

REPORT

To: CORPORATE SERVICES COMMITTEE		Subject: RESPONSE TO CONSULTATION PAPER ON SCOTTISH CIVIL COURTS REVIEW	
From: EXECUTIVE DIRECTOR OF CORPORATE SERVICES			
Date: 18 February 2008	Ref: AH/ES		

1. INTRODUCTION

- 1.1. The purpose of this report is to seek Committee approval for the Council's response to the Scottish Government's Consultation Paper on the Scottish Civil Courts Review.
- 1.2. The Lord Justice Clerk, the Right Honourable Lord Gill has been appointed to lead a Review into Civil Justice and the Civil Courts. The main areas of his remit are:-
 - 1.2.1. the disproportionate cost of litigation, particularly in relation to cases of low monetary value;
 - 1.2.2. balancing the demands of civil and criminal business;
 - 1.2.3. specialisation; and
 - 1.2.4. case management.
- 1.3. This Review is welcome by local authorities as it has the potential to assist in the delivery of the effective delivery of justice to the community through an accessible and affordable system based on the principle of proportionality.

2. BACKGROUND

- 2.1. The Review's primary purpose is to improve access to justice for the people of Scotland. An effective and efficient civil justice system is a vital component of a civilised and prosperous society. A good civil justice system must provide citizens with high quality advice, information and assistance, at a price they can afford, to help them avoid civil legal problems arising, to provide means to help to resolve problems satisfactorily when they do arise, and to ensure that citizens' civil rights and responsibilities are protected and enforced when necessary.
- 2.2. The Civil Justice System would be failing if the Civil Courts are seen to be remote and inaccessible, if people are inhibited from pursuing or defending valid claims because they cannot afford the assistance they need to enable them to do so, or if the procedures and language the Courts use creates confusion in the minds of the general public. These are all issues which the Review will address.
- 2.3. Two principles are considered necessary to underpin any proposals for reform, namely, proportionality and value for money.
- 2.4. Each chapter of the Consultation Paper identifies key questions for discussion and deals with a number of specific issues. Some identify areas where further information and investigation are needed. Some refer to options for change that have already been identified, either because they have already been introduced in one or more areas of Scotland or because they have already been adopted in other jurisdictions or

because they have emerged from work already done by the Review. The purpose of the consultation paper is to identify what the options are, what issues they raise and whether they are worthy of further examination. With this in mind the paper raises a number of specific questions.

3. **COUNCIL RESPONSE**

- 3.1. Attached is Appendix 1 which contains the response which it is proposed to issue on behalf of the Council. It reflects experience in dealing with the Civil Justice System and offers comment to assist the review in making its recommendations.

4. **RECOMMENDATION**

- 4.1. That the Committee approves the response made as part of the consultation process.


Executive Director of Corporate Services
Enc

Scottish Civil Courts Review

Comments on consultation

The paper deals with four groups of questions: access to justice; the cost and funding of litigation; the structure of the civil courts; and how the courts operate.

The stated aim of the consultation paper is "to improve the system for the benefit of those for whom it is intended to serve rather than those who work within it."

1. Introduction

1. Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so what would be the key features of such a system?

Yes, with emphasis on "encourage", bearing in mind the need for balance to be achieved between investing in formal court structures and supporting the provision of less formal methods of dispute resolution. As an effective and efficient court structure is integral to a civilised society, investment in streamlining and improvement of this structure must be paramount.

However there may be merit in devising a preliminary system whereby the public could agree to refer their case to a suitably qualified professional for a decision. The key features would be:

- *There should be at least a prima facie case;*
- *Sifting of referrals by a legal professional*
- *Voluntary referral;*
- *An upper monetary limit in the value of such cases;*
- *Matters affecting children or adults with incapacity would be likely to require to be treated differently and submitted for special consideration to a professional panel;*

2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

Yes. No.

3. Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?

No.

2. Access to Justice

1. What contribution can public legal education make to improving access to public justice?

Whilst it is recognised that knowledge of the legal system and its procedures is of great value, this in itself cannot deliver improved access to public justice. Not everyone will avail themselves of educational resources. There will always be a place for early intervention to avoid unnecessary litigation or to speed the process.

2. Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?

None known

3. To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

It is recognised that some party litigants pursue cases with little or no merit, and that such cases take up a disproportionate amount of court time. However it is also recognised that court procedures can be daunting to the uninitiated who may have a reasonable case. Therefore there is a place for a certain amount of assistance with a view to obviating unnecessary use of court time and securing early disposal. In this context simplified procedures, online guidance, and in court advice all have the potential to streamline and enhance current practices. Those projects quoted in the consultation paper appear to have been welcomed by the judiciary, lawyers and other professionals working in this area.

The feasibility of design court procedures to accommodate initiatives such as the above would require a cost benefit analysis.

4. What contribution, if any, can (a) "self help" services for party litigants and (b) court based advice services make to improving access to justice?

See above.

5. Are there any other issues which impact on access to justice in Scotland which the Review should consider?

None known

6. Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?

Yes, provided these cases are sufficiently high in volume. Whether or not this is accommodated within the existing structure is likely to be determined by budgetary concerns. The cases mentioned as being suitable for this alternative procedure are debt, consumer and housing cases. For these types of cases a civil tribunal operating in an inquisitorial style without the need for legal representation may be appropriate. Given the Republic of Ireland experience in relation to personal injuries and private residential tenancies there may also be scope for implementing a suitable model.

However there is a danger in assuming that low value cases do not have significance. A successful action in respect of £200 bank charges could result in considerable financial consequences for the banking industry. There should be an ability to remove a low value case from simplified procedure when an important principle or precedent is at issue.

3. The Cost and funding of litigation

1. What if any information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with the sums awarded by the court or settlement figures.

Approximately 60% of legal expenses incurred are recovered.

2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?

No comment

3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

No comment

4. Are the current rules for recovery of judicial expenses satisfactory?

Consideration should be given to establishing a procedure for tendering in respect of expenses. The percentage fee in going to taxation does not make taxation cost effective where the parties are a few hundred pounds apart. A party could be able to tender an amount in satisfaction of the expenses.

5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

In view of the Report of the Working Group on the Legal Services Market in Scotland it would appear that there is room for improvement in this area particularly in relation to consistency.

6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

No comment

7. Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

None known

8. What impact have speculative fee arrangements had on access to justice?

Allows access to people otherwise financially prohibited from raising Court actions, particularly given the current limitations of civil legal aid.

9. Should legal expenses insurance, including "before the event" and "after the event" insurance, have a greater role to play in the funding of litigation in Scotland?

No comment

10. What impact would the ability to recover "after the event" insurance premiums from unsuccessful parties have on litigation?

There could be a dramatic decrease in extra-judicial settlement.

4. The structure and jurisdiction of the civil courts

1. Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?

Yes

2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?

Provided a body of judges and sheriffs with suitable experience of both criminal and civil law is maintained, there appears to be merit in designating some judges and sheriffs exclusively to civil business. However this would only work in practice in larger sheriff courts.

3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

See above

4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

Yes. Extension of the current commercial and family specialisations at both Supreme and sheriff court level.

5. What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?

Value, complexity and importance should be significant factors.

6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

No change to the existing provisions

7. Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

No

8. Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?

A first instance jurisdiction should be retained.

9. If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?

The danger in setting a financial limit is the assumption that low value cases are not of significance. See answer 6 above.

10. Are the current powers to transfer cases between sheriff courts and between the Court of Session and sheriff court satisfactory?

No – there should be greater powers of transfer in the interests of economy particularly when cases more appropriate for the Sheriff Court are raised at first instance in the Court of Session.

11. Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?

No.

12. Alternatively, should there be another level of judiciary within the sheriff court to deal with "third tier business"?

No but on the basis that there will be an increase in capacity for additional business to go through the Sheriff Courts.

13. Does the current division of the sheriff court into distinct geographical jurisdiction present difficulties or does it have advantages?

It has advantages re access and local knowledge

14. Are the current arrangements for dealing with undefended actions satisfactory?

Yes

15. Are the current arrangements for the disposal of cases raising issue of public or administrative law satisfactory?

Yes

16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?

It is acknowledged that there could be scope for centralising high volume, uncontested actions and referring to the relevant sheriff court only the minority of defended claims for instance in debt, simplified divorce actions and various summary applications. There may also be scope for including statutory appeals and applications in this category. Commissary cases would appear to be essentially administrative and there may be scope to take these outside the judicial process.

17. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

No the cost of defending an action raised outwith the local court would be high for example travel and subsistence for witnesses.

18. Is there a case for all sheriffs to have an all-Scotland jurisdiction?

Yes, the ability of all Sheriffs to sit throughout Scotland could enhance service delivery.

19. If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek to the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?

Yes. Complexity, value, importance of case and comparative cost of litigating in either forum.

20. Are the existing appeal arrangements satisfactory?

See answer to 11 above

21. Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

Yes both judicial and administrative.

22. Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session?

Yes.

23. Should there be a limit to the number of levels of appeal through which an action can progress? If so, how many levels would be appropriate? What provision, if any, should be made for exceptional cases and how should these be defined?

No

24. What are the advantages and disadvantages of reliance on temporary judges and part-time sheriffs?

Advantages in relation to expediting court business.

5 Principles for reform to civil procedure and key procedural issues

1. Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should be the main elements of that overriding objective or statement of philosophy be?

Yes. Effective delivery of justice to the community through an accessible and affordable system based on the principle of proportionality. Implicit within this overarching objective would be the following key elements:

- *Proportionality balancing the time and expense against the amount in dispute and the importance of the issues at stake.*
- *Value for money*
- *Fair allocation of resources*
- *Efficient and properly resourced court system*

2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

Yes but with the emphasis on encouragement rather than requiring alternative dispute resolution. Any element of compulsion could raise issues under Article 6 of the European Convention on Human Rights.

3. If so, how should this be done and at what point or points in the progress of a dispute?

It would be appropriate to identify the types of dispute which are likely to be most suited to alternative dispute resolution, and within that context to suggest to parties that this may be an option. This could happen pre-litigation and there could also be scope for referral after commencement of litigation.

4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

Those cases in which an important principle of law requires a ruling or where it is in the public interest that matters are aired in open court.

5. What form should mediation or other methods of dispute resolution take and how should this be funded?

Before properly qualified and trained mediators. Publicly funded.

6. In what respects can modern communication and information technology be harnessed to improve access to the civil courts?

E-mail could be used to communicate with the court. Consideration needs to be given to electronic signatures and authentication. This would include consideration of the need for encryption and other suitable security measures. There may also be a place for evidence being given by video link.

7. To what extent should the court control the conduct and pace of litigation?

The conduct and pace of a court action is currently controlled by court rules, court timetables, volume of business, availability of parties, witnesses and agents. The current practice should continue.

6. Working methods of the civil courts

1. What are the advantages and disadvantages of pre-action protocols?

To encourage early exchange of information; to facilitate settlement where possible; to facilitate efficient case management for those cases which go ahead.

2. Should there be a greater use of pre-action protocols?

No

3. Should compliance with pre-action protocols be voluntary or compulsory?

Voluntary

4. Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what point in proceedings and what criteria should the court apply in deciding whether leave should be granted?

No

5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.

Generally satisfactory although there should be perhaps more consultation with regular users of the courts.

6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

yes

7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?

Not for all types of action – eg the simplicity of small debt actions cannot be mirrored by Petitions for Judicial Review.

8. To what extent should a system of abbreviated pleadings be introduced?

The danger is lack of clarity and insufficient information to know the case you have to answer. This could lead to further delay, further procedure and increased cost.

9. Are the current arrangements for summary disposal satisfactory?

Yes

10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?

No. Procedural decisions are crucial and can have a significant impact on the progress, conduct and outcome of a case.

11. Are the current arrangements for dealing with routine procedural business satisfactory?

yes

12. Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing?

Yes

13. In the conduct of substantive hearings should there be greater use of written rather than oral arguments?

yes

14. To what extent should there be an earlier and/or wider disclosure of evidence?

Current arrangements generally satisfactory.

15. To what extent should the court have control over the use of expert and other evidence?

See answer 14 above

16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?

no

17. Should civil jury trials be retained?

no

18. Should written judgements be required in all cases?

No

19. Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?

Yes. Sanctions could involve a system of fines imposed through deductions from/additions to expenses.

20. What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?

A sheriff initiated vexatious litigant procedure

21. Is the current legislation on vexatious litigants in need of reform and, if so, how should this be done?

See answer 20 above

22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

No

23. Would it be desirable to introduce separate procedures for multi-party litigation?

Yes

24. Is the rule governing the procedure to be followed for judicial review satisfactory?

Yes