



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

### JUSTICE COMMITTEE

Tuesday 26 June 2012

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**JUSTICE COMMITTEE**  
**22<sup>nd</sup> Meeting 2012, Session 4**

**CONVENER**

\*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

**DEPUTY CONVENER**

\*Jenny Marra (North East Scotland) (Lab)

**COMMITTEE MEMBERS**

\*Roderick Campbell (North East Fife) (SNP)

\*John Finnie (Highlands and Islands) (SNP)

\*Colin Keir (Edinburgh Western) (SNP)

\*Alison McInnes (North East Scotland) (LD)

David McLetchie (Lothian) (Con)

\*Graeme Pearson (South Scotland) (Lab)

\*Humza Yousaf (Glasgow) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Gemma Crompton (Consumer Focus Scotland)

Professor Tom Mullen (University of Glasgow School of Law)

Professor Alan Paterson (University of Strathclyde School of Law)

Alan Rogerson (Forum of Scottish Claims Managers)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

Committee Room 6



## Scottish Parliament

### Justice Committee

*Tuesday 26 June 2012*

[The Convener *opened the meeting at 10:00*]

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Good morning and welcome to the 22nd meeting this year of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when switched to silent. I have received apologies from David McLetchie.

Item 1 is a decision on taking business in private. Does the committee agree to take in private item 4, which is consideration of our work programme?

**Members** *indicated agreement.*

## 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 sub-committees 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 have 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 should not be excluded from being council members as other stakeholders or non-practising lawyers. We do not suggest a limbo state in which

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.

## Subordinate Legislation

### **Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Miscellaneous) 2012 (SSI 2012/187)**

10:52

**The Convener:** Item 3 is consideration of one statutory instrument that is not subject to any parliamentary procedure. The Subordinate Legislation Committee has not drawn the Parliament's attention to the act of adjournal on any grounds in its remit. As members have no comments, are we content to make no recommendation on the act of adjournal?

**Members** *indicated agreement.*

10:53

*Meeting continued in private until 11:11.*





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