

Speaking Note for the Law in Scotland Conference 8-9 May 2009

Review of the Civil Courts

I am honoured to be invited to talk about the Scottish Civil Courts Review to a gathering of lawyers who will be most directly affected by the outcome. We began our work in April 2007 and will soon submit our Report to the Cabinet Secretary for Justice.

I have been saying for years that such a review was long overdue and that it is important that the outcome should be change that is significant and lasting. This is not the time for tinkering with the system. We have had that for a century or more. But it is not the time to cause upheaval by introducing changes that may require to be amended within a short time. This review is an opportunity to make a lasting difference.

We have carried out a wide-ranging examination of the structure of the courts, their jurisdictions and their procedures. We have amassed a body of information never before collected in one source. We have received evidence from respondents to the consultation paper, from statistical data compiled by SCS and from comparative studies of other jurisdictions. We have also held numerous meetings with interested bodies and individuals.

I am grateful to all those who have helped us in our study. Over 200 individuals and organisations gave us their views and ideas. We may not know what the answers are but we certainly know what the problems are.

Our work has also been informed by what is done in other jurisdictions. The difficulties which we have identified are often reflected in work being done elsewhere. That does not mean that there are ready made solutions to be found elsewhere. Systems are different in other jurisdictions, with practical and cultural implications for every change proposed. Decisions taken reflect a wide range of influences which will be different in every country. It has nonetheless been useful to learn what we can from others' work.

The responses to the consultation paper were clear on the areas where reform is needed. It was reassuring that the issues that we had provisionally identified seemed to be on the right lines. We have been surprised by some of the points being made and experiences related to us. We have heard from legal practitioners at an individual and a representative level; members of the judiciary, court users; advisory bodies; and many more. There are relatively few matters where a possible solution would be universally acclaimed; but there are a few areas where there is strong consensus. So while we will not please some people, I hope that we will not antagonise everybody.

The civil justice system in Scotland is a Victorian model that had survived by means of periodic piecemeal reforms. But in substance its structure and procedures are those of a century and a half ago.

It is failing the litigant and it is failing society. It is essential that we should have a system that has disputes resolved at a judicial level that is appropriate to their degree of importance and that disputes should be dealt with expeditiously and efficiently and without unnecessary or unreasonable cost. That means that the judicial structure should be based on a proper hierarchy of courts and that the procedures should be appropriate to the nature and the importance of the case, in terms of time and cost.

Scottish civil justice fails on all of these counts. Its delays are notorious. It costs deter litigants whose claims may be well-founded. Its procedures cause frustration and obstruct rather than facilitate the achievement of justice.

Unless there is major reform and soon, individual litigants will be prevented from securing their rights, commercial litigants will continue to look elsewhere for a forum for their claims, public confidence in the judicial system will be further eroded, Scotland's economic development will be hindered, and Scots law will atrophy as an independent legal system.

The conclusions of our Review are as stark as that.

You may think that the profession has enough to contend with without also having a civil courts review as well. I sympathise with that view. In over 40 years in the profession, I have never experienced times like these. But there is never an ideal time for change. So I urge you to be receptive to the conclusions of a lawyer-led programme for reform, if only for fear of something worse.

If you were to sit down and devise a civil justice system for the 21st century, it would be nothing like what we have. But the Review is not a clean-sheet exercise. We have to practise the art of the possible. What that points to is:

- a) in the immediate future, swift and properly-resourced reforms that will check the system's present drift; and
- b) in the longer term, the establishment of a mechanism by which the system will constantly adapt and renew itself rather than lurch into piecemeal reforms every two or three decades.

This is a once-in-a-generation opportunity. I think that the Scottish Ministers recognise that. What we will offer will be an integrated set of proposals that will give the best prospect of change if adopted as a package.

It would be regrettable if only the easy gains were to be cherry-picked to give the semblance rather than the reality of reform.

It would be a breach of protocol, and a discourtesy to the Cabinet Secretary, if I were to discuss the conclusions of our Review. But I think that it may help to set the

context in which our report will be drafted if I identify the main topics and let you know the way the wind was blowing in our consultation exercise.

The consultation process and the research undertaken by the Review Team suggest that the issues fall into three broad categories: access to justice, delay, and inefficiency.

Access to Justice

Fundamentally this is about the cost of accessing the civil courts - both real and perceived.

Looking at the position in other countries, I think that we are fortunate in Scotland to have a system of legal aid which is not capped. The system itself does not fall within the remit of the Review; but we welcome the recent increase to the upper disposable income threshold introduced by the Scottish Government. There remain concerns however about whether the civil court system in respect of costs generally supports access to justice in all circumstances.

For example, although speculative fee arrangements of various kinds are now common in reparation actions, there are many other types of action that are unlikely to be funded on this basis; for example, family actions. In complex reparation actions, such as claims in relation to medical negligence, it may be difficult for

claimants to find a solicitor willing to act on a speculative basis and after the event insurance premiums may be prohibitively expensive.

Many respondents drew attention to the unreasonable cost of litigation and to the fact that, where speculative fee arrangements were not available, many potential litigants may not be able to afford to assert their rights. There is also the deterrent effect of the risk of an adverse finding in expenses if the action fails.

The shortfall between party and party expenses and agent and client expenses was also referred to, in particular, in relation to commercial litigation in which it was submitted that recovery rates are much lower than in England and Wales and that this operates as a disincentive to litigating in Scotland. In England and Wales, the average recovery rate is also the subject of complaint.

Concerns were also expressed about the system of taxing judicial accounts of expenses.

Delay

We have not been surprised to find that there is a strong feeling that the pressure of criminal business, in terms of volume and the priority assigned to it, is having a detrimental impact on civil business in both the Court of Session and the sheriff court. Lengthy waiting periods for proofs and the deferment or interruption of cases to make way for criminal business all cause concern and add to expense.

There have been other causes of delays. For example, respondents complained of delays in issuing judgments in the Court of Session. Our attention has been drawn to numerous cases in which the delay was excessive. We were surprised by the depth of feeling on this matter.

This is important for everyone. For those litigants in the commercial field who have a choice of where to litigate, the prospect of delay can outweigh the competitive advantage which Scottish solicitors are able to offer. A number of solicitors practising in the commercial field have said that they had lost business as a result of the length of time it takes for cases to be resolved, particularly if there is an appeal. That is not good for Scotland.

Inefficiency

In the context of remedying inefficiency the areas that require to be considered urgently are (a) the appropriate use of judicial resources, including part time resources; (b) specialisation; (c) case management; and (4) IT.

In response to questions regarding the allocation of business between the Court of Session and the sheriff court, many respondents favoured the *status quo*; but many others suggested that there is too much low value litigation in the Court of Session, and the sheriff court too, and that this has an adverse effect on the expeditious

conduct of other business. It was suggested that it was not a cost effective or appropriate use of judicial resources.

Many respondents were in favour of the creation of a new level of judicial officer to deal with lower value cases and were generally of the view that this should be a professional post.

We also received representations on the use made of temporary or part time resources in the Court of Session and the sheriff court. Part time appointments were conceived to provide flexibility in dealing with emergencies and unexpected peaks of work. The reality is that they form a permanent and integral part of the court programme in both the Court of Session and the sheriff court. The programme could not be delivered without them. Respondents have complained that part time justice may lead to inconsistent decision making and poor case management. They have also expressed concern about the appropriateness of part time judges and sheriffs sitting in courts in which they commonly practise. This may not be good for the appearance of things.

There was considerable support from practitioners and court users for a greater degree of specialisation, particularly at sheriff court level, and for a more proactive system of case management. The way in which court programmes are structured at present and the demands of summary criminal business make it difficult to ring-fence civil business, or to provide a degree of specialisation or continuity, in all but the largest courts. Family practitioners, in particular, were concerned about a lack of

continuity and consistency in decision making in cases involving children. Those involved in referrals from children's hearings and adoptions were concerned about the problems of allocating hearings of sufficient length for complex cases. As a result hearings took place for a day or two at a time over extended periods, often of several months or more. This cannot be right in an area of law in which the child's best interests are a paramount consideration.

The proposal, canvassed in the consultation paper, to establish regional civil justice centres where specialist sheriffs would be based did not attract much support. It was felt that this would be expensive to set up. There was a strong view that family cases should be dealt with locally in view of the need for parties to attend child welfare hearings and the fact that urgent interim orders are often sought in such cases. Concerns were expressed about access to justice if parties were required to incur the cost of travel to a regional centre rather than have their case heard in the local sheriff court.

Housing was another area where it was thought that a greater degree of specialisation was desirable. A number of respondents favoured the establishment of a specialist housing tribunal or an expansion of the jurisdiction and remit of the Private Rented Housing Panel. Others, including those representing the interests of tenants, thought that housing cases raise important and complex issues of law and should remain within the sheriff court. There was, however, considerable support for improving the procedure in housing cases, placing greater emphasis on

alternative dispute resolution, and exploring alternative methods of supervising payment arrangements.

On the issue of mediation and ADR, respondents who had experience of court proceedings as litigants, and organisations representing the interests of litigants, tended to have a more positive attitude towards mediation and other forms of dispute resolution than respondents from the legal profession. This suggests that litigation is not currently providing all that people want in terms of dispute resolution processes and that there is a desire for the civil justice system to provide a broader range of options.

There was a fair degree of consensus that mediation was not appropriate in cases where there was a need for a judicial precedent or a declaration of legal rights, but there was no evidence of concern that greater use of mediation might lead to “loss of law” or harm the development of Scots law. On the contrary, some respondents suggested that one of the benefits of greater use of mediation would be that court resources would be freed up to deal more expeditiously with cases that genuinely need judicial determination.

There was scarcely any support for the idea that mediation should be a compulsory first step, as a condition precedent to the raising of a litigation.

There has been considerable support for the proactive case management model adopted in the commercial court in the Court of Session and in the commercial court,

the personal injury pilot and the family court in Glasgow sheriff court. There was general agreement that the impact of the reforms to the ordinary cause rules in the sheriff court had lessened with time and that options hearings had become a formality where the principal agents did not appear personally. This leads to drift and multiple continuations. There was support in principle for a more actively case managed system, although views differed as to how this could be achieved if there was no continuity or "case ownership" by the judiciary.

Complaints were also made about the use, for tactical reasons, of over elaborate and technical pleadings; and late disclosure of documents or evidence. There was particular concern that procedures are not sufficiently geared towards efficient use of court time.

The majority of respondents supported the proposition that greater use should be made of IT. In particular, there was considerable support for electronic filing and transmission of documents to the court; for the creation of electronic processes or case files; for the use of telephone or videoconferencing facilities for procedural and, where appropriate, substantive hearings; for the ability to file and process certain types of claim on-line; for the digital recording of evidence; and for advice and self help guides to be available on-line to assist those without legal representation.

Scotland is far behind many other jurisdictions in its use of IT. There are obvious resource problems, but even if IT is a medium to long term project, there are quick

and easy gains to be made in the introduction of more efficient, streamlined case management systems.

Also within the concept of inefficiency is the question of the management of party litigants in the civil courts. It was clear from our consultation that party litigants create significant difficulties, for the courts and for their opponents, and can result in a significant waste of judicial time. It is a party litigant's right to represent himself but we have to acknowledge that this should not be at the expense of other court users. We must therefore look at how best to support and manage party litigants to minimise disruption. That raises the related problem of abuse of process.

Conclusion

We intend that our proposals will set out a pragmatic and practical programme of reform. They will not please everyone; but please approach them with an open mind. Please also recognise that they are the product of two years of dedicated work by the Review Team, whose efforts are beyond praise. I am grateful for the opportunity to thank the Team publicly. The Review has been a considerable undertaking and I am proud to have had the privilege of leading it.