members.

Reforms in England and Wales have been sweeping. The scope of civil legal aid is being reduced and legal aid is being removed altogether in some areas of family law, housing and clinical negligence. That is not a road that I am prepared to go down. I am protecting the scope of civil legal aid, which is vital in the current financial climate, while ensuring that the criminal legal aid system continues to be just and equitable.

To conclude, the passing of the bill will deliver vital savings to ensure that legal aid can be targeted at those who need it most. It will also begin our journey towards much-needed civil justice reform.

I move,

That the Parliament agrees that the Scottish Civil Justice Council and Criminal Legal Assistance Bill be passed.

16:34

Lewis Macdonald (North East Scotland) (Lab): When we debated the bill at stage 1, I said that we were in the familiar position of addressing a Scottish Government justice bill that dealt with two quite different subjects. That was a relatively marginal criticism, because Labour supported the general principles behind both parts of the bill.

Sadly, we are now in a position that is even more familiar, because in recent months we have seen what happens when the Scottish Government ignores the views of others and presses ahead with legislation that is not fit for purpose. That, for example, is how the Police and Fire Reform (Scotland) Act 2012 appears to be viewed by the chief constable of the new police service of Scotland. As some of us heard at the lobby outside the Parliament today, that is how this bill is viewed by many of those who practise criminal law in our courts.

Reform of the justice system is just as important as reform of our police and fire services. The bill is only the first of a number of measures that ministers propose, and decisions that ministers will be required to take in the next few months, that will affect the delivery of justice. It must therefore concern us all that ministers have so signally failed to build a consensus in support of the proposed measures in part 2 of the bill, covering criminal legal aid.

The cabinet secretary finally found the time at the end of last year to talk to representatives of the legal profession and to offer some changes to meet some of their many concerns. However, Mr MacAskill did so only after they had withdrawn their services from clients in an effort to convince the Government that their concerns were real and substantial, and after he had resisted efforts by other parties, including the Justice Committee, to insert the changes into the bill that were clearly required. We welcome the Government's concessions—late and reluctant though they may have been—because they meet in part some of the concerns that we raised during the passage of the bill.

In particular, we were quite clear that the proposed threshold for liability to pay contributions—a disposable income of £68 a week—was far too low. It would have captured many of those in the greatest poverty, for whom making any level of contribution to legal costs would be one extra cost too far. Therefore, we welcome the fact that the threshold has been raised to £82 a week, which is more realistic, although of course it does not answer the question of affordability altogether. People with disposable incomes of £82 a week are still on very low incomes, which is why the working of the new system will need to be carefully monitored if those people are to retain fair and reasonable access to justice.

It is clear from what the Scottish Legal Aid Board has told us—indeed, the cabinet secretary confirmed it today—that the higher threshold will be paid for by increasing the contributions that are payable by those who are entitled to legal aid but who are at the higher end of the income scale.

SLAB has also offered us comparisons with the impact of changes in England. It expects the consequence of that change to be that many of those who remain theoretically entitled to criminal
legal aid will in fact cease to have access to the legal aid system altogether—they will be represented as private clients, because the assessment will leave them eligible for only a token amount of legal aid.

SLAB’s figures confirm that those people are by no means well off. A disposable income of around £11,500 a year is still poverty relative to the population as a whole, even if it is at the higher end relative to other people who are entitled to receive legal aid. Again, especially given SLAB’s expectation that many solicitors will persuade those clients to go private, the impact of the new system on those at the upper end of the eligible group will need to be monitored closely, to ensure that they can achieve access to justice.

We have also raised the issue of what should happen when people who have been drawn into payment towards legal aid costs for the first time are acquitted. Graeme Pearson eloquently moved an amendment to that effect. The Government has offered no movement in that area—not even on giving discretion to the judiciary to have contributions refunded only in certain cases, as Graeme Pearson proposed.

That would have been a modest improvement, protecting a few of those poorer people brought to court and then acquitted, but creating no general presumptions with implications across the justice system as a whole. It is a pity that the Government did not see fit to take the opportunity to support that compromise position.

Another critical issue has been in relation to the collection of contributions. A key argument at stage 2 was that the cost and burden of collection might for some solicitors be enough to tip the argument against offering criminal legal advice in the first place. For small rural firms doing only a small proportion of criminal work, a decision to stop doing any such work could impact on access to justice for any accused person in that area.

The Government has conceded that SLAB could collect contributions on behalf of solicitors. By doing so, it has accepted the principle of such collection, but the way in which it has done so fails to engage with the legal profession’s concerns and will not attract the support of many. To provide for collection by a Government agency would have been a useful support for the introduction of contributions, and it is again disappointing that Mr MacAskill has chosen not to take the opportunity offered by a Labour amendment to enable solicitors to seek that service without the risk of taking on an open-ended liability to cost recovery by the Legal Aid Board.

If the job of Government is to produce the necessary reform and build support for a reform agenda, it seems to me that the Government is, once again, not doing that job with this bill.

We support the principles underlying both parts of the bill: the modernisation of the civil justice system and contributions to the costs of criminal legal aid by those who can afford to pay. Many others support the principles, too, but they continue to be concerned about the detail and the practicality of how the Government proposes to implement the changes. It is surely a matter of regret that the Government’s approach has divided the legal profession and left so many defence solicitors believing that the Government does not care what happens to them or their clients. It is equally regrettable that the approach has divided the Parliament and that those on our side cannot support the bill.

16:41

Annabel Goldie (West Scotland) (Con): I restate my position as a former practising solicitor in Scotland who is no longer a member of the Law Society or on the roll of solicitors.

Although I intend to focus my comments on part 2 of the bill, I will briefly mention part 1. Part 1 implements a key recommendation of the Gill review and it is a welcome step towards updating Scotland’s civil court rules. The council will have a remit to review the wider civil justice system. We should be in no doubt that the council will be a powerful organisation that will exercise considerable influence.

I noted the cabinet secretary’s assurances at stage 2 that the council will act in an open and accountable way and that appointments to it will be made in an accountable manner. It is unfortunate, however, that the amendments in relation to the activities of the council lodged by Margaret Mitchell at stage 2 and Jenny Marra’s amendment 22 debated today, which my party supported—amendments that sought manifest openness and transparency; I do not see how people could object to that—were rejected by the Scottish Government.

I will turn to part 2 of the bill, which I find problematic. Part 2 has had a difficult time. Indeed, I understand that the Justice Committee came close to rejecting part 2 at stage 1, but had a change of heart at stage 2. We have heard from Lewis Macdonald the reaction from the legal profession. Notably, 12 bar associations, including Edinburgh and Glasgow, remain opposed to the legal aid reforms, and the Law Society of Scotland, while accepting the Scottish Government’s compromise offer, maintains opposition to the collection regime.

My party has attempted to support efforts to improve the efficiencies of the bill. Certainly, the
increase in the disposable income threshold above which contributions will be made, and the agreement that the disability living allowance, its replacement personal independence payments, and war pensions will be disregarded is welcome. It is also right that no contributions will be required for offenders in custody or in police stations, which at least means that access to legal advice at a critical time will not be restricted.

The rejection of Margaret Mitchell’s amendment 24, which sought to exclude the income and capital of spouses and partners, which would have been a lot fairer to an accused who desperately needs advice and may need financial help, was unfortunate. Margaret Mitchell attempted to secure a wider debate on the question of contribution refunds; Mr Pearson spoke about that, too. That wider debate is needed and I hope that the Scottish Government will consider that and perhaps reflect on what might be done.

Part 2 of the bill is underpinned by the presumption that those who can afford to pay for public services should do so. I support that general proposition and I welcome the cabinet secretary’s conversion to the Scottish Conservatives’ way of thinking. However, that presumption must be weighed against the specific situation in which it is to be deployed. When that situation is the administration of justice and the fundamental right of an accused to legal advice, it is the responsibility of the state to ensure that those unable to pay for that advice are not denied it.

That is where, for me, the bill hits a brick wall, because either the Government discharges that responsibility with a cohort of state-funded public defence solicitors or it creates a workable criminal legal aid system. The overall provision of public defence lawyers would be very expensive and much more inflexible to administer than a criminal legal aid system.

In this bill, the Government has failed in its attempt to deliver a workable criminal legal aid system. When an accused is unable to meet privately the cost of legal defence, the legal aid system must work on the basis that the accused can access advice without immediately being confronted by demands for money that he or she might not have. Equally, at that critical point the solicitor should have confidence that the legal aid system will resolve what the accused is due to pay and when, so that the solicitor can proceed without impediment to give advice.

The bill fails those fundamental tests. It presents the spectre of an anxious accused who desperately needs advice and is expected to scrape around to find sufficient funds to unlock the advice, and a solicitor who departs from the role of adviser and assumes the mantle of debt collector to hound the accused for money. If at that point the accused does not have or cannot produce the money—shoes for the children or food on the table might have taken precedence—the solicitor is placed in a professional and moral dilemma about what to do.

That is not a workable criminal legal aid system. It is a dog’s breakfast and an affront to decent standards of fairness and the fundamental right of an accused to representation. The bill raises significant questions about access to justice. What is predictable is that individuals who are accused of crime will be scared of seeking advice, might not be able to muster the funds to pay for advice and might end up representing themselves. That helps neither them nor the courts.

I welcome the reforms to the civil justice system in the bill, but the criminal legal aid system that part 2 will deliver is unfair and unworkable and will betray the most vulnerable. For that reason, my party is unable to support the bill.

16:46

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I declare an interest as a former solicitor and member of the Law Society of Scotland.

I have sympathy with one little aspect of what Lewis Macdonald said. Here we are, considering another bill that deals with two distinct matters. Labour and the Liberals were guilty of that offence when they were in power, and I regret that we have not cured the problem.

The Scottish civil justice council is very much to be welcomed. It will focus on preparing and drafting civil rules and procedure for the Court of Session and the sheriff court, which are terribly important for the effective and just working of civil justice—as my history teacher would say, “a good thing”.

At the beginning, the council’s work will be technical and to do with the rules. It will comprise four judges from the Court of Session and sheriff court, two advocates and two solicitors, and the Lord President will have the flexibility to appoint six members, to whom David McLetchie—I regret that he cannot be here today—referred brazenly as Lord Gill’s six-pack. Even Lord Gill was momentarily distracted by that comment. That flexibility will be important as we move on from procedural to policy issues and issues that concern users.

On private meetings, I say to naughty Jenny Marra that at today’s Justice Committee meeting she agreed—quite rightly—to take two agenda items in private, because they were to do with housekeeping and allowed us to discuss
witnesses. I hope that Ms Marra is not going to say that that was sinister. It was not sinister at all.

The background to part 2 of the bill, as members said, is the cost element. The Scottish budget has been cut hugely and the legal aid budget will fall to £132 million by 2014-15. We have to find money somewhere. The situation is much better in Scotland than it is south of the border. We face a 7.3 per cent reduction; the reduction is 17 per cent in England and Wales. It is not fair, but it is where we are as we go into a triple-dip recession. I will not go on about who is to blame for that recession; we are there and we have to look at how we operate. Other jurisdictions, such as England and Wales and New Zealand, have criminal legal aid contributions.

I will not go over things that the cabinet secretary and other members said. However, I say to Annabel Goldie that I welcome the discounting of the partner’s income in special circumstances, such as when the partner is a witness to or alleged victim of the crime. It would be most unjust to include the partner’s income in such circumstances. The Law Society broadly welcomed the Government amendment in that regard.

Annabel Goldie: Christine Grahame makes a perfectly valid point, but the financial circumstances of a partner or spouse can be exceedingly complex, and the point is that they cannot be quantified or confirmed either swiftly or accurately. I have had experience of such situations as a solicitor, and I am sure that Christine Grahame has, too. That is a concern when we have an accused person who needs advice.

The Deputy Presiding Officer (Elaine Smith): I will give you back a bit of time, Ms Grahame.

Christine Grahame: I will concede Annabel Goldie’s point. The financial circumstances can also be volatile in certain cases. That is why I believe that the legislation, in that respect, has to be kept under review.

I move on quickly to the refund of contributions, which was raised by Graeme Pearson. The idea is attractive, but it has opened up a huge can of worms. For example, should we look at having full awards of expenses in criminal proceedings? Should the Crown be able to take expenses against an accused when something should never have gone to trial in the first place? I do not think that the issue could be fixed in the bill. The position in which private clients or the Crown are in the same position is worthy of investigation, but we could not simply insert provisions on that really complex matter into the bill. We will have to return to it.

As I said, I believe that the wrong choices have been made in England and Wales. The bill is not perfect, but it is a darn sight better than removing civil legal aid from welfare cases, immigration cases and debt cases, as had to be done in England and Wales.

The Deputy Presiding Officer: I must ask you to conclude now.

Christine Grahame: With this bill, we have made the best that we can of a bad financial deal.
to is the scale of the changes that are proposed in the bill.

As I said earlier, and as some SNP speakers have more or less admitted, the bill is driven by finance. I am very understanding of the Government’s financial difficulties, but it is not appropriate that something as important as the administration of justice should be driven solely by finance, particularly when the sums to be saved are not, in the scale of the Scottish budget, very significant.

That is the underlying reason for the changes, but the argument that has been advanced is that we need an equation of criminal legal aid and civil legal aid. The cabinet secretary has gone as far as saying that he will amend the contribution limit for civil legal aid to enshrine that equality in law. I believe that that is a fundamentally flawed argument.

Admittedly, the argument is a powerful and persuasive in relation to domestic abuse, and I have heard the cabinet secretary make that point on many occasions in the past few months. However, as I have already said, my view is that there should be no payment at all by women in domestic abuse cases. In addition, the more general point is that we cannot base a whole case on one example. As I said earlier, the general equation of the two situations is flawed, because when someone is accused they have the power of the state against them, they have no choice and, crucially, they may be innocent.

That is why I think that the whole bill has been based on a fundamentally flawed premise. My colleagues and I have very serious concerns about the people on low incomes who will have to make a contribution. The position is made worse by the fact that, if they are found to be innocent, they will get no reimbursement. I merely restate my serious concerns about that.

I regret that the modest amendment that Annabel Goldie moved to require a report on the impact of collection was not accepted, but we will have to look very carefully at how collection works in practice. Indeed, we will have to monitor the effect of the whole bill.

As the Presiding Officer is indicating that I should wind up, I will say that I am glad that we are voting against the bill today.

16:55

Roderick Campbell (North East Fife) (SNP): I refer to my entry in the register of members’ interests as a member of the Faculty of Advocates.

As Annabel Goldie has said, the bill has been controversial, but part 1 is less controversial. We have heard a lot today about the balance between lawyers and non-lawyers in the new civil justice council, but let us not forget that Lord Gill told the Justice Committee in evidence that he envisaged that the bulk of the council’s early work would be the drafting of technical rules. I accept that the balance between lawyers and non-lawyers may need to change over time. However, the Lord President has a big task ahead of him, and I believe that it is right that Parliament has not sought to impose too many restrictions on his powers or to be too prescriptive in terms of his appointments.

The Scottish Government has made it clear that it will not preclude a lay person from being the deputy chairman of the council, and I am sure that we all welcome that assurance. I hope and am confident that the Lord President will recognise that his appointments will reflect a wide range of interests, in accordance with the principles set out by the Public Appointments Commissioner for Scotland. I hope, too, that the insurance industry, trade unions and others will be happy with the appointments when they are made.

As to part 2 of the bill, despite the agreement on the principle in particular that those who can contribute towards their legal aid should do so, the detail has been hotly debated. The cabinet secretary has had a very difficult task in the current financial climate, but what is proposed still compares favourably with the situation in England, where some people with an income below the Scottish threshold will pay their full costs in the magistrates court or up to 90 per cent of them in the Crown Court, where I understand that the minimum contribution, if it is to be made, would be £254.

As Christine Grahame has suggested, English legal aid is faring far worse than the 7.3 per cent cut that we will experience in Scotland over the next few years. The Scottish Government has listened and has increased the disposable income threshold for contribution and accepted that the limits will have to be kept under review. It goes without saying that, if there was evidence that the limits were affecting the right of individuals to a fair trial, they would have to be considered further.

On collection issues, through discussions before the publication of the bill, the Government accepted that SLAB will collect for solemn or the more serious cases. While it is true that the Government has not moved on the principle of solicitor collection in summary cases, it accepts the need to offer assistance to small firms in the collection process, which was the basis of one amendment that we discussed earlier this afternoon.

Some say that the change proposed in the bill is a break from the normal relationship between
solicitor and client, but we should not forget that, although it amounts to only £154,000 in total per year, the current collection for ABWOR—assistance by way of representation—for guilty pleas in summary cases has nevertheless to be collected by solicitors.

We have heard a lot of anecdotal evidence that solicitors do not collect that money. Mark Harrower of the Edinburgh Bar Association said that one reason for that was because it might create conflict between solicitors and clients. It is never easy to ask for money, but it is stock in trade for solicitors to do so with private clients and that may also cause conflicts to arise from time to time. Such collection is therefore not unique, and to oppose collection without properly testing matters in practice seems to me wrong.

We must also acknowledge that, under the new limits, up to 88 per cent of applicants will pay no contribution at all, so let us not overegg the pudding. Let us see how collection works in practice and what SLAB can do to help smaller firms. I welcome the cabinet secretary’s assurance that he will keep matters under review, particularly in the operation of the part 2 provisions.

As to refunds, in contrast to the position in England and Wales there is no tradition of reimbursing legal expenses in Scotland in cases where the accused is acquitted, which is possibly due to the absence of private prosecutions historically. However, I sympathise with the view of many Opposition members and recognise that refunds or reimbursement of expenses is something that needs further thought, not just for legally aided clients but for all. As I said at stage 1, that is a much wider issue. I urge the Government to keep the matter under review and not to kick it into the long grass.

16:59

Alison McInnes (North East Scotland) (LD): Had the establishment of a Scottish civil justice council been proposed on its own, we would have been glad to support it. Although I would have liked Jenny Marra’s amendment on the make-up of the council to have been agreed to, I still believe that the council’s creation will prove to be of benefit to the development of our civil justice system.

However, the benefits of part 1 of the bill are not enough to counteract the problems with part 2. Although I acknowledge that there has been some movement on collections, I do not think that the compromise is enough. I see no good reason for us not to look to SLAB to collect all the contributions.

That is a relatively minor qualm compared with the concern about access to justice. Earlier today, I joined members of protest for justice outside the Parliament—legal professionals and members of the public who are concerned about the bill’s potential impacts on one of the central tenets of any democratic society: fair access to justice.

Reform of our legal system is nothing new. It has been put to me that many changes have been made to legal aid over the past 20 years, which have always been for the worse, but this is the first time that industrial action has been taken. The strength of feeling on the issue is not for show; it is real. The people at the heart of our legal profession—those who deal with accused persons day in, day out—are worried that the new law will fundamentally damage justice in Scotland. The issue is not, as the cabinet secretary has all too often asserted, about making criminals pay for their defence; it is about ensuring that all suspects—who are innocent until proven guilty—can, regardless of their circumstances, access proper legal help, advice and representation.

Since the stage 2 proceedings, the Government has been involved in fairly superficial negotiations with the Law Society and other representatives to seek a compromise. Once again, the Government’s casual and—at times, I think—bullying approach to law making has been shown up. Having been presented with the Government’s final, take-it-or-leave-it offer, the Law Society chose, pragmatically, to accept it, but it immediately sent out a briefing against the impact of the bill.

Although the Government might claim that its changes are protecting legal aid while ensuring that savings are made, that is simply not true. Even with the higher threshold, the effect of the changes will be to remove legal aid from a large chunk of working people.

Ann Ritchie, who is the president of the Glasgow Bar Association, shared with me examples of the sort of cases that she has dealt with in the past that the changes would have an impact on. The people concerned were working men and women with no previous convictions who were found not guilty. Had the proposed threshold been in place when they went to trial, they might not have been eligible for legal aid and might not have been able to afford the contribution. We could face the prospect of more people being forced to represent themselves in court, but without legal expertise they would lack the crucial tools to do so. We will risk sending more innocent people to jail, which would not be in the best interests of justice.

The truth is that we do not know how bad, ultimately, the impact of the changes will be, but we do know that the justice secretary is willing to risk irrevocably harming access to justice to cut a comparatively small amount from the legal aid
budget, which can never be cash limited anyway. Once that precedent has been established, there is a risk that legal aid will be further eroded to make more savings.

Access to legal support is a fundamental necessity of a fair justice system. We accept the need for reform, but part 2 of the bill is a blunt instrument that will have far-reaching consequences for justice in Scotland, and the Liberal Democrats cannot support it.

17:03

John Finnie (Highlands and Islands) (Ind): The proposed Scottish civil justice council enjoys a lot of support and it will have an important role to play in the procedural changes and the research that is carried out.

I am grateful to the various organisations for their briefings, not least Friends of the Earth, which said that ensuring that the new council is established in accordance with the principles of accountability, openness and participation is a crucial step on the way to Aarhus convention compliance.

It is fair to say that the Aarhus convention continues to exercise a number of bodies and individuals; I wrote to the Minister for Local Government and Planning about it following last week’s planning debate. If we accept that there are financial challenges—as, I think, members across the chamber do—we must demonstrate those principles, not least as the council will have a significant influence over the way in which environmental law develops in Scotland.

On accountability, I share some of the concerns about the legislative patronage that the bill gives to the Lord President. In his defence, as other members have mentioned, it has been said that he is a decent chap who would not overstep the mark. I, too, have no cause to doubt that, but we must understand that the powers are given to the postholder and not just to the present incumbent. As Malcolm Chisholm said, there are no guarantees about what might happen in future. Just this week, concerns have been expressed about a significant public appointment by the new Scottish Police Authority. Therefore, I welcome the cabinet secretary’s assurance that there will be scrutiny of how things progress in that regard.

I am particularly pleased that the Scottish Government took on board points about public appointments, that a fair, open and accessible appointment process has been adopted and that the Lord President will be required to publish a statement on how he will achieve that.

Openness is terribly important. Malcolm Chisholm talked about assurances and, if he checks through the debates, he will find a lot of assurances. The Lord President gave the assurance that it was extremely unlikely that the Court of Session would object to rules that were drawn up. I note that the Lord President has a role in the Court of Session and the new council. The Justice Committee was also assured that the Lord President would reflect a wide range of interests when appointing council members. Many individuals have paid a lot of attention to those assurances.

I supported one amendment from Jenny Marra, which was on the council’s composition. It is important that the council’s members represent a cross-section. I have used the term “lawyers club” and I feared the potential for a lawyers club to be created. It is important to involve users. We have heard that people would not be up to it and we have heard promises of change in the future. Many members will have heard such statements in another forum in relation to another debate.

As for participation, no matter how the numbers are juggled, the Lord President should be in no doubt that people are very interested in his discretionary appointments. Most effective organisations value rather than fear participation. The best employers consult their employees and unions and value their participation; the best shops value their customers; and the best public bodies listen and engage. I hope that the Lord President will do that in relation to his appointments.

Accountability, openness and participation are required. The civil legal system’s customers hope for active involvement. I hope for active involvement from consumer and environmental groups as a step towards bringing Aarhus convention compliance closer. I wish the council well in its important role of keeping the civil justice system under review, and I will support the bill.

17:06

Graeme Pearson (South Scotland) (Lab): I would like to put aside the rights and wrongs of the bill for a moment and look at the approach that we have witnessed in the lead-up to our discussions of the bill. I have no doubt that the names of consultees form large lists on various A4 pages, but it has become apparent that consultees lack confidence that their views—not only on part 1 but on part 2, as we have heard—were listened to and responded to productively.

Let us look at the headlines on parts 1 and 2. Who could object to the Scottish civil justice council and the aims that the bill sets out for it? It is long overdue and progressive, and one hopes that it will place civil justice to the fore and modernise a system that I have no doubt needs
fresh air. Equally, who could object to the principle in part 2 that those who can pay should pay? It is logical and represents a desirable outcome that I have no doubt that many members of the public support.

Given that, why have we had industrial action in our courts, a split among solicitors, an angry response from many solicitors who tried to have their views heard, and a demonstration outside this building by solicitors before we met to discuss the bill? The rejection at stages 2 and 3 of all Opposition amendments that were lodged to parts 1 and 2 was unedifying. The improvements that Opposition parties suggested were meant to be constructive and to make the legislation that comes to pass more acceptable to the public and something that could be lauded by all.

As a result of the threats of industrial action and the legal profession’s well-publicised resistance to the proposed changes, we have ended up with policy on the hoof in part 2. Changes have been implemented at the last minute. The cabinet secretary said this afternoon that he did not know what the cost of some services might be in the future. We have ended up with a transfer from the Government to solicitors of the risk of non-recovery of some fees. Solicitors might well also have to pay the Scottish Legal Aid Board for its efforts to recover outstanding fees.

I mentioned earlier the injustice for those who are acquitted in cases where judges indicate that the prosecutions have been ill conceived. Measures in this regard were rejected because of the problems that they might present—Christine Grahame said that they would open a can of worms. I say to the cabinet secretary that, sometimes, cans of worms need to be opened. The problems cannot be resolved at one swoop—if they could, they would have been dealt with a long time ago—but there is no doubt that some cases that go through our courts leave people damaged and in poverty. If there are elements that we can introduce to make things better for the public, we are duty bound to introduce them.

There is no attempt in the bill to deal with people who would appear to come before the courts on regular occasions throughout the year, accessing legal aid for three, four, five or six separate cases. Nothing has been done to deal with that.

With regret, I must indicate that I do not support the enactment of the bill, and I will be voting against it.

17:11

Annabel Goldie: This has been an illuminating debate. I do not underestimate the challenges confronting the Scottish Government, but something has been shied away from. Lewis Macdonald said that there are two entirely different subjects in the bill, and Alison McInnes alluded to that, too. I agree with that.

The reform of the civil justice system is proceeding on the basis of an extensive and authoritative review by Lord Gill. There has been a well-informed process to justify our decisions as to how we might embark upon the civil justice reforms. In that respect, that bit of the bill has been proceeding on a stable basis. We want more efficiency and broader civic involvement in the Scottish civil justice system, and that will be achieved through the Scottish civil justice council. The amendments from Margaret Mitchell and Jenny Marra that were discussed this afternoon would have improved openness and transparency, and it is a great pity that the Government did not accept them.

We could have had a standalone, solid, consensual civil justice bill. Criminal legal assistance is an entirely different matter. As I have said, I do not underestimate the challenging proposition involved, but would not the whole process have benefited from broader consultation and a separate bill resting on what that broader consultation produced, with the aim of trying to unite people? That matters to Scotland, not just to civic Scotland and those who are accused of committing crimes. It matters that we have a solid, confident, competent, professionally capable legal profession. At the moment, we have a legal profession that is split into pieces. I do not need to explain that to the cabinet secretary—he knows it for himself.

I agree with Lewis Macdonald that the profession is divided. That is unfortunate, because the best way forward for the reform of criminal legal assistance would have been to have information, real discussion, a meeting of minds and a genuine attempt to chart a way forward.

At the heart of any civilised state is the right of the accused to legal advice. That is an important tenet, as is the presumption of innocence. I agree with Malcolm Chisholm that such fundamental principles cannot be driven by money alone. The Scottish Government has failed to demonstrate how those two basic principles are supported, protected and delivered by part 2 of the bill.

Let us consider the position of an accused person with limited income, no knowledge of their partner’s or spouse’s income, who is facing a criminal charge and urgently needs advice. As regards that individual’s disposable income, the amount concerned might represent an electricity bill or a pair of shoes for a child. What is the accused to do? Represent himself or herself? Go to a money lender? Try and pawn something in order to make the contribution? Knowing himself or herself to be innocent—this is a really alarming
prospect—should they plead guilty just to bring the matter to an end? Those are all entirely predictable consequences of the provisions of the bill.

Kenny MacAskill: Will the member take an intervention?

Annabel Goldie: I cannot, as I am in the final minute of my speech.

In a situation in which the client presents an explanation that constitutes a defence and has to make a contribution but does not have the money, what is a solicitor meant to do? For a one-off, the solicitor might offer pro bono services. Those who have been in practice have often done that. However, that is not sustainable if the majority of the solicitor’s clients are in that position. Are they to be turned away? Is the solicitor to try to subsidise the inadequacy of the criminal legal aid system?

That is why I think that the Scottish Government has failed to demonstrate exactly what it thinks should be happening and how on earth it thinks that the proposed system is meant to work in the interests of justice and fairness. As it has failed to satisfy me on that test, my party will not be supporting the bill.

17:15

Jenny Marra (North East Scotland) (Lab): The creation of the civil justice council was an opportunity for us to rejuvenate the antiquated way in which civil justice rules are currently made. Organisations that deal daily with the impact of the rules councils’ decisions told us what we needed to do to make those decisions more open, accessible and easier to understand. Throughout the passage of the legislation, Labour has attempted to put down reasoned amendments that reflect those principles.

However, today has been a missed opportunity for innovation, transparency and progress, with the Government instead content to sit on its hands and close its ears to the experts. Instead of opening up the membership of the council so that the needs of litigants are at the heart of our civil justice system, we have seen the Government doubt the ability of lay organisations to do that job, despite support for them from many people across the chamber. Instead of extending our commitment to having public organisations that are open, transparent and accessible, Kenny MacAskill’s apathy has ensured that a closed-doors policy is the preferred modus operandi.

Further, in the face of irrefutable evidence that our legal system is still operated with a deeply entrenched gender imbalance, the SNP has yet again failed in its duty to use the power of legislation—which is at its fingertips—to right that wrong.

We cannot help but feel that Kenny MacAskill’s lack of engagement and unwillingness to listen has resulted in a bill that does not nearly meet its full potential. If it were not already evident in part 1, the development of part 2 makes it abundantly clear that the SNP still has lessons to learn about listening.

The simple truth is that it should never have taken more than six months, disruption in our courts and an 11th hour intervention by the cabinet secretary for the Government to finally engage on its plans for our justice system. It knew from day 1, as we did, that the contribution and collection system that it put in place would have a profound impact on access to justice.

Kenny MacAskill: Does the member welcome the fact that the Government insisted on there being parity with civil legal aid, which was not being insisted on by the criminal bar?

Jenny Marra: I do not welcome that at all. I put it to the cabinet secretary in committee many times that, when a criminal prosecution is brought, it is the state prosecuting the individual, so such comparisons are not really appropriate.

The Law Society told the Government of the impact, as did the Faculty of Advocates, Capability Scotland, the Scottish Human Rights Commission and the Labour Party. Solicitors from across the country told the Government that, too—indeed, they continued to do so today outside this building.

As Lewis Macdonald said, uprating the threshold of contribution from £68 to £82 does not answer the question of affordability, as the burden of that cost will still be met by those who are on low incomes. The SNP is putting the burden of the cost on the working poor in this country.

Finally, the collection system that the cabinet secretary has cobbled together in 11th-hour negotiations will do nothing to mitigate the risk that we will see people standing in court without a solicitor. That is a very real risk under the bill.

The SNP poses a significant risk to our justice system not just through the bill. In the coming weeks, we will consider the contracting of legal criminal representation, which is allowed for under legislation that was passed in the final throes of the Tory Government in 1997. Over the coming weeks, months and years, under section 52 of the Crime and Punishment (Scotland) Act 1997, the SNP Government will allow contracting in this country if its proposal is voted through. The Minister for Community Safety and Legal Affairs might want to cast her mind back to the House of Commons debate on that, when she described the very legislation that she now intends to use as
“a rag-bag of proposals that is almost incoherent in its approach.”—[Official Report, House of Commons, 5 April 1996; Vol 284, c 1107.]

I ask her to reflect on those comments when she seeks to bring that legislation into effect in the coming months.

The emerging story is that the SNP Government refuses to listen. It is happy to accept the advice that Scots will turn up in court unrepresented; it is happy that the working poor will bear the brunt of the cost; and it is happy to use Tory legislation to undermine the quality and independence of legal advice in Scotland. We are not happy to support such concessions, and we will oppose the bill at decision time today.

17:21

Kenny MacAskill: Notwithstanding some of the comments made by the Opposition, I welcome the fact that we have got to this juncture.

Of the two parts of the bill, the matters relating to the civil justice council have been welcomed, at least in some aspects, by most members in the chamber. We have been on this journey for some considerable time. Part 1 of the bill deals with some of Lord Gill’s many recommendations for reform. We last debated civil justice reform in 2009, following the publication of the report of Lord Gill’s review, which had been established by my predecessor. We have built upon that.

To be able to carry out the more fundamental review that Lord Gill, like most of us in the chamber, felt is necessary to get Scotland’s civil law into a position where it is fit for the 21st century, we require to make changes. Before the fundamental changes in his reforms, which will also require primary legislation, we require to make other changes. Some changes have been dealt with on a non-legislative basis, but others are dealt with by the aspects of the bill dealing with the civil rules council. That matter was first raised by Lord Gill’s predecessor as Lord President, Lord Hamilton, who made it quite clear that he felt that it was necessary to make these changes if we are to be able to give effect to the more fundamental reforms proposed by the then Lord Justice Clerk, Lord Gill.

Obviously, the membership of the Scottish civil justice council has been the subject of much interest and debate. The Lord President may require the wisdom of Solomon in deciding how to balance who should be included, but I believe that it is best to give him some element of flexibility. Not everyone can be, or needs to be, included around the table. I believe that the Lord President—and, indeed, anyone who holds that office—will ensure a fair representation that takes into account the balance of needs and wants.

Numerous people who are not currently included in the council’s membership have sought a place on it. I have received representations from the Association of British Insurers, the Sheriffs Association and other legal and, indeed, non-legal bodies. If we were to accommodate everyone who wished to have a place on the council, it would probably be impossible for it to convene—if it convened in public, as some wished—even in the chamber in which we sit. We need to have some trust and faith in the Lord President, whose position is well regarded by everyone who has ever held that office, so we should give him the degree of flexibility necessary to deal with that.

The next aspect of the bill is legal aid, on which we have seen some hypocrisy from those on the Opposition benches. They were prepared to support the principles of the bill at stage 1, but it seems that they are not prepared to support the bill today. Other parties condemn it outright yet sit in government south of the border, where the approach to the matter is significantly worse and harsher.

Alison McInnes: Is the cabinet secretary telling the Parliament that the extent of his ambition is to be less bad than somewhere else? If that is so, he has a lot of explaining to do.

Kenny MacAskill: No; my ambition—it is not just my ambition, but my intention and that of the Government—is not to replicate the absolutely appalling situation with legal aid south of the border, where whole areas have been discarded. We have had crocodile tears around the chamber, but let us look at some of the matters on which no legal aid is available south of the border because of the cuts that have taken place—cuts started not under the current Tory coalition south of the border, but under a Labour Government under Jack Straw. They include asylum, clinical negligence, criminal injuries compensation, debt, employment, housing, immigration, family matters and welfare benefits—nobody is eligible to apply for legal aid on any of those matters, irrespective of their income. The Scottish Government is not prepared to consider such a scenario, which is why, when we face the second-highest legal aid bill on record, we want to ensure that we balance that bill, which we will do by requiring those who have the ability to make a contribution in criminal cases to do so.

Lewis Macdonald: We are, of course, here to debate the bill that the cabinet secretary has introduced. Will he respond to some of the points that have been made about the impact of the way in which he has drawn his bill up on those whose incomes are just above the bare poverty level?

Kenny MacAskill: I will continue to point out the situation south of the border, because we heard
from Annabel Goldie how appalling she thinks the situation will be here. [Interruption.]

The Deputy Presiding Officer: Order.

Kenny MacAskill: South of the border, in the magistrates court, it is an in-or-out system. Anyone with annual disposable income of more than £3,398—which is just more than £65 a week—fails the means test and does not get legal aid. In the Crown Court, anyone with annual disposable income of more than £3,398 is required to pay 90 per cent of that towards costs. [Interruption.]

The Deputy Presiding Officer: Order. Would members who have just come into the chamber please keep order?

Kenny MacAskill: Let us contrast that with the situation in Scotland, where 88 per cent of people who face a criminal charge, on applying for legal aid, will have it granted with no contribution. Only 12 per cent will be required to make a contribution. In Scotland, the contribution level commences at £3. People who are earning several hundred pounds and who have the ability to make a modest contribution will be required to do so.

The Government faces challenges and there are significant claims on the Scottish Legal Aid Board, many of which come from those who are doing remarkably well from the amount of legal aid provision to their clients. Therefore, we must balance matters. That is why I am extremely grateful to the Legal Aid Board for having introduced proposals that will allow us to continue to provide legal aid for matters such as asylum, clinical negligence and all those other areas of civil concern.

We have taken on board the concerns about disposable income and, in doing so, we have dealt with the concerns of the Law Society of Scotland. However, unlike Ms Marra, we are prepared to ensure that the provisions apply not only to those who face civil proceedings, but to those who face criminal allegations. We want to ensure parity between the person who is a victim of domestic violence and the person who is charged and alleged to be the perpetrator of domestic violence.

Miss Goldie forgets that many people who face civil challenges also have the weight of the state facing them. People who have their children removed are in most cases dealt with under civil, not criminal, legal aid, as are people who face bankruptcy, insolvency or the loss of their house and all the matters that go with that.

Annabel Goldie: Yes, but part 2 of the bill is about people who are accused of crime and their right to be legally represented and how they achieve that.
Decision Time

17:30

The Deputy Presiding Officer (Elaine Smith): There is one question to be put as a result of today’s business. The question is, that motion S4M-05479, in the name of Kenny MacAskill, on the Scottish Civil Justice Council and Criminal Legal Assistance Bill, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chie (South Scotland) (SNP)
Brown, Keith (Glasgkannah and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Helen (Cowdenbeath) (Lab)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Easter Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against

Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, lain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

The Deputy Presiding Officer: The result of the division is: For 62, Against 53, Abstentions 0.
Motion agreed to,

That the Parliament agrees that the Scottish Civil Justice Council and Criminal Legal Assistance Bill be passed.

The Deputy Presiding Officer: That concludes decision time.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS PASSED]

CONTENTS

Section

PART 1
SCOTTISH CIVIL JUSTICE COUNCIL

Establishment
1 Establishment of the Scottish Civil Justice Council

Functions and powers
2 Functions of the Council
3 Powers of the Council
4 Court of Session to consider rules
5 Annual programme and report

Membership
6 Composition of the Council
7 Lord President appointment process
8 Tenure
9 Disqualification and removal from office
10 Expenses and remuneration

Operation
11 Chairing of the Council
12 Proceedings
13 Committees

General
14 Dissolution of existing rules councils
15 Modification of enactments
16 Interpretation of Part 1

PART 2
CRIMINAL LEGAL ASSISTANCE

Contributions in respect of automatically available criminal advice and assistance
17 Contributions in respect of automatically available criminal advice and assistance

Assistance by way of representation in relation to criminal matters
18 Availability of criminal assistance by way of representation
Clients’ contributions for criminal assistance by way of representation

Contributions for criminal legal aid

Contributions for appeals where appellant deceased

General

Regulations about contributions for criminal legal assistance
Consequential modifications

PART 3

GENERAL

Ancillary provision
Commencement
Short title
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS PASSED]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

PART 1

SCOTTISH CIVIL JUSTICE COUNCIL

Establishment

1 Establishment of the Scottish Civil Justice Council

There is to be a body to be known as the Scottish Civil Justice Council (“the Council”).

Functions and powers

2 Functions of the Council

(1) The functions of the Council 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.

(2) In carrying out its functions under this Act, the Council must have regard to—

(a) the principles in subsection (3), and
(b) any guidance issued by the Lord President.

(3) The principles are—

(a) the civil justice system should be fair, accessible and efficient,
(b) rules relating to practice and procedure should be as clear and easy to understand as possible,
(c) practice and procedure should, where appropriate, be similar in all civil courts, and
(d) methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

(4) For the purposes of this Part, “draft civil procedure rules” are draft rules which relate to a matter in subsection (5).

(5) Those matters are—
(a) any matter relating to a court within the remit of the Council which the Court of Session may regulate by act of sederunt,
(b) any matter relating to a court within the remit of the Council in anticipation of the Court of Session being given power to regulate the matter by act of sederunt, or
(c) any matter relating to a proposed court in anticipation of—
   (i) the court being established and added to the remit of the Council, and
   (ii) the Court of Session being given power to regulate the matter by act of sederunt.

(6) The courts within the remit of the Council are—
(a) the Court of Session, and
(b) the sheriff court.

3 Powers of the Council

(1) The Council may take such action as it considers necessary or desirable in pursuance of its functions.

(2) In particular, the Council may—
(a) have regard to proposals for legislative reform which may affect the civil justice system,
(b) have regard to the criminal justice system and its effects on the civil justice system,
(c) consult such persons as it considers appropriate,
(ea) make proposals for research into the civil justice system,
(f) provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system, and
(g) publish any recommendation it makes.

4 Court of Session to consider rules

(1) The Court of Session must consider any draft civil procedure rules submitted to it by the Council and may—
(a) approve the rules,
(b) approve the rules with such modifications as it considers appropriate, or
(c) reject the rules.

(2) Where the Court of Session approves draft civil procedure rules (with or without modification) it must embody the approved rules in an act of sederunt.

(3) Nothing in this Part affects the powers of the Court of Session to prepare or make rules which relate to a matter in section 2(5).

5 Annual programme and report

(1) The Council must prepare an annual plan setting out its objectives and priorities for each yearly period beginning on 1 April before the start of that period (“the programme”).

(2) The Council must prepare an annual report on its activities as soon as reasonably practicable after the end of each yearly period ending on 31 March (“the report”).

(3) The report must include a summary of the recommendations made (if any) by the Council during the period covered by the report.

(4) The Council must lay a copy of the programme and the report before the Scottish Parliament.

(5) In complying with the duty in subsection (4), the Council may combine the programme for the coming year with the report for the ending year.

6 Composition of the Council

(1) The Council is to have not more than 20 members and is to be comprised of—

(a) the Lord President,
(b) the Chief Executive of the Scottish Court Service,
(c) the principal officer of the Scottish Legal Aid Board,
(d) 1 member appointed by the Scottish Ministers under subsection (2),
(e) at least 4 judges (“judicial members”), including a minimum of—
   (i) 1 judge of the Court of Session, and
   (ii) 1 sheriff principal or sheriff,
(f) at least 2 practising advocates (“advocate members”),
(g) at least 2 practising solicitors (“solicitor members”),
(h) at least 2 persons (“consumer representative members”) who, between them, appear to the Lord President to have—
   (i) experience and knowledge of consumer affairs,
   (ii) knowledge of the non-commercial legal advice sector, and
   (iii) an awareness of the interests of litigants in the civil courts, and
(i) up to 6 other persons considered by the Lord President to be suitable to be members of the Council (“LP members”).
(2) The Scottish Ministers must appoint as a member a person who is a member of staff of the Scottish Government and whom they consider to be suitable to be a member of the Council.

(3) The Scottish Ministers may by order amend subsection (1) by substituting for the number of members (or the minimum number in a category of membership) for the time being specified there such other number as they think fit.

(4) Before making an order under subsection (3) the Scottish Ministers must consult the Lord President.

(5) The power to make an order under subsection (3) includes power to make such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

(6) But such power does not include power to modify the description of a category of membership described in subsection (1) or to add a category of membership.

(7) Orders under subsection (3) are subject to the affirmative procedure.

7 Lord President appointment process

(1) The Lord President must appoint persons to be members of the Council in respect of the categories of membership described in section 6(1)(e) to (i) and ensure that the number of members in each such category of membership is maintained at the required level.

(2) The Lord President must prepare and publish a statement of appointment practice setting out the process which the Lord President will follow for appointing—

(a) advocate members,
(b) solicitor members,
(c) consumer representative members, and
(d) LP members.

(2A) In preparing the statement of appointment practice the Lord President must have regard to the principles in subsection (2B).

(2B) The principles are—

(a) appointments to the Council should be made fairly and openly, and

(b) so far as reasonably practicable, all eligible persons should be afforded an opportunity to be considered for appointment.

(3) The statement of appointment practice must include a requirement for the Lord President to consult—

(a) the Faculty of Advocates before appointing an advocate member,
(b) the Council of the Law Society of Scotland before appointing a solicitor member,
(c) the Scottish Ministers before appointing—

(i) a consumer representative member, or

(ii) a LP member.
8 Tenure

(1) The Lord President, the Chief Executive of the Scottish Court Service and the principal officer of the Scottish Legal Aid Board are members of the Council by virtue of holding their respective offices.

(2) A member appointed by the Scottish Ministers holds office until such time as the Scottish Ministers appoint a replacement member.

(3) A judicial member holds office for a period of 3 years unless, prior to the expiry of that period, the Lord President replaces the member with another judicial member or requires the member to leave office.

(4) Any other member holds office for a period of 3 years.

(5) A member appointed under section 7(1) ceases to hold office—
   (a) at the end of a period of appointment,
   (b) upon giving written notice of resignation to the Lord President,
   (c) on becoming disqualified from holding office as a member or on being removed from such office (see section 9),
   (d) on ceasing to fall within the category of membership in respect of which the member was appointed.

(6) For the purposes of subsection (5)(d), a LP member ceases to fall within that category of membership where, in the opinion of the Lord President, the basis of the LP member’s appointment has materially changed.

(7) A person who is or has been a member of the Council may be reappointed (whether in respect of the same or a different category of membership) for further periods.

9 Disqualification and removal from office

(1) A person is disqualified from appointment under section 7(1) as a member of the Council, and from holding office as such a member, if the person is or becomes—
   (a) a member of the Scottish Parliament,
   (b) a member of the House of Commons,
   (c) a member of the European Parliament,
   (d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994,
   (e) a member of the Scottish Government, or
   (f) a Minister of the Crown.

(2) The Lord President may, by notice in writing, remove any member appointed under section 7(1) if satisfied that the member—
   (a) is unfit to be a member by reason of inability, neglect of duty or misbehaviour, or
   (b) is otherwise unsuitable to continue as a member.

(3) The Lord President must consult the Scottish Ministers before removing—
   (a) a consumer representative member, or
   (b) a LP member.
10 Expenses and remuneration

(1) The Scottish Court Service may pay such expenses as it thinks fit to—
(a) a member of the Council, and
(b) a person appointed under section 13(2) as a member of a committee of the Council.

(2) The Scottish Court Service may pay such remuneration as it thinks fit to—
(a) an advocate member,
(b) a solicitor member,
(c) a consumer representative member,
(d) a LP member, and
(e) a person (other than one mentioned in subsection (3)) appointed under section 13(2) as a member of a committee of the Council.

(3) Remuneration is not to be paid under subsection (2) to a person who is—
(a) a member of staff of the Scottish Legal Aid Board, or
(b) a member of staff of the Scottish Administration.

Operation

11 Chairing of the Council

(1) It is for the Lord President to determine who is to be chair of the Council.
(2) The only persons who may be chair are—
(a) the Lord President (but see also section 12(5)), or
(b) a judicial member holding the office of judge of the Court of Session.
(3) A person ceases to be chair when—
(a) if applicable, the judicial member ceases to be a member of the Council, or
(b) the Lord President determines that someone else is to be chair under subsection (1).
(4) Members of the Council must elect a member to act as deputy to the chair.

12 Proceedings

(1) The Lord President may determine the number of members required to constitute a quorum for meetings of the Council.
(2) The Lord President may determine different numbers of members to constitute a quorum for different purposes.
(3) The Council may otherwise determine—
(a) its own procedure, and
(b) the procedure of any committees established by it.
(4) The validity of any proceedings or actings of the Council is not affected by—
(a) any vacancy in the membership of the Council (even if that vacancy creates a
deficiency in one of the categories of membership),

(b) any defect in the appointment of a member of the Council,

(c) disqualification of any individual from holding office as a member of the Council.

5 (5) The Lord President may nominate the Lord Justice Clerk to attend and participate in
meetings of the Council on behalf of the Lord President (which participation includes,
where the Lord President is acting as chair under section 11(1), chairing the meeting).

6 (6) The Chief Executive of the Scottish Court Service may nominate a member of staff of
the Scottish Court Service to attend and participate in meetings of the Council on behalf
of the Chief Executive.

7 (7) The principal officer of the Scottish Legal Aid Board may nominate a member of staff
of the Scottish Legal Aid Board to attend and participate in meetings of the Council on behalf
of the principal officer.

8 (8) The Scottish Ministers may nominate another member of staff of the Scottish
Government who they consider would be suitable to be a member of the Council to
attend and participate on behalf of the member appointed by them under section 6(2).

13 Committees

(1) The Council may establish committees.

(2) A person who is not a member of the Council may be appointed to be a member of any
committee established by it.

General

14 Dissolution of existing rules councils

(1) The Court of Session Rules Council established under section 18 of the Administration
of Justice (Scotland) Act 1933 (c. 41) (and continued under section 8 of the Court of
Session Act 1988 (c. 36)) is dissolved.

25 (2) Section 8 of the Court of Session Act 1988 is repealed.

(3) The Sheriff Court Rules Council is dissolved.

(4) Sections 33 and 34 of the Sheriff Courts (Scotland) Act 1971 (c. 58) are repealed.

15 Modification of enactments

30 (1) In section 38(3) of the Legal Aid (Scotland) Act 1986 (c. 47) (rules of court), after
“consult” insert “the Scottish Civil Justice Council,”.

(2) In section 32(3) of the Sheriff Courts (Scotland) Act 1971 (c. 58) (power of Court of
Session to regulate civil procedure in sheriff court), for “Sheriff Court Rules Council
under section 34 of this Act” substitute “Scottish Civil Justice Council”.

35 (3) In section 62 of the Judiciary and Courts (Scotland) Act 2008 (asp 6) (administrative
support for other persons), in subsection (1)—

(a) after paragraph (d) insert—

“(ea) the Scottish Civil Justice Council,”, and

(b) paragraphs (e) and (g) are repealed.
16 **Interpretation of Part 1**

In this Part—

“advocate” means a member of the Faculty of Advocates,

“draft civil procedure rules” has the meaning given in section 2(4),

“solicitor” means a person qualified to practise as solicitor under section 4 of the Solicitors (Scotland) Act 1980 (c. 46),

“the Chief Executive of the Scottish Court Service” means the chief executive appointed under paragraph 14(1) of schedule 3 to the Judiciary and Courts (Scotland) Act 2008 (asp 6),

“the Lord Justice Clerk” means the Lord Justice Clerk of the Court of Session,

“the Lord President” means the Lord President of the Court of Session,

“the principal officer of the Scottish Legal Aid Board” means the principal officer appointed under paragraph 7(1) of Schedule 1 to the Legal Aid (Scotland) Act 1986 (c. 47).

15 **PART 2**

**CRIMINAL LEGAL ASSISTANCE**

Contribution in respect of automatically available criminal advice and assistance

17 **Contributions in respect of automatically available criminal advice and assistance**

In the Legal Aid (Scotland) Act 1986 (c. 47) (“the 1986 Act”), in section 8A (criminal advice and assistance: automatic availability in certain circumstances)—

(a) after subsection (1) insert—

“(1A) Regulations under subsection (1) may also provide that, in such circumstances as may be prescribed in the regulations, section 11(2) is not to apply in respect of advice and assistance made available to a relevant client.”,

(b) in subsection (2), for “subsection (1)” insert “subsections (1) and (1A)”.

18 **Availability of criminal assistance by way of representation**

(1) In section 9(2) of the 1986 Act (regulations may apply Part 2 to representation), after paragraph (dd), insert—

“(dda) provide that, in relation to assistance by way of representation which relates to such criminal proceedings as may be prescribed, sections 9A and 11A are to apply instead of sections 8 and 11;”.

(2) After section 9 of the 1986 Act insert—

“9A **Availability of specified criminal assistance by way of representation**

(1) Assistance by way of representation to which this section applies by virtue of regulations made under section 9(1) is to be available to a client where—

(a) the solicitor—
(i) has considered the financial circumstances of the client, and
(ii) is satisfied as to the criteria mentioned in subsection (2), or
(b) the Board has approved the provision of the assistance.

(2) The criteria are—
(a) the scheme of eligibility provides that the fees and outlays of the assistance cannot be met without undue hardship to the client or the dependants of the client, and
(b) any further criterion prescribed in pursuance of section 9(2)(c).

(3) The Board must establish a procedure for a client to apply to the Board for approval under subsection (1)(b) in circumstances where assistance by way of representation has not been made available under subsection (1)(a).

(4) For the purposes of this section, “scheme of eligibility” means a scheme approved under section 9B(3).

(5) This section is subject to any provision made in regulations under section 8A(1).

9B Scheme of eligibility

(1) The Board must, for the purposes of section 9A, prepare and publish a scheme of eligibility setting out financial circumstances in which the Board considers that paying the fees and outlays in respect of assistance by way of representation will result in undue hardship for a client or the dependants of a client.

(2) Before publishing a scheme of eligibility the Board must submit the scheme to the Scottish Ministers for approval.

(3) The Scottish Ministers may approve a scheme of eligibility submitted to them under subsection (2) with or without modification.

(4) The Scottish Ministers may at any time—
(a) approve a modification of an approved scheme of eligibility proposed by the Board or withdraw approval of such a scheme or modification,
(b) require the Board to prepare and publish a scheme under subsection (1).

(5) In preparing and publishing the scheme of eligibility under subsection (1) the Board must comply with any direction given by the Scottish Ministers.

(6) A scheme of eligibility may make different provision for different cases or classes of case.”.

19 Clients’ contributions for criminal assistance by way of representation

(1) In section 11(1) of the 1986 Act (clients’ contributions), after “below” insert “or, where applicable, section 11A”.

(2) The title of section 11 becomes “Clients’ contributions: general”.

(3) After section 11 insert—

“11A Clients’ contributions: specified criminal assistance by way of representation
(1) This section applies where—
   (a) assistance by way of representation has been made available to a client under section 9A(1) (“the assistance”), and
   (b) the client—
      (i) has disposable income of, or exceeding, £82 per week and is not (directly or indirectly) in receipt of any of the benefits mentioned in section 11(2)(b), or
      (ii) has disposable capital of, or exceeding, £750.

(2) The client is liable to pay a contribution in respect of the assistance provided of up to, but not in aggregate exceeding, such amount as may be prescribed by regulations made under section 33ZA(1).

(3) Except where regulations made under section 33ZA(1) otherwise provide—
   (a) in a case where the assistance is being provided—
      (i) by a solicitor employed by the Board by virtue of sections 26 and 27 or, as the case may be, section 28A, or
      (ii) by counsel instructed by such a solicitor,
      it is for the Board to determine the amount of and collect any contribution payable by the client under subsection (2), and
   (b) in any other case, it is for the solicitor to determine the amount of and collect any contribution payable by the client under subsection (2).

(4) A contribution collected by the solicitor is to be treated as payment of a fee or outlay properly chargeable (in accordance with section 33)."

Contributions for criminal legal aid

After section 25AB of the 1986 Act insert—

"25AC Legal aid: contributions

(1) A person (A) is not to be required to pay any sums in respect of criminal legal aid received in pursuance of this Part except in accordance with subsection (3) or section 25AA(5).

(2) Subsection (3) applies where—
   (a) the legal aid is not being provided in any of the circumstances described in section 22(1) or under section 23(1), and
   (b) A—
      (i) has disposable income of, or exceeding, £82 a week and is not (directly or indirectly) in receipt of any of the benefits mentioned in section 11(2)(b), or
      (ii) has disposable capital of, or exceeding, £750.

(3) A is liable to pay a contribution in respect of the criminal legal aid provided of up to, but not in aggregate exceeding, such amount as may be prescribed by regulations made under section 33ZA(1)."
(4) Except where regulations made under section 33ZA(1) otherwise provide—
   (a) in a case where the criminal legal aid is being provided—
      (i) in relation to solemn proceedings, proceedings relating to an appeal or proceedings relating to the Supreme Court,
      (ii) by a solicitor employed by the Board by virtue of sections 26 and 27 or, as the case may be, section 28A, or
      (iii) by counsel instructed by such a solicitor,
   it is for the Board to collect any contribution payable by A under subsection (3), and
   (b) in any other case, it is for the solicitor to collect any contribution payable by A under subsection (3).

(5) A contribution collected by the solicitor is to be treated as payment of a fee or outlay properly chargeable (in accordance with section 33).

(6) For the purposes of subsections (4)(b) and (5), “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.

25AD Payment of fees or outlays otherwise than through contributions

(1) Except in so far as regulations made by the Scottish Ministers under this section or section 33ZA(1) otherwise provide, any fees and outlays payable to the solicitor in respect of criminal legal aid are to be paid as follows—
   (a) first, out of any contribution payable by the person receiving the criminal legal aid in accordance with section 25AC(3),
   (b) second, in priority to all other debts, out of any expenses which by virtue of an order of a criminal court are payable to that person by any other person in respect of the matter in connection with which the criminal legal aid was given, and
   (c) third, by the Board out of the Fund, following receipt by it of a claim submitted by the solicitor.

(2) In subsection (1)—
   (a) the reference to fees and outlays is a reference to any fees and outlays properly chargeable (in accordance with section 33) in respect of criminal legal aid given to a person under this Part (but does not include the salary payable to a solicitor employed by the Board under sections 26 and 27 or section 28A)),
   (b) the reference to a contribution payable by the person receiving criminal legal aid does not include a contribution which it is for the Board to collect (whether under section 25AC(4)(a) or any regulations made under section 33ZA(1)).

(3) For the purposes of this section, “the solicitor” means the solicitor by whom any criminal legal aid is being provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it.”.
Contributions for appeals where appellant deceased

21 Contributions for appeals where appellant deceased

In section 25AA of the 1986 Act (legal aid in respect of appeals under section 303A of the Criminal Procedure (Scotland) Act 1995), after subsection (4) insert—

“(5) Where legal aid is being made available to an authorised person under this section (in either of the circumstances described in subsection (2) or (3)), the Board may require the payment of a contribution in respect of the expenses of the criminal legal aid of such amount as the Board may determine.

(6) The Board may require the contribution to be paid from the estate of the deceased person or by the authorised person.

(7) The amount determined by the Board under subsection (5) must not exceed the whole expenses of the criminal legal aid provided.

(8) The Board must take into account any contribution made by the deceased person prior to death in assessing the amount of contribution payable.

(9) It is for the Board to collect any contribution payable under subsection (5).”

General

22 Regulations about contributions for criminal legal assistance

After section 33 of the 1986 Act insert—

“33ZA Regulations about contributions for criminal legal assistance

(1) The Scottish Ministers may by regulations make provision in connection with the amount, determination and collection of any contribution payable under section 11 (in so far as relating to criminal matters) or section 11A, 25AA or 25AC.

(2) Regulations made under subsection (1) may, in particular—

(a) make provision permitting a lower contribution to be payable where otherwise the person liable to pay the contribution, or the dependants of such person, would suffer undue hardship,

(b) make provision for determining appropriate contributions where the person is in receipt of criminal legal assistance in respect of two or more distinct proceedings,

(c) except in relation to section 25AA, specify whether it is for the Board or the solicitor providing the assistance to determine the amount of, or collect, a contribution,

(d) specify how a person’s contributions are to be transferred or accounted for in relation to proceedings which are—

(i) instituted by way of summary complaint but which are subsequently dealt with under solemn procedure, or

(ii) instituted by way of indictment but which are subsequently dealt under summary procedure,

(e) make provision about the payment of contributions by instalments,
(f) make provision requiring the Board to make arrangements to provide to
solicitors a service of collecting contributions payable to solicitors on
their behalf.

(2A) Regulations made under subsection (1) containing provision made in pursuance
of subsection (2)(f) may include provision about the operation of the service,
including provision—

(a) regulating the arrangements for remitting to a solicitor the amount of a
contribution (or an instalment of a contribution) following its collection,

(b) enabling or requiring, or, where enabled or required, regulating, the
imposition by the Board of charges for the recovery of any reasonable
costs the Board incurs in connection with the provision of the service to
a solicitor.

(3) Regulations made under subsection (1) may provide for different provision in
relation to different cases or classes of case.

(4) In this section “the solicitor” means the solicitor by whom any criminal legal
aid is being provided or, where it is provided by counsel, the solicitor on whose
instruction counsel provides it.”.

23 Consequential modifications

(1) The 1986 Act is amended as follows.

(2) In section 4(3)(aa) (Scottish Legal Aid Fund), after “11” insert “, 11A, 25AA or 25AC”.

(3) In section 8 (availability of advice & assistance), after “8A(1)” insert “or 9(1)”.

(4) In section 8A(1) (criminal advice and assistance: automatic availability in certain
circumstances)—

(a) the words “the financial limits in section 8” become paragraph (a),

(b) after that paragraph insert “; or—

(b) the criteria mentioned in section 9A(2)”.

(5) In section 9(2) (regulations may apply Part 2 to representation), in paragraph (de), after
“11(2)” insert “or 11A”.

(6) In section 11 (clients’ contributions)—

(a) in subsection (1)—

(i) after “(2)” insert “or”,

(ii) the words “or (3)” are repealed,

(b) in subsection (2A)—

(i) for the words from “criminal” where it first occurs to “assistance” where it
third occurs substitute “advice and assistance (other than assistance by way
of representation to which section 9A applies)”;

(ii) after “27” insert “or section 28A”;

(c) in subsection (3A), after “27” insert “or section 28A”, and

(d) subsections (3) and (4) are repealed.
(6A) In section 12 (payment of fees and outlays otherwise than through clients’ contributions)—

(a) in subsection (3)(a), after “11(2)” insert “or, as the case may be, section 11A(2),” and

(b) after subsection (3), insert—

“(4) In subsection (3), the reference to an amount payable by the client does not include an amount which it is for the Board to collect (whether under section 11A(3) or any regulations made under section 33ZA(1)).”.

(6B) In section 33A (contracts for the provision of criminal legal assistance)—

(a) in subsection (5)(a), after “11(2)” insert “, 11A(2) or 25AC(3)”, and

(b) after subsection (5), insert—

“(5A) In subsection (5), the reference to an amount payable by the client does not include an amount which it is for the Board to collect (whether under section 11A(3), section 25AC(4)(a), or any regulations made under section 33ZA(1)).”.

(9) In section 36(2) (regulations)—

(a) in paragraph (b)—

(i) after “11(2),” insert “11A(1),”,

(ii) for “and 17(2)” substitute “, 17(2) and 25AC(2)”,

(iii) for “amount specified in section 10(2)” substitute “amounts specified in sections 10(2), 11A(1) and 25AC(2) and, in so far as relating to criminal matters, sections 8 and 11(2)”.

(10) In section 37(2) (parliamentary procedure) after “24(4)” insert “, 33ZA(1)”.

**PART 3**

**GENERAL**

24 **Ancillary provision**

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) The power of Scottish Ministers to make an order under subsection (1) includes power to make different provision for different purposes.

(3) An order under subsection (1) may modify this or any other enactment.

(4) Subject to subsection (5), an order under subsection (1) is subject to the negative procedure.

(5) An order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is subject to the affirmative procedure.

25 **Commencement**

(1) This Part comes into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under this section may include transitional, transitory or saving provision.

26 **Short title**

The short title of this Act is the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.
Scottish Civil Justice Council and Criminal Legal Assistance Bill
[AS PASSED]

An Act of the Scottish Parliament to establish the Scottish Civil Justice Council; to make provision about contributions in respect of criminal legal assistance; and for connected purposes.

Introduced by: Kenny MacAskill
On: 2 May 2012
Bill type: Government Bill