

The Scottish Civil Courts Review

Consultation on the Civil Courts Review

Response by Alistair J Bonnington, Solicitor Advocate

Chapter 1 – Introduction

- Q1: Yes, but the courts could run some sort of “pre-court mediation” service, within the court building (or annex). Informality and speed would require to be the key characteristics of such a pre-court system.
- Q2: Yes. But the Review must recognise that almost the whole of the Scots population is excluded from our civil courts by prohibitive cost.
- Q3: No.

Chapter 2

- Q1: The beginnings of a movement towards teaching the likes of public law in Scottish schools is to be applauded. However, it is difficult to see, given the enormous cost of litigation, that teaching people about their legal rights is going to do anything other than make the public more frustrated about the slowness and high cost of the court system than they are at present.
- Q2: I do not feel qualified to answer this question as I have not practised as a civil Legal Aid practitioner for some years. However, the concentration on the provision or non-provision of civil Legal Aid might indicate that this Review is not going to address the fact that for the vast majority of Scots the substantive law might as well not exist because they cannot afford to go to court to enforce their rights.
- Q3: For disputes involving small amounts of money, it is reasonable to allow individuals to represent themselves and organisations to be represented, for example, by directors or senior employees. A more speedy and informal system, possibly along the lines of the English arbitration system, could be introduced into Scotland.
- Q4: In view of the encouraging nature of the trials, this sort of scheme should be widened.
- Q5: It is slightly worrying to read that the Review is not sure if there is an unmet need for legal services in Scotland. Practitioners spend a great deal of time telling clients that, although they have certain legal rights to be advanced, to do so would be foolish because of the enormous cost of the system. The Judges and Sheriffs sitting in civil courts deal only with a tiny proportion of the population, who are extremely wealthy, extremely poor, or simply mad. No-one else takes anything to do with courts. The Review has to deal with the

enormous problem of access to justice for the vast bulk of the Scottish population. The Scottish courts and legal profession have a very bad track record for not having addressed this in the past. They are too ready to blame politicians and to whine on about low Legal Aid rates. However, although it is within their own power to improve the situation, they have failed to do so and the Review should put that right.

Q6: Yes. It perhaps would be better as some sort of adjunct to the court system as the skills within, for example, the Clerks Department in the court could be put to good use in this regard.

Chapter 3

Q1: None.

Q2: With reference to previous answers, it deters almost everyone who is in their right mind from getting involved in litigation.

Q3: To some degree, but it is the lawyers' fees and the awards of expenses which are the real problem.

Q4: Judges and Sheriffs seem to award all or nothing. There must be a case for Judges awarding a modified proportion of taxed judicial expenses. It has to be borne in mind that systems like America do not award judicial expenses at all – so the Scottish system is not the only model.

Q5: So far as I am aware.

Q6: It helps only in a minimal way, so few people qualify for it.

Q7: For the vast majority of citizens there is a problem in funding litigation of any sort in Scotland.

Q8: In Scotland I am not aware of them having had any effect. I know that in England in defamation cases the conditional fee agreements have told very much against defenders, who basically now try to buy their way out of litigation because of the costs. Only richer media defendants can now afford to stand on principle and defend cases. In other words, the speculative fee arrangements in England mean that justice is not done in the area of law in which I practise.

Q9: This undoubtedly would be a matter worth exploring. If insurance companies can be persuaded to fund cases in this way, this would help with problems with lack of access to justice in Scotland.

Q10: As stated in the answer to question 8, I only know of experience in the English courts on defamation matters. The ability to recover the insurance premium is a large part of the problem which makes media defenders settle irrespective of the merits.

Chapter 4

- Q1: Yes.
- Q2: Yes.
- Q3: Yes. A Sheriff would not need to remain in the Civil Division forever. He/she could transfer from one to the other depending on personal preference and the business needs of the court.
- Q4: Undoubtedly. There is, as the Review has already observed, no difficulty these days in people travelling reasonable distances within Scotland. So, there being a specialised court in, say, Aberdeen Sheriff Court, would not be a difficulty in the 21st century.
- Q5: Certain Edinburgh solicitors raise cases in the Court of Session because they will recover more expenses. This is the worst possible reason for making the choice.
- Q6: The Sheriff Court should have exclusive jurisdiction in cases up to £100,000 worth in value.
- Q7: No.
- Q8: The Court of Session requires to retain, in the first instance, work in the likes of company matters and commercial litigation. However, everyday work, the like of personal injury cases, might be transferred to the Sheriff Court. At the end of the day, it is just a question of marrying up the type of work with the appropriate forum. Logically, highly complex technical cases would seem more suited to the Court of Session.
- Q9: Already answered.
- Q10: I do not feel able to answer this.
- Q11: Given the wide range of talents, and lack of talent, within the shrieval bench, at the very least two tiers are appropriate! We vary between having Sheriffs who could probably quite easily be promoted to the Court of Session and others who should really be restricted to working in the District Court. This makes the Sheriff Court ripe for a two-tier system. It is perfectly reasonable that there should be a civil court of a lower level. However, I do not agree it should be outwith the Sheriff Court. I think it should be within it. The problem that has arisen over the past 20 or so years is that so many solicitors and Counsel are so miserable at their work and worried about pensions that they want a job as a Sheriff. The competition for these posts has become exceptionally fierce in the legal profession in Scotland. It is seen, quite rightly, as a very easy way of earning a good salary and look forward to a non-contributory pension. Most of the work carried out by the Sheriff Court is pretty pedestrian. Consideration might be given by the Review about two levels of Sheriffs, and the level of pay given to Sheriffs should be reviewed.

- Q12: See answer to Q11.
- Q13: Some advantages but, as observed by the Review, travel within Scotland is relatively easy in the 21st century. So the existence of specialised Sheriff Courts is a perfectly reasonable step.
- Q14: Not sure.
- Q15: The procedures are far from clear. Nobody can understand the judicial review case of West v Secretary of State for Scotland. That includes Court of Session Judges, who have said as much. BBC Scotland recently had a case where we petitioned the Nobile Officium on the basis that no other remedy was appropriate. However, the court has taken the view that judicial review would have been open to us under Section 7 of the Human Rights Act 1998. I do not argue with the court's decision, but it is an illustration of the fact that in the Court of Session there is no clear system for dealing with such cases.
- Q16: Not able to answer.
- Q17: If I am right in thinking that there is no reason why Scotland should not have specialised Sheriff Courts in certain geographical areas, perhaps a national Sheriff Court would be the inevitable outcome under such a system.
- Q18: Yes.
- Q19: It would be necessary to have this system if the Sheriff Court is to become the primary court of first instance in all or most civil litigation matters. The value of the case, its legal importance and its complexity should be the considerations.
- Q20: Yes.
- Q21: It is difficult to see how a Sheriff Court of any size could not operate without a Sheriff-Principal. Someone with some degree of administrative authority over the Sheriffs has to be a legal peer, rather than an administrative officer. For example, in the Health Service doctors have never taken kindly to being ordered about by NHS administrative staff and we do not want to end up with that problem in the legal profession.
- Q22: Yes.
- Q23: Not sure.
- Q24: The excessive reliance in recent years on temporary Judges and part-time Sheriffs indicates that the system is under-resourced – something that the Review itself has already concluded is the case. The perception of the client who has his or her case dealt with before a temporary Judge or part-time Sheriff is that his case is not being afforded proper treatment. The quality of

both temporary Judges and part-time Sheriffs in some cases is questionable. The public know this much better than Judges and Sheriffs realise.

Chapter 5

- Q1: As the Review has pretty much identified already, the over-arching objectives should be resolution of civil disputes between parties in a speedy, effective and efficient manner with only such costs incurred as are proportionate to the value of the subject matter of the litigation.
- Q2: I think it is reasonable for the court to encourage the use of a mediation services but it would be wrong for it to be a requirement, as sometimes parties will know that mediation will fail before even trying it.
- Q3: This should be done at the pre-action stage initially. It could be re-visited at certain appropriate junctures in the procedure, eg the closing of the Record.
- Q4: I do not feel qualified to answer.
- Q5: I do not feel qualified to answer.
- Q6: Perhaps increased use of Email, such as is used in commercial actions in Glasgow Sheriff Court and the Court of Session could be extended to other forms of business.
- Q7: To a much greater degree than at present. The courts are a public resource and are not to be misused by parties or lawyers.
- Q8: I do not really feel qualified to answer, but I should imagine all cases would so benefit.

Chapter 6

I do not feel qualified to answer questions 1-24 at the end of Chapter 6.