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