

Note of Observations from the Civil Justice Advisory Group on the Scottish Civil Courts Review consultation paper

The Scottish Consumer Council arranged a meeting of the advisory group on civil justice chaired by Lord Coulsfield which reported in 2005 to discuss the consultation paper issued by the Scottish Civil Courts Review chaired by Lord Gill. The meeting was held on 17 March 2008 and was attended by members of Lord Gill's policy group and review team. It was not possible to deal comprehensively with the subject matter of Lord Gill's review, but the discussion covered a good deal of ground and a number of matters of interest or concern emerged, which, it is hoped, may be of assistance.

The primary purpose of the Civil Courts Review is stated to be to improve access to justice for the people of Scotland [para.1.9], and it is understood that the review team would welcome assistance on the question how "justice" is to be understood. The problem of defining justice has exercised the best legal and philosophical minds for millennia, without leading to results which command general acceptance. However, we suggest that for the purposes of this review, it is not necessary to become involved in the abstract issues which arise in attempting to provide a general definition of justice.

The problem can be simplified by making a distinction between procedural and substantive justice. Procedural rules can provide a fair process by which a decision is to be reached. However fair the process, the result may be unjust because the law is unjust, but that is a matter for reform of the substantive law and procedural reforms cannot cure such injustice. The principal requirements for procedural justice are really not too difficult to specify. They are examined in the cases which have arisen under Article 6 of the ECHR (which applies to the determination of civil rights and obligations¹ as well as to criminal proceedings) and for the purposes of this exercise can be summarised as follows:

1. The state must provide facilities and arrangements which enable anyone who is involved in a dispute or claims to have suffered a wrong or injustice to have access to a competent court, that is, a tribunal established by law which
 - is authorised to pronounce a final and binding decision
 - will reach its decision according to law, not arbitrarily
 - is independent
 - is suitably qualified and resourced to decide that particular kind of dispute
2. There must be rules of procedure which [apart from exceptional circumstances]
 - permit all parties to a dispute to present their cases in person or to obtain and employ legal advice and representation
 - follow a judicial process, that is one which is broadly adversarial.
 - require all parties to give notice of what their cases are and entitle them to receive notice of the case against them
 - allow reasonable time and facilities for the preparation of the case, but prevent undue delay either by a party or by the court
 - give all parties a sufficient opportunity to present their cases to the court and a fair and public hearing
 - treat all parties equally and allow equality of arms

¹ There is an extensive literature about what this expression covers, but for the present purpose it is not necessary to go into it.

- provide for a reasoned decision to be given in public or made public.

Articulating these basic elements of procedural justice may help to clarify thinking about some of the ideas canvassed in the consultation paper.

- It is no doubt correct to say that the court should be the last resort for determination of a dispute. Nevertheless, access to a court is a fundamental right, and while facilities for non-judicial determination should be provided, and every encouragement should be given to potential litigants to make use of them, the right protected by Article 6 is one of access to a court. Hence, for example, proposals for compulsory mediation may have to be carefully considered.
- The central function of a court is to decide, and to do so independently. While therefore it may be desirable to provide ancillary services to litigants, such as in-court advice, negotiation or ADR, it is essential that those services should clearly be seen to be ancillary and not part of the central function of the court.
- There are also implications for any proposal for a third-tier court. If such a court is to be a court and issue binding decisions, the same requirements in principle must apply to any negotiation or ADR services supplied in connection with proceedings before it.
- The requirement of suitable qualification and adequate resources also applies to a third-tier court. It must not be forgotten that cases involving low financial values, which are the obvious candidates for disposal in such a court, not infrequently involve issues of law, and sometimes even of fact, which are complex and difficult.
- That does not, however, mean that every case, however minor, must receive the full Rolls-Royce treatment. It is legitimate to have regard to issues of cost, availability of resources and proportionality in setting rules for the jurisdiction and procedure of different levels of courts.

From the above, it is clear that there are two fundamental requirements for any satisfactory proposals for any new level of courts or any reorganisation of court structures. Firstly, it is necessary to have a clear picture of the purpose of the changes: would the objective be to achieve better justice or to relieve the burden of work in other courts? Secondly, any proposals should be based on careful scrutiny of the requirements in regard to cost, premises, facilities and qualified personnel. The group were particularly concerned that in the formulation of any procedural changes, the users should be given a full opportunity to discuss the proposals before implementation: some previous reforms have been less than satisfactory because they were not designed with the needs of users in mind.

At the meeting, there was discussion of the issues of the reorganisation of the Sheriff Court, and, in that context, of specialisation. The two are related, because while specialisation is conceivable in the larger courts, it could not be achieved in the smaller courts without some reorganisation. There are wide divergences of view on the question of specialisation, and it could not be said that any clear consensus emerged. The most that can be said is that if it can clearly be shown that specialisation in some particular field or fields would have significant advantages, either from the

point of view of better justice or improved speed and efficiency, it might be acceptable either to arrange for a sheriff specialising in a particular field to take a case in another sheriff court or for a case to be transferred to a court in which specialisation is available. It cannot be said that there was any particular enthusiasm for either possibility.

Similarly, there was some sympathy for the idea that there might be a third tier of courts, similar to the lay justices courts, but subject to the observation that it would be necessary to be clear what these courts were to do, how they were to be structured and what form they should take. It was observed that most of the individuals who appear in civil courts are there as defenders, and that the system should be designed with that in mind. Such individuals might, for example, find a tribunal with several members more intimidating. Again, therefore, it seems to be essential that if any such proposals are to be made, the objectives should be precisely specified and the costs and requirements fully calculated.

There was also mention of the need for simplification of procedure and the desirability of as much uniformity of procedure and practice across different courts as can be achieved. Practice is important because it appeared that under the existing rules, which apply to all Sheriff Courts, there are nevertheless significant variations in the way the rules are operated. It is of course easier to wish for simplification than to achieve it, and there was insufficient time to attempt to consider particular proposals. There was, however, mention of the baleful influence of the plea to the relevancy and of the recent critical comments on that plea in the case of *Somerville v Scottish Ministers* in the House of Lords.

There is clearly an advantage in having simple forms of procedure and having them as uniform as possible across different courts and different types of litigation. Since the Court of Session procedure for personal injury actions seems to have been reasonably successful, there have been a number of suggestions that it should be applied across a wider range of actions. It is, however, necessary to be cautious about attempting to do that without close examination of the circumstances to which the procedure has to be applied. It is important to remember that the personal injury action proposals came out of lengthy and intensive discussion between a number of very experienced practitioners, in which close attention was paid to the manner in which personal injury actions can be expected to develop, the way in which and the time at which evidence can be expected to become available and other such matters. It was not devised as a template for actions generally and close thought would have to be given to the consequences of attempting to “roll it out” more widely.

A number of other matters were mentioned briefly. There was general support for the improvement of advice and mediation services, including in-court mediation, and there was sympathy for investigating, at least, whether sheriff clerks might be trained to conduct that process. Concern was repeatedly expressed about the need for research and about the time taken to bring about reform.

**Civil Justice Advisory Group
15 April 2008**