



# **Consumer Focus Scotland's evidence to the Justice Committee on the Scottish Government's Draft Budget 2012-13 and Spending Review 2011**

**October 2011**

# About Consumer Focus Scotland

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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 (SCC), have campaigned for many years for improvements to be made to the civil justice system to ensure it better meets the needs of its users. We therefore welcome the opportunity to submit evidence to the Justice Committee's call for written evidence on the Draft Budget 2012-13 and Spending Review 2011. Our comments are limited to the questions on the courts and legal aid, particularly as they relate to civil justice.

## General Comments

2. An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. The costs of doing so should be affordable, while the processes available should be both appropriate and free of undue delay. While the significant reductions in central and local government finances rightly require detailed discussion about how such challenges might be met, it must not be forgotten that the current economic climate has a real practical impact on individuals, leading them to experience more, and more acute, problems. The key challenge is to ensure that consumers' ability to access appropriate advice services and methods of dispute resolution is not eroded as a result of financial pressures. The needs of consumers should be treated as paramount when considering how to meet the challenges of budget reductions.
3. While traditional responses to a harsh economic climate might be to either cut costs or cut supply, the challenge today is to identify ways in which we can cut the demand for services by addressing people's needs at an earlier stage in creative ways. We support the view of the Civil Justice Advisory Group (CJAG) chaired by the Right Honourable Lord Coulsfield, set up by the SCC and reconvened in 2010 by Consumer Focus Scotland, that the courts should be a remedy of last resort.<sup>1</sup> We believe there is a need for more preventative intervention in relation to civil problems, to ensure disputes are avoided wherever possible, or resolved as early as possible, in the most effective way.
4. We therefore support the Scottish Government's recently stated intention to build upon one of the key CJAG recommendations that the civil justice system be designed around a 'triage' approach to help inform and guide individuals in identifying the most appropriate route to deal with their problem(s).<sup>2</sup> Reforming the civil justice system in a way which encourages and facilitates the resolution of problems as early as possible and in the most appropriate way is a key means of ensuring that limited resources are invested in the most efficient and effective way.

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<sup>1</sup> Scottish Consumer Council (2005) *The Civil Justice System in Scotland – a case for review?*, Glasgow: Scottish Consumer Council; 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

<sup>2</sup> Scottish Government (2011) *A Sustainable Future for Legal Aid*, Edinburgh: Scottish Government

## Answers to specific questions

### **What impact will the proposed funding restrictions have on efficient and prompt handling of both civil and criminal cases?**

5. As both the 2005 CJAG report and the report of the Scottish civil courts review<sup>3</sup> made clear, there are significant concerns about the extent to which the demand for court resources to deal with criminal cases impacts on civil court business. There are of course good reasons why criminal business often takes precedence, as there are strict time limits within which cases must be heard in court. Nevertheless, such demands often lead to a lack of judges to deal with civil cases, delays in cases being heard and cancellation of civil proofs. This leads to increased costs to parties, as well as to the public purse. While the recommendations of the Scottish civil courts review were designed to address some of these issues, these reforms will be long-term in their implementation. Our concern is therefore that civil cases may be disproportionately impacted by the current budget reductions.

### **In what ways could legal aid rules be changed to fairly reflect more limited resources (e.g. through more contributions or restricting the types of cases covered) and promote efficiency within the justice system?**

6. Publicly funded legal advice, information and representation are essential public services for those who experience civil justice problems. Ensuring the availability of good quality, accessible advice is a key means of promoting efficiency within the justice system. Effective intervention by an adviser at an early stage will often be sufficient to resolve a dispute before it escalates into a more serious problem, requiring more costly and time consuming dispute resolution processes. In addition to the benefits it can bring for individuals, continued funding for advice provision is a vital aspect of preventative spending, saving money not just within the justice system, but also within other public sector budgets such as health and housing.<sup>4</sup> We have therefore welcomed the Scottish Government's efforts to ensure availability of advice, such as increasing the eligibility limit for civil legal aid and providing funding to help people with problems associated with the economic downturn.
7. While the draft budget and spending review contains limited detail about budgetary priorities for legal aid, more information is set out in the recent Scottish Government publication *A Sustainable Future for Legal Aid*.<sup>5</sup> This includes a number of suggestions about how required cost savings could be achieved, for example, by changing the eligibility assessment for legal aid, moving towards legal aid being seen as a funder of 'last resort,' and considering the use of contracting for civil cases.
8. We agree that in light of the scale of budget cuts, there is a need to examine whether the legal aid system is operating as cost-effectively and efficiently as possible. While we hope that the impact of changes on consumers will be minimised as much as possible, it is unlikely that all consumers will escape the

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<sup>3</sup> Scottish Civil Courts Review (2009) *Report of the Scottish Civil Courts Review*, Edinburgh: Scottish Civil Courts Review

<sup>4</sup> Consumer Focus Scotland (2011) *Written Evidence to the Finance Committee on the Draft Budget 2012-13: Preventative Spending*

<sup>5</sup> Scottish Government (2011) *A Sustainable Future for Legal Aid*, Edinburgh: Scottish Government

impact of these savings. We therefore agree that there is a need to focus legal aid on those who need it most, as stated in *A Sustainable Future for Legal Aid*. It is important that alternative means of funding are explored. For example, we believe that other forms of funding, such as legal expenses insurance (LEI) or speculative fee arrangements have the potential to increase some people's access to justice. However, such funding arrangements won't always be available or appropriate for all consumers. It is therefore important that the feasibility of any reforms to the availability of civil legal aid be fully considered before such changes are implemented. Recent research into the legal expenses market by Consumer Focus, for example, found evidence of fragmentation in the LEI market, with different insurers covering different types of disputes, and to different values.<sup>6</sup> This research also found that consumers (in England and Wales) had low levels of awareness of LEI and that many regarded such expenditure as unnecessary during the recession.

9. Legal aid will therefore remain a necessary and essential form of funding for many consumers, particularly those on lower incomes, for whom alternative means of funding may not be an option. We would have serious concerns about the impact on some consumers' access to justice if a decision were made to remove certain categories of work from the scope of legal aid. The Scottish Government recognises the damaging effect that such a change would have, not only on access to justice, but also to other parts of the justice system and wider society,<sup>7</sup> and we hope this signifies that such a change is not currently under consideration. It would be strongly preferable for appropriate efficiencies to be found in the operation of the current system.
10. We believe that further examining how the legal aid system currently operates could lead to improvements for consumers. One difficulty with the current system is that it concentrates on traditional areas of practice, such as family law and reparation, provided by private practice solicitors, and is supplier-led. To date, this has meant that there has not been a strategic approach to the provision of publicly funded legal services. This has resulted in patchy service provision, and consequently, unmet legal need in some areas, in terms of both geography and subject matter. We believe the recognition of the need for better targeting of resources may lead to a more client-led legal aid system.

### **How will funding cuts impact on access to justice and will any groups be particularly affected?**

11. Prior to the April 2009 increase to the civil legal aid eligibility limit, there was evidence that those on middle incomes felt most disadvantaged in obtaining legal advice in relation to both those who were better off and those on low incomes.<sup>8</sup> This led to concerns that many people on moderate incomes were dissuaded from pursuing cases through their perceived inability to meet potential expenses. It is possible that those on middle incomes will be most vulnerable to the impacts of any changes to legal aid availability, particularly as substantial contributions can already be required at the higher end of the

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<sup>6</sup> Consumer Focus (2011) *In case of emergency: consumer analysis of legal expenses insurance*, London: Consumer Focus

<sup>7</sup> Scottish Government (2011) *A Sustainable Future for Legal Aid*, Edinburgh: Scottish Government

<sup>8</sup> Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing

eligibility limit. It is essential that the impact of any reforms on consumers' access to justice is fully considered before implementation.

12. We also have concerns about the suggestion in the draft budget that one means of reducing the court budget might be to increase the level of court fees. It is clear from research that cost, and fear of cost, is a major deterrent to many people in pursuing a claim.<sup>9</sup> Those who are not eligible for legal aid, and who do not have trade union backing or legal expenses insurance, must generally pay the costs involved in resolving their disputes from their own pockets. In 2008, the SCC successfully campaigned to limit court fee rises which it considered disproportionate. We have concerns that if court fees were disproportionately increased to mitigate budget reductions, this might deter individual litigants from pursuing or defending claims in court.
13. While we accept that litigants who can afford to do so should be required to pay towards the cost of their court case, we do not support the Scottish Government policy of moving towards 'full cost recovery' through civil court fees. The public subsidy for court services is currently around 20%, but the Scottish Government intends to proceed to a policy of 100% recovery.<sup>10</sup> The civil justice system provides a public service and we believe that government has some responsibility to finance the court structures through which disputes can be resolved; individual litigants should not be expected to pay for the entire cost of providing the judge and running the courts. The policy of full cost recovery does not apply to the criminal courts or tribunals.

### **What is the future for in-court advice services?**

14. In-court advice services provide a very valuable service to unrepresented parties. We have long supported their continuation and expansion: our predecessor body, the SCC, was responsible, together with Citizens Advice Scotland, for establishing the first in-court advice service in Edinburgh sheriff court in 1997. It is critical that services exist to provide consumers with access to advice at any stage in the process when they may require it. While of course those with disputes should be encouraged to seek advice at an early stage, for many people this is not the reality. For those people, in-court advice services provide an important safety net.
15. There is strong evidence that in-court advice services, where they exist, are viewed as a great success by all involved, including clients, sheriffs, solicitors, advice agencies and court staff.<sup>11</sup> The provision of in-court advice was strongly supported by those recently consulted by the CJAG, who saw it as offering a valuable service. The CJAG report supported the civil courts review recommendation that in-court advice services be extended and developed to be more widely available.

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<sup>9</sup> Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing

<sup>10</sup> See for example, the Scottish Government's response to the Scottish Parliament's Public Petition Committee, Petition PE1303 dated 16 July 2010

<sup>11</sup> Samuel, E. (1998) *Supporting Court Users: the Pilot In-Court Advice Project in Edinburgh Sheriff Court*, Edinburgh: Scottish Office; Samuel, E. (2002) *Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2*, Edinburgh: Scottish Executive; Morris, Richards et al (2005) *Uniquely Placed: Evaluation of the In-Court Advice Pilots (Phase 1)*, Edinburgh: Scottish Executive

16. We accept that financial and practical considerations make it unlikely that in-court advisers could be permanently based within all courts; more flexible solutions may need to be found. It might be more feasible for in-court advisers to cover a range of courts, for example, provided court programming was appropriately coordinated. The Scottish Legal Aid Board has recently granted funded a range of different advice models, and is currently evaluating this programme of work. This may be useful in identifying appropriate models for future development of in-court advice. Given the successful relationship between the in-court advice and mediation services in Edinburgh sheriff court,<sup>12</sup> the Scottish Government should also consider the potential role of in-court advisers as part of its plans to consider how to better build the use of alternative dispute resolution into the court system.<sup>13</sup>

### **Will cuts to the SCS budget lead to staff redundancies and/or the closure of courts?**

17. We cannot comment on whether the proposed cuts in the SCS budget will lead to staff redundancies and/or the closure of courts. It is important, however, that any such consequences do not have a negative impact on members of the public who may need to use the courts. It is vital that institutions for resolving disputes are easily accessible to those who need to use them. The need for local dispute resolution mechanisms is likely to be particularly acute in rural areas, where distances can be large and public transport may not be easily available. It is important that steps are taken to ensure that local communities are involved in discussions on any proposed changes to the services provided in their area.

18. Some of the challenges facing the courts may be addressed through providing alternative means of accessing services. For example, as part of its Making Justice Work programme, the Scottish Government is exploring options for making greater use of IT, such as videoconferencing. It may also be appropriate to consider whether use could be made of alternative premises. The CJAG report, in recommending a clearer separation between civil and criminal business in the courts, suggested that there may be potential to develop closer links between some civil court business and tribunals, including use of shared premises. We therefore believe that further examination of the judicial estate would be appropriate in the current financial climate.

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<sup>12</sup> Samuel, E. (2002) *Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2*, Edinburgh: Scottish Executive

<sup>13</sup> Scottish Government (2011) *A Sustainable Future for Legal Aid*, Edinburgh: Scottish Government

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