

**Civil Courts Review Team**  
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**Response of Aberdeen Bar Association to Scottish Civil Courts Review Consultation Paper.**

We would advise that for ease we have split our response into topic headings rather than answering the specific questions within the consultation paper. The various headings and our responses are as follows:-

**ALLOCATION OF BUSINESS BETWEEN THE COURT OF SESSION AND THE SHERIFF COURT**

Until the recent raise in the financial limits for the privative jurisdiction of the Court of Session, our Supreme Court was dealing with cases with a value of £1,500. Although this has now been raised to £5,000 we still consider it unsatisfactory that our Supreme Court is to deal with claims of such a low value.

We broadly support the idea of a “gatekeeper” to determine whether a particular case should be allocated to the Court of Session or a Sheriff Court. We may even venture further to suggest that cases should automatically be allocated by the gatekeeper to the Sheriff Court unless it is demonstrated that the case is of particularly high value, has some complex or novel point of law or is of some other importance, similar to the test currently applied to remitting an action from the Sheriff Court to the Court of Session.

We do however consider that the gatekeeper’s decision should be subject to review by the judiciary. For instance, if a case is allocated to the Sheriff Court but a party considers that the Court of Session would be a more appropriate forum, it would be open to that party to apply to have the matter considered by a judge and it is our view that should be a Lord Ordinary.

Whilst the gatekeeper may be centrally located it is of course still important to have the ability to obtain a warrant for service locally and also for there to be the capability for urgent matters such as interim interdicts to be dealt with quickly at a local level.

We do not see any justification at all for there being two distinct sets of rules and procedures for the Sheriff Court and the Court of Session. This historical distinction is antiquated and we feel one set of rules of procedure is more appropriate. We do however consider it would be desirable to have one universal set of rules, with separate chapters for family, personal injury and commercial procedure.

Finally, considering the point at which a gatekeeper would make an allocation to a particular court, it would seem that the stage of lodging a Record would be more sensible than at the raising of the action as the issues are more likely to be clearly set out. What on the face of a Summons appears straightforward may be by the time Defences are lodged more complex, or indeed vice versa.

The parties are also likely to have been in dialogue by that stage and may well be able to make a joint representation (by email) that the matter should be dealt with, for instance in the Sheriff Court at Fort William and furthermore that they wish to have 2 day Proof allocated.

## **ORGANISATION OF THE SHERIFF COURT**

We take the view that the precise lines demarcating different Sheriffdoms and different Sheriff Court jurisdictions is out dated. One of our members gives the example of raising an action where the defenders' postcode according to the Scottish Court Service website was Banff. However the precise postcode was divided between two jurisdictions and the writ was bounced and the agent was told it should be sent to Peterhead. Whilst jurisdiction is of course important such precise application of it seems to defeat the object of access to justice. We consider that there is no justification for separate Sheriffdoms and we think a Scotland-wide jurisdiction is appropriate.

Each action would still ultimately be dealt with at the Sheriff Court most closely related to the action such as the location of the incident, the residence of the defender or perhaps more importantly convenience for witnesses and parties. This again could be determined by a gatekeeper, subject to review by the judiciary if any party disagrees with the allocation.

In essence we are in favour of more flexibility in matters of jurisdiction rather than fastidious application of historical rules. Another example would be the requirement in matrimonial actions that a person must have been resident in a place for a certain number of days. We think current resident is enough of a test.

We have heard of suggestions of there being two "Super Courts" based in the central belt and we would very strongly urge against that. We accept there is some merit in having certain of the larger courts deal with an increased level of business and possibly adopting a different internal structure to the smaller rural courts. We also agree that the exact number of Courts should be looked at. For instance where there are Courts very close together with good transport links, the closing of one of those Courts would not be detrimental to access to justice and would perhaps improve administration. However, we consider the implementation of *only two* "Super Courts" with *both* being located in the central belt would be hugely detrimental to access to justice. We also wonder about the human rights of a person living in Wick or Shetland who may have to travel to Edinburgh or Glasgow for justice. The geographical make-up of Scotland simply does not lend itself to having justice centred only around Glasgow and Edinburgh.

We also support a change in the timebar rule to the effect that the clock stops when a Summons is warranted or signetted for service, rather than on service. There would then have to be a prescribed period within which service is to take place thereafter.

In terms of procedure we are strongly in favour of judicial case management of actions. We would envisage that actions are dealt with by the same judge throughout with non-contentious matters being dealt with by e-mail. We envisage this working broadly along the lines of the personal injury pilot at Glasgow Sheriff Court or the procedure for commercial actions at Aberdeen and Glasgow Sheriff Courts. We think there are tremendous merits in all actions being dealt with in this way.

We must however point out our concern that the current Scottish Court Service may well not cope with such a system with there being problems with, for example missing documents and missing interlocutors and allocation of time for Proofs. There would need to be a huge investment in training of the staff but we think that the benefit of a more efficient system would outweigh the cost.

Having a Scotland-wide jurisdiction may also help the time old difficulty of there not being enough Sheriffs to deal with the number of Proofs set down for any one day. For instance, if there is a Sheriff with availability in a nearby Court, parties could be offered the opportunity to have their Proof heard there rather than it being discharged.

In case it is not apparent from the above, without separate Sheriffdoms there would no longer be a requirement for Sheriffs Principal. We consider there could be a new post or posts created for effectively the same role to be carried out but centrally. The current situation where there are different Practice Notes allowing different procedures in different Sheriffdoms seems ludicrous and surely difficult to understand by the public. Such duties as the Sheriffs Principal have could be carried out by a centralised post, possibly under the office of the Lord Advocate.

Finally we consider there is no need for the present style of written Sheriff Court judgements and we favour the type of judgement issued by the Court of Session. The length and detail of the judgement should be determined by the value and complexity of the case and in certain cases a simple one paragraph judgement recording the Sheriff's finding could be sufficient.

## **LOWER TIER**

We consider there is merit in having a lower tier of judiciary whereby minor disputes can be resolved in an equivalent of the District Court. We consider there are greater functions that can be carried out by senior Sheriff Clerks or some other legally trained person to deal with the resolution of minor disputes. We understand that in other jurisdictions such as in North America clerks are trained in mediation. If mediation fails or is unsuitable, a legally qualified person but not a Sheriff could hear disputes. We would possibly look to Employment Tribunals as an example of how this works. Perhaps a more radical suggestion is to have a "Disputes Tribunal" combined with the Employment Tribunals. We consider this would give quick and cheap access to justice for lower value claims.

Even if there is to be no radical change to the current system for lower value claims, we remain of the view that Sheriff Clerks should be given greater powers to deal with non-contentious matters and incidental applications. The lower value claims may not necessarily benefit from an email system of dealing with non-contentious matters as there are more likely to be a higher number of party litigants.

## **APPEALS**

As stated above, we would not necessarily envisage a place for Sheriffs Principal in a new system based on a Scottish-wide jurisdiction.

We consider that a Sheriff should have a power to rectify procedural mistakes. For example if a party fails to appear at an Options Hearing or peremptory diet and decree in absence is granted it seems to us there is no reason why another Sheriff cannot hear arguments from parties before deciding whether to recall the decree, without a party having to take an appeal to the Sheriff Principal.

We also consider where leave to appeal is required this should be sought from the appellate court, rather than the originating Court.

We also consider that an agent who had a right to appear in the original action should have a right to appear in any subsequent appeal.

In our ideal court system we would envisage a roving appellate Court on a circuit, akin to the High Court. We consider it wholly inappropriate that appeal to the Court of Session presently takes over a year. There should be local and quick access to justice, including appeals. If a greater number of actions are dealt with at Sheriff Court level, that should free up Lords Ordinary to deal with appeals more efficiently. We do however consider it inappropriate that parties have to go to Edinburgh for this.

We also consider Sheriffs should have some appellate functions, if there are to be no local Sheriffs Principal, for example Mental Health Tribunals could be appealed to Sheriffs, as could appeals from the "Disputes Tribunal" suggested above.

## **PRE-ACTION PROTOCOLS**

We consider the present voluntary pre-action protocols for personal injury action are satisfactory. We would not like to see compulsory pre-action protocols.

## **CIVIL V CRIMINAL**

We are of the view that the larger courts may well benefit from a split in the business, but we do not think this could be justified in the smaller and more rural courts.

Generally, we think this really depends on how the new regime is to be structured. We would like to see a further consultation on this point when the Review Committee have formed some view on the likely future structure of the civil court system.

## **SPECIALISATION**

We broadly support the idea of specialisation in certain areas of civil law and in particular within commercial actions, personal injury and to an extent family actions and consider that this would be beneficial.

Clearly the views from the bench are important but we are of the view that it may be better to limit the time an individual judge spends dealing with a particular type of case to a year or so.

We do not consider that specialisation will work in the more rural areas i.e.: outside the Sheriff Courts with the greatest volume of business.

We are strongly of the view that specialisation is not as important as having the same Sheriff deal with a particular case from the point it becomes defended to the point of disposal as far as is practicable. Keeping the same Sheriff is a better use of time and resources. We believe that consistency throughout a case is important.

We are strongly of the view that Regional Civil Justice centres seem to defeat the principle of access to justice, particularly for those in more rural areas.

Specialisation within the larger Sheriff Courts largely depends on having the right person for the job.

There has to be a balance between specialisation and local knowledge and depending on the case either may be more appropriate. We are of the view that parties should be able to choose to have their case heard in a court where there is access to a Specialist Sheriff in a particular area.

We are of the view that the personal injury pilot in Glasgow Sheriff Court is working well and should be rolled out to all Sheriff Courts.

## **COMMERCIAL ACTIONS**

We are of the view that the procedure within the Sheriff Court Rules (and indeed the Court of Session) works well and the focus from the bench enables cases to be dealt with quicker than under the ordinary cause procedure. We can see no reason why this type of approach (i.e. more interventionist role by the Sheriff) cannot be utilised in other types of civil actions.

If this type of procedure is rolled out to all / most civil actions, then the support structure requires to be in place to deal with the additional administration required.

Judicial expenses in commercial actions are more favourable than in ordinary actions but are set to reflect the front loading of actions.

### **CASE MANAGEMENT**

In terms of procedure we are strongly in favour of judicial case management of actions. We also consider that the use of telephone / email / conference calls should be utilised where possible to reduce court appearances where matters are agreed. Again this requires that the administrative support is there – the present arrangements are inadequate. It is often the case that more junior members of the team clerk the courts while more senior members are tied up with administration. In addition the staff are rotated regularly which often means that inexperienced personnel are dealing with administration with which they are not familiar and this inevitably leads to mistakes being made. The staff do however do their best to work within the current system.

As indicated above, we are of the view that retaining the same Sheriff throughout an action (as far as practicable) is beneficial and the Sheriff should have an active role as in commercial procedure.

In our view, the current system of having a set timetable of procedure can provide the opportunity to manipulate the process and delay matters. We believe that there should be more flexibility within the procedure so that a case can progress quickly where there is a desire to do so or not as the case may be.

We should have same set of rules in Court of Session and in Sheriff Courts so that there is consistency. Specific rules can be drawn up for particular types of action where this is required. Practice Notes should apply to all Sheriffdoms.

### **PLEADINGS**

We need to retain something in order that each party is obliged to set out the legal basis of their claim / defence, together with the set of facts they are relying on. We are strongly of the view that each party must give fair notice to

the other in respect of evidence that they intend to lead at any proof. Parties must be obliged to set out the legal basis of their claim and how that is to be applied to their particular claim / defence. We are also of the view that the pleadings should be in ordinary English language.

The Sheriff if having a more interventionist role should perhaps have the power to dismiss a case if the pleadings are inadequate.

### **MEDIATION / ADR**

If parties are not prepared to participate then they should not be forced.

It shouldn't be compulsory and there should be no sanction.

If Mediation were dealt with in the Rules it may raise awareness of it and at least bring it to the parties' attention. We would suggest having to confirm prior to the stage of obtaining a warrant, that mediation has been considered. The greatest benefit is ensuring solicitors and parties have thought about it in appropriate cases.

### **JUDICIAL REVIEW**

If an issue of public policy then this should be dealt with by the Court of Session.

However, for more local issues, for example, an appeal against exclusion from a Golf Club, then there is no reason why the matter cannot be held in the Sheriff Court. Indeed for localised disputes this would mean a better access to justice.

### **COSTS**

There are not enough Firms genuinely providing Civil Legal Aid (Many firms advertise on law society website as doing it, but they don't).

If Regional Civil Centres, then unlikely that SLAB would pay for travel time – again reducing access to justice.

If there were changes in the present civil legal aid regime and reduced beurocracy, then this may assist.

Current levels of judicial expenses are insufficient – in ordinary procedure parties tend only to recover 60 – 80% of what the litigation has actually cost them. Clearly this is a deterrent to litigate. This may become less of an issue if the changes result in disputes being resolved earlier.

Generally, we are of the view that an Ordinary action can cost anything between £10,000 and £15,000 and in many complex and long running cases, the cost can be much higher.

## **GENERAL**

As indicated throughout our response we are of the view that the current arrangements for the administration of the Sheriff courts are inadequate. It appears that the SCS is inadequately funded given the increasing volumes of business now being dealt with by the courts. The staff do their best within the constraints of the system but there are areas which could be improved. There appears to be a high turnover of staff which results in inexperienced staff dealing with the day to day administration. In addition the staff are rotated on a regular basis and in our view it seems as if the staff are moved on to a different department just as they get a good working knowledge of the department they are in. In the event that we have a greater use of email and judicial management of cases, then there will require to be sufficient suitably trained staff to deal with the increased business.

Finally, we were interested to note that the Scottish Court Service recently released details of the consultation into increased court fees. That concept appears to be totally at odds with this consultation which is based on the principle access to justice. Surely increasing the court fees, particularly in actions affecting a person's status is another barrier to justice. We strongly feel that this is a matter which should be considered as part of the wider review of civil procedure, and not as a stand alone consultation.