Dear Ms Gibson,

Making Justice Work - Courts Reform (Scotland) Bill Consultation

I welcome the opportunity to comment on the Scottish Government's proposals for a Courts Reform (Scotland) Bill.

General comment

Recent and present reforms to the justice landscape include major initiatives such as Lord Gill’s Scottish Civil Courts Review, significant changes to legal aid including children’s legal aid, Sheriff Principal Taylor’s Review of Expenses and Funding of Civil Litigation in Scotland, Tribunals Reform, Scottish Court Service plans for court closures, and various other strands.

It is not clear whether any systematic assessment of these major reforms on children and young people has taken place, for example in the form of a Children’s Rights Impact Assessment\(^1\) (CRIA), taking account of the fact that children and young people may be directly affected as parties to litigation\(^2\) or as witnesses (including as complainers/victims), or indirectly\(^3\).

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\(^1\) See, for example, Paton & Munro (2006), *Children’s Rights Impact Assessment: The SCCYP Model*, Edinburgh: Scotland’s Commissioner for Children and Young People; available on www.sccyp.org.uk.

\(^2\) For example, children’s hearings proofs and appeals, various other civil proceedings, Judicial Review, etc.

\(^3\) For example, in family actions including those relating to contact, s. 11 orders, children’s hearings proofs and appeals, interdicts e.g. in domestic abuse cases, or as third parties affected by litigation involving their parents, again including domestic abuse-related proceedings, divorce/dissolution of Civil Partnership, etc.
In light of the magnitude and reach of recent, current and forthcoming reforms to civil justice in Scotland, an assessment of the cumulative impact of those myriad strands of reform, happening as they do in the context of cuts to public services, is crucial. This would appear to be imperative, if unintended consequences such as unjustifiable adverse consequences on access to justice are to be avoided and all of the ‘eight benefits’ of the Scottish Government’s Making Justice Work programme are to be achieved (e.g. ‘affordable access’, ‘improved user experience’, ‘fair and equitable justice’).

There will be examples where one reform measure on its own seems innocent in terms of its impact on access to justice for children and families, but several measures combined may have a significant adverse impact; consider for example the following set of (fictional, but realistic) circumstances which make reference to recent and current reform to civil justice:

- Public authorities under significant financial strain are more likely to make decisions which adversely affect the most vulnerable, and may “cut corners”.
- Service users may perceive such decisions as unjust or unfair; local advice services may have been cut or overloaded, impeding access to support.
- Access to legal advice and assistance may be difficult, especially where courts are marked for closure, business moved and local legal services follow.
- There may be difficulties obtaining legal aid, and specific problems may occur, for example: where a child’s interest diverges from their parent’s, whose income is taken into account in establishing the child’s eligibility for legal aid; where the appropriate remedy is Judicial Review and appropriate representation is unavailable.
- Restrictive time limits currently proposed (see comments below) may by that point restrict or preclude the scope for challenge to the authority’s decision.

I would therefore recommend that the Scottish Government carry out and publish an assessment of the cumulative impact of civil justice reforms, taking particular account of the direct and indirect effects on children and young people.

Summary Sheriffs

The Scottish Government’s stated intention is that the proposals for a new third tier of the judiciary be taken to be a new type of judge rather than a ‘downgrading’ of justice. However, if one considers in detail the rationale provided across the document for the “pushing down” of ‘low value’ business to the lower tiers of the judiciary, it is possible to see how the concerns relating to ‘downgrading’ may have arisen. As the qualifications and experience required for appointment as summary sheriff are identical to those currently required of candidates for shrieval office, the question may not be one of a ‘downgraded’ bench, but of certain types of civil business being perceived as being ‘downgraded’ by redistribution to the new, lower tier courts.

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4 para 70f.
5 Especially at paras 34-44.
Whilst the consultation document highlights the benefits of the proposals envisaged for the existing levels of the judiciary, it is not clear at this stage what benefits, if any, the proposed reforms will have for the people whose cases will be heard by the new summary sheriffs. The type of business envisaged to transfer, which includes children’s hearings referrals, family cases (e.g. s. 11 orders, contact, etc) and actions relating to domestic abuse (such as interdicts), are certainly not considered ‘routine’ or ‘low value’ by the people affected, and are often anything but ‘straightforward’\(^6\). I would further hope that sheriffs do not generally view these important types of cases as a ‘burden’ from which they seek to be ‘relieved’.

In my view, the benefits of the proposed redistribution of business, including that which significantly affects children and young people, for the users of the courts require further exploration and explanation before any new judicial structure is put in place.

**Judicial Review**

Judicial Review (JR) is a central safeguard of the rule of law in our constitutional and governance framework\(^7\). Any limitation or curtailment of access to the Court of Session’s supervisory jurisdiction should therefore be considered with caution.

I welcomed the recent reformulation of the test for standing in ‘public law’ JRs as one concerned with ‘sufficient standing’\(^8\), as this should remove a long-standing barrier to access to JR in Scotland. As such, it may benefit children and young people through increased access to the courts and the greater scope for public interest litigation on children’s rights issues.

The Commissioner’s office is affected by any changes to JR in two distinct ways. As noted above, JR may be a vehicle for progress in advancing the legal protection of the human rights of children and young people in Scotland. Also, as a public authority created by statute, this office is itself potentially subject to JR under the Human Rights Act 1998 and the common law grounds of ‘illegality’, ‘irrationality’ and ‘procedural impropriety’\(^9\).

Against that background, I would submit the following comments on the two main proposals relating to JR in the draft bill.

**Time bar**

Firstly, the draft bill would introduce a three-month time limit for petitions for JR, with some discretion on the part of the court to extend this where appropriate.

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\(^6\) Draft Explanatory Notes, para 69.

\(^7\) *R (Cart) v Upper Tribunal* [2011] UKSC 2, per Lord Dyson at 122.

\(^8\) *Axa General Insurance Ltd and Others v The Lord Advocate and Others* [2011] UKSC 46, per Lord Hope at 62, Lord Reed at 171.

\(^9\) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, per Lord Diplock at 410.
One key reason given for this change in the Gill Review, which is restated in the Scottish Government’s consultation document, is that

‘the interests of good administration, and the right of third parties to rely on administrative decisions once they have been made, require that an affected person wishing to challenge an administrative decision should do so at the earliest opportunity.’

While I am in agreement with it, this proposition requires to be balanced against the realities facing would-be petitioners in the context of cuts to services and the effects (including cumulative effects) of recent justice reforms, as sketched above. Particularly for vulnerable people who are hardest-hit by cuts to services and benefits, three months is not a long time to discover and appreciate the full impact of an adverse decision, realise that it may be challengeable, navigate the sometimes convoluted mechanisms to raise concerns and complaints, obtain appropriate legal advice and – with increasing difficulty – legal aid.

It must therefore be questioned whether the significant shift in policy from there being no time bar at all in JR cases to a rather short one of three months is appropriate, noting also that in the Gill Review’s consultation the introduction of a time limit was backed by only ‘just over 20% of the respondents on this issue’. Commenting on recent (admittedly much more draconian) proposals to restrict JR in England and Wales, The Bingham Centre for the Rule of Law described the existing 3-month time limit there as ‘already very tight’. Leading researchers on JR in England & Wales expressed concern that stricter time limits may lead to an increase in premature claims and impede early settlement.

On balance, and in light of the general comments above, it is my view that the proposed three-months time bar would be too restrictive. If a time bar is to be introduced, a longer period would strike a fairer balance.

Permission stage

Secondly, the draft bill would introduce a requirement to obtain permission to proceed with a petition for JR, in a shift away from the current process by which a petitioner proceeds straight to a hearing for first orders to be granted. The Gill Review’s rationale for this proposal is that a permission stage has been shown to work well in England & Wales, where it is credited with ‘filtering out unmeritorious applications’ and in aiding early resolution.
While this recommendation has advantages, other findings of the research relied upon by the Gill Review should inform the design and implementation of any permission process that is introduced. Notably, that research found large variation in permission rates amongst individual judges in England and Wales, ranging from 11% to 46% of applications\(^\text{15}\). Further, permission rates are reportedly twice as high in oral hearings than they are in a purely paper-based process\(^\text{16}\). Finally, if the aim of the proposed reform is the more appropriate use of judicial resources, the Bingham Centre’s point regarding inappropriate resistance by respondents at permission stage will be relevant, and it would be appropriate to explore whether measures should also be taken to curb such behaviour rather than focus exclusively on petitioners\(^\text{17}\).

**Alternative Dispute Resolution (ADR)**

The draft bill makes no provision in relation to ADR, although the increased use of ADR is discussed in positive terms in the consultation document and a question put relating to promotion of ADR through court rules. Close attention should be paid to the suitability of ADR, and particular methods of ADR, for certain types of cases. In particular, there are known concerns about ADR’s potential to reflect unchallenged the unequal power relations which are at the centre of domestic abuse, thereby adversely affecting the party (or parties) experiencing abuse and/including any children.

I trust the comments above are of help to the Scottish Government. Please do not hesitate to contact Nico Juetten at my office (0131 558 3733 or nico.juetten@sccyp.org.uk) in the first instance if we can be of further assistance.

With best wishes,

\[\text{Tam Baillie}
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Scotland’s Commissioner for Children and Young People

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\(^\text{16}\) Bondy & Sunkin (2013), cited above.

\(^\text{17}\) Bingham Centre (2013), cited above, para 63.