The Civil Justice System in Scotland: a case for review?

A summary of the final report from the Civil Justice Advisory Group

November 2005

Systems of justice require re-examination from time to time because new problems arise, new practices, good or bad, develop and new demands and expectations can be perceived. In recent years, concerns have been expressed from various quarters that the civil justice system in Scotland may no longer be able to meet the demands being placed on it, and that the system, or at least aspects of it, would benefit from a review.

In late 2003, the Nuffield Foundation awarded a grant to the Scottish Consumer Council to support a series of seminars on the future of the civil justice system in Scotland. The initiative had the full support of the Scottish Executive. The aim of the seminars was to identify, so far as possible, the features of the present system which gave rise to concern, and to bring out suggestions for change, however radical those might be. The process was taken forward by an advisory group of key stakeholders, chaired by the Right Honourable Lord Coulsfield.

Six seminars were held in Edinburgh between September 2004 and April 2005. The structure of the seminar series was intended to mirror a user’s journey through the civil justice system, from seeking advice on their dispute, through the dispute resolution process, to the enforcement stage.

Views were sought on which aspects of the current system were seen to be working well, which, if any, particular aspects were viewed as a priority for reform, and whether there was a need for a full or partial review of the system. In addition to the seminars, letters were sent out to stakeholder organisations asking for their views on these issues. Written submissions were received from a variety of bodies, and a series of meetings were also held with key stakeholders.

A more detailed discussion of the issues contained in this summary report can be found in the advisory group’s full report, available from the Scottish Consumer Council.
Summary of main conclusions

Is a civil justice review required?

The series of seminars identified some major challenges and opportunities for reform and suggested possible routes by which reform might proceed. There are a range of problems, some very significant, which have proved intractable in the past and which require a fresh examination based on a thorough investigation of the present functioning of the system. The advisory group therefore recommends that there should be a review of several important aspects of the civil justice system in Scotland, as discussed in more detail below.

What should a review look at?

1. The problem of disproportionate costs, particularly in relation to cases of relatively low financial value.

2. The relationship between civil and criminal business and its impact on the organisation and administration of the courts.

3. Whether there is a need for specialisation among courts or judges and the manner in which such specialisation might be organised.

4. Whether the conduct of court business could be improved by increasing the role of the courts in case management.

5. The way in which lawyers’ remuneration is assessed and particularly its impact on the costs recoverable in litigation.

6. Whether enforcement of court judgments can or should be left to the parties or whether there should be some public role in ensuring that judgments are observed.
1. The problem of disproportionate costs, particularly in relation to cases of relatively low financial value.

This is a major problem, which should be the primary focus of a review. Access to justice is a fundamental right, and the cost of legal proceedings is frequently a real barrier to that right. In cases of lower financial value, the costs of litigation can often become utterly disproportionate to the financial value of the claim.

This disproportion can create serious problems for many individuals, and even small businesses, who may become involved in legal disputes. Although the financial value of the claims in such cases may be small in comparison with those in commercial or personal injury litigation, they are often critically important to the parties, who should not be denied a proper legal resolution of their disputes because the risk of crippling expenses is too great.

The system should encourage the resolution of disputes at the earliest stage possible: the courts should be viewed as the last port of call for the resolution of disputes, rather than the first. Many disputes are capable of being resolved by reference to regulators, complaints procedures or consumer arbitration or mediation schemes where these are available. Access to some form of court as a last resort for the determination of disputes is a fundamental right, and there is a need for a more formal forum to which cases which are not resolved by agreement or by less formal procedures can go.

Attempts to deal with the problems of claims of lower financial value and disproportionate expenses within the traditional adversarial court structure have not been particularly successful in the past. It is therefore worthwhile to try to approach these problems in a different way. There is a need for a new simplified procedure

What are ‘cases of lower financial value’?

Ultimately, it would be for any review body to decide how ‘cases of lower financial value’ are defined. However, the term is intended to refer to claims which involve sums of relatively low financial value within the broad spectrum of claims dealt with by the civil justice system as a whole. Such cases may, of course, be of critical importance to those who are involved in them. The discussions suggest a consensus that an appropriate upper financial limit for claims under any new procedure might be around £5000.

Note: the advisory group does not express any view as to whether the financial limit for small claims under the present procedure should be increased without other changes being made.

It would be necessary for any review body to consider whether a new procedure might extend to various other types of non-monetary claims which typically involve individuals, who are often unrepresented, and where the financial value involved is often low. These are discussed further in the full report.

The need for research

The lack of empirical evidence about the way in which the civil justice system operates at present was a common theme throughout the process. This makes it difficult to establish a clear picture as to how well the current system is working. It is difficult to see how a review body could give adequate consideration to possible reforms unless much better information is made available about:

- The views and experiences of individual users of the civil justice system.
- Who sues in the civil courts, in what kinds of disputes and in relation to what sums of money.
- What is the outcome of cases begun in the courts? What proportion settle, go to trial, lapse or are withdrawn? What sums are awarded, or paid on settlement?
- How long do cases take to reach a conclusion? Are there significant differences between different types of case?
- How much does it cost the parties to litigate? Are there differences between different types of case?
with a more inquisitorial approach than the current small claims procedure to deal with cases of lower financial value. A number of possible alternative structures were suggested throughout the process: these are discussed further in the full report. The advisory group favoured a new procedure which could be conducted under the general control or supervision of the sheriff court. It would, however, be for any review body to consider in more depth how such a procedure might work.

Higher value cases
While the initial focus of any review should be on cases of lower financial value, it would be difficult to carry out a review without some impact upon the procedure and jurisdiction of the sheriff courts generally, and even those of the Court of Session.

Firstly, there would need to be a relationship between the financial limit for cases of lower financial value and the lower limit of the privative jurisdiction of the Court of Session. It would be necessary to consider how any change might affect personal injury cases.

Secondly, there are other problems and demands which are common to courts of all levels. There are three closely interrelated factors involved: whether there should be greater separation between the civil and criminal courts, the impact of criminal business on civil cases, and the argument made by some for greater specialisation within the courts.

2. The relationship between civil and criminal business and its impact on the organisation and administration of the courts.

At present, there is no clear separation between the civil and criminal courts at either sheriff court or higher court level. One consequence of this lack of physical separation is that many members of the public tend to associate the courts with criminal matters, which can be intimidating and can contribute to a reluctance to become involved in civil proceedings.

Criminal cases take priority, for obvious reasons, in the organisation of court business, with the result that procedure in civil cases is always open to disruption because of the demands of criminal cases.

The increasing level of criminal business has resulted in a recurrent problem in many courts, where a civil case is partly heard and then requires to be adjourned to a future date. This causes great inconvenience to parties, their representatives and witnesses. Delays and last minute cancellations can also result in increased costs to the parties, or to the public purse in legally aided cases.

A review should consider whether this is the best way of organising court business, or whether it might be better to allocate some judges and sheriffs to conduct civil business only and others to the conduct of criminal business only. There are persuasive arguments for and against such an approach, as set out in more detail in the full report. The advisory group concluded that there is a need to consider the protection of the courts’ ability to give enough time to ensure the efficient dispatch of civil business.

3. Whether there is a need for specialisation among courts or judges and the manner in which such specialisation might be organised.

There is some evidence of a demand for increased specialisation within the court system. The commercial procedures in the Court of Session and in Glasgow sheriff court, and the family court in Glasgow, have been a success, but whether any further specialisation is possible and desirable would be for a review body to examine.
4. Whether the conduct of court business could be improved by increasing the role of the courts in case management.

There is significant concern about cost and delay within the civil justice system. Despite attempts at case management in various courts, essentially the parties and / or their representatives decide what amount of time and effort are to be devoted to particular cases and therefore how long these cases will take.

A review could consider whether there may be scope for providing that in particular classes of case the court could consider and decide how much time it was prepared to devote to a particular case or type of case, and tell the parties how much time they have to present their case. Such an approach might lead to a significant reduction in the time taken and the cost incurred in a range of legal proceedings, other than those relating to cases of lower financial value.

A review should also consider the introduction of a procedure to deal with class, or multi-party, actions in the Scottish courts.

It was also suggested that the management of cases of very high value, such as cases of catastrophic personal injury, would benefit from a review.

A range of suggestions were also made for modifications to existing procedures which might be considered by a review:

- the introduction of pre-action protocols along the lines of those in England and Wales
- provision for provisional assessments of the prospects of the case
- provision for the reference of disputes to alternative dispute resolution
- greater powers for judges to control the amount, nature and form of evidence which is submitted to the court

5. The way in which lawyers’ remuneration is assessed and particularly its impact on the costs recoverable in litigation.

The evidence strongly suggests that one of the problems in controlling the costs of legal proceedings, whether publicly financed or otherwise, is that lawyers are essentially paid according to the amount of work they actually do. While the overall level of costs is an issue which requires further investigation, lack of predictability of costs is just as important to those who employ lawyers. A review should consider whether it would be beneficial to explore other methods of payment, such as fixed fees.

6. Whether enforcement of court judgments can or should be left to the parties or whether there should be some public role in ensuring that judgments are observed.

Any review should look into the issue of enforcement, particularly in relation to claims of lower financial value. While it is clear that enforcement is problematic across the board, there is particular concern about the position of individuals involved in cases against commercial organisations. At present, although such individuals are responsible for enforcing their own court decrees, it is clear that many expect the court to assist them with this. A review should look into the possibility of a role for the state in assisting such individuals to enforce their decrees.
Copies of the full report, the papers prepared by the seminar speakers, the transcripts of the six seminars and the written submissions received are all available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil

Hard copies may also be obtained on request from:

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