



The Committee of Scottish Clearing Bankers

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CONSULTATION ON THE CIVIL COURTS REVIEW

The Committee of Scottish Clearing Bankers (CSCB) is the representative body of the four Scottish clearing banks (Bank of Scotland, The Royal Bank of Scotland plc, Clydesdale Bank PLC and Lloyds TSB Scotland plc). The Committee represents Scottish clearing banking in the financial structure of Britain and seeks to promote the industry by providing an authoritative voice on Scottish matters to ensure that they are adequately recognised and safeguarded.

CSCB is pleased to respond to the Consultation Paper, as users of the civil justice system – both as defenders and pursuers - and in recognition of the role that its members play in Scotland’s economic and civic welfare.

CSCB supports the Review, especially if its outcome is to provide a modern civil justice system, which supports the commercial and economic development of Scotland.

We have identified those questions to which we feel it is relevant for us to respond and these are set out below.

CHAPTER 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?

Generally, CSCB supports the proposal that the civil justice system should encourage early resolution of disputes, preferably without resort to the courts. Key to this are:

- transparency of the costs associated with the different methods for resolving disputes, and the extent to which those costs are borne by the taxpayer;
- consumer education;
- the development across the spectrum of Scottish society (individuals, commerce, government and the third sector) of skills to resolve disputes before they escalate; and the development of a culture that acknowledges that all “things that go wrong” need not, by definition, give rise to compensation or allocation of blame.

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?

CSCB supports the principles and assumptions discussed in paragraphs 1.11 to 1.14.

3. ***Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?***
1. Consideration should be given to the sort of "legal culture" that the Scottish courts and civil justice system are, or should be, supporting. This might be expressed as a principle. When formulating recommendations, consideration should be given to their impact on achieving a balance between asserting rights and accepting responsibilities. It is unlikely that recommendations which encourage (directly or indirectly) a litigious culture, as has developed in the USA, would be welcome.
 2. What drives parties to elect (where election is available) Scots Law to govern their contracts and / or their choice of Scotland as a jurisdiction? Conversely, what are the reasons for parties to elect (where election is available) **not** to contract under Scots Law or **not** to litigate through the Scottish Courts. Answers to these questions may provide indicators of areas for improvement in the Scottish judicial system.
 3. In England & Wales, the banks party to the OFT test case on bank charges have been able to deal with a large proportion of applications for stays/sists on paper and the courts in Northern Ireland have simply issued a "blanket stay" across all bank charges claims - in Scotland in contrast, the banks have been required to attend hearings for each individual customer claim - this is extremely costly and is undoubtedly taking up a large amount of the Sheriffs' time. The Scottish courts should consider introducing more streamlined procedures to deal with volume claims of this sort.

It would also be useful if the Scottish courts could accommodate other applications across all cases involving specific parties. For example, where a large organisation or company, which has a high volume of cases before the Scottish courts, changes its name or designation, it would be useful if such a change could be made across all cases administratively, instead of having to make individual applications in each case. This is possible in England & Wales and Northern Ireland, but not in Scotland. Where such a company has hundreds of cases in different courts across Scotland the ability to do this could significantly reduce the amount of time taken in each court to process the individual applications.

4. Much could be done to simplify the terminology used around Scottish Court procedure. Large strides were taken in this regard in the Civil Procedure Rules introduced in England and Wales in 1999 - for example changing "writ" to "claim form"; "affidavit" to "witness statement" and removing all Latin terminology. The obscure language used in Scottish court procedure is undoubtedly a barrier to access to justice.

CHAPTER 2: ACCESS TO JUSTICE

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

Public legal education may be part of the solution. However, the success of that education will be dependent also on instilling within the overall culture that the most effective solutions are, in the majority of cases, negotiated "win/win" settlements. Key to that is the acceptance of responsibilities, as well as the enforcement of rights.

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?

Whilst there should be procedures which enable litigants to take part in the process without legal representation, there should be safeguards to avoid vexatious litigation/ litigation with little or no merit to avoid disproportionate use of public money (in the context of use of court resource), and also to protect opponents. This could be achieved by extending the current in-court advisory service.

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?

Before any decisions are made on non-judicial fora for low value cases, there should be a good understanding of the perceptions, as well as the facts, of the quality of justice delivered through existing

alternative fora, both in Scotland and elsewhere. Do these fora have the confidence of both defenders and pursuers? Anecdotally, for example, there is a perception amongst employers that Tribunals are prone to favour the employee, and that may be having an adverse effect on the business community. If there were to be a tribunal for, say, debts, then the tribunal would need to have the confidence of creditors as well as debtors. Otherwise, the unintended consequence may be to make Scotland a less attractive place to do business in, and Scots Law an unattractive jurisdiction to choose (where choice is available).

CHAPTER 3: THE COST AND FUNDING OF LITIGATION

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

The main litigation with which members of CSCB are involved relates to debt recovery. A decision to litigate in those circumstances takes account of a number of factors, including the personal circumstances of the customer. The cost, including cost associated with management time in the litigation, is also an important factor.

In terms of other, non-debt recovery litigation, the members of CSCB generally only litigate if there is a legal principle involved. The factors that tend to be taken into account when deciding whether or not to litigate tend to be cost, time and publicity.

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?*

The use of insurance cover for legal expenses promotes the concept of “user pays” which has certain attractions. However, two points should be considered:

1. What is the impact on defenders without insurance?
2. What safeguards are needed to avoid a ballooning of litigation, with no or little merit, and the impact on the administration of justice system?

CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

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

Separate judges and sheriffs specialising in civil law and criminal law would be welcome. It would reflect what is already happening in the legal profession and, indeed, in other professions, where the ever increasing complexity of legislation and regulation, and speed of change, make specialisation a necessity.

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?*

There should be some degree of specialisation in the civil courts, especially in areas where the development of the law is fast moving. However, that specialisation should not be too granular, otherwise the benefits of the depth and breadth that judges and practitioners bring to a case may be lost. The lines might be drawn by reference to generic matters, which might include:

- Personal relationships and status e.g. family law, inheritance; defamation
- Business relationships e.g. contract; bankruptcy; employment; professional negligence
- State e.g. public/ administrative/ welfare law
- Personal injury

Each of these areas could have its own appellate line, starting with a lower court for the straightforward and/ or low value cases, and moving up through to a Supreme Court.

However, before any decisions are made about specialist courts, it is important to consider the following:

- a) How effectively the current specialist fora are operating.

- b) Whether Scotland has sufficient volume of cases coming under a specialisation to make a separate forum viable.
- c) What qualifications and experience a judge would require to have to ensure that, not only does s/he have the requisite specialist legal knowledge, but also has a sufficiently strong base of general legal knowledge and experience to avoid law being developed in silos.
- d) What ongoing training there would be for judges.
- e) What criteria should be set to ensure practitioners appearing before the specialist forum have the requisite level of expertise.

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?*

For non-debt recovery litigation, the members of CSCB generally only litigate if there is a legal principle involved. Accordingly, its members are more likely to raise an action in the Court of Session to ensure the quality of debate and judicial deliberation. The CSCB members may also raise an action through the Court of Session’s Commercial Causes procedures to expedite the move to a final decision.

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

The Court of Session should have exclusive jurisdiction for cases where there is a point of legal principle which covers a class of litigant or potential litigant. .

CHAPTER 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 the main elements of that overriding objective or statement of philosophy be?*

CSCB supports the introduction of a formal over-riding objective or statement of philosophy, as a way of “setting the tone” for access to justice. The main elements are well expressed in the Review’s remit and Lord Woolf’s definition of what it means for a case to be dealt with “justly”. CSCB would also support a principle which educates expectations that individual responsibilities are as important as individual rights, and that this balance may be achieved through a “win/win” rather than a “winner takes all” approach.

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?*

CSCB supports the use of mediation or other methods of dispute resolution, on the basis it is only used in appropriate disputes (for example, as outlined by the Scottish Mediation Network). A particularly strong argument for mediation and other methods of dispute resolution is that they encourage active party engagement, requiring the parties to take responsibility for resolving the dispute rather than hiding behind process and procedure.

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

CSCB supports the increased use of communications and IT technology wherever possible. With appropriate investment, the Scottish judicial system and legal profession could create a competitive advantage.

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

Pace, in particular, is key and should therefore be controlled by the courts.

8. *What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?*

There seems to be no reason why judicial (using the term in its broadest sense to cover also non-judicial fora such as tribunals) case management and case-flow management should not be applied to all cases. Justice requires speed of decision-making. There should be active discouragement of process overtaking progress.

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

Generally, CSCB supports initiatives which will modernise the judicial system in Scotland, streamline processes and procedures, deliver court-led disciplines in relation to case management from initiation through to judgement, and ensure proportionate and fair allocation of court resource. A more formal system of sanctions for non-compliance with rules and procedures would be appropriate to instil the message that the judicial system is a limited commodity which needs to be used responsibly.

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?*

In the experience of some of its members, the use by a party litigant of a “litigation friend” has not been particularly helpful either in assisting the party litigant or in expediting the process.

Separately, the CSCB would support an amendment to the current rules, so that companies would have a right of audience via an authorised person.

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

Any move towards class actions needs to be balanced with safeguards against what the Review describes as “blackmail litigation”. Otherwise, the risk is a move to “popular justice”. That risk would be further increased if, as the Review describes them, “lawyer entrepreneurs” were able to capitalise. The implications for Scotland’s attraction as a place to do business may be harmed if there were not appropriately robust safeguards.

Consideration should also be given to the ability of a defender to apply to the courts to bring multiple individual actions raised against that pursuer, which cover the same legal point, in to the one court for single resolution. See CSCB’s answer to Question 6 under Chapter 4.

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THE SCOTTISH CIVIL COURTS REVIEW

RESPONDEE INFORMATION FORM: CIVIL COURTS REVIEW

Please complete the details below and return it with your response. This will ensure we handle your response appropriately.

Name: THE COMMITTEE OF SCOTTISH CLEARING BANKERS

Postal Address: 38B DRUMSHEUGH GARDENS
EDINBURGH EH3 7SW

1. Are you responding: (please tick one box)

- (a) as an **individual** go to Q2a/b
(b) on behalf of a **group/organisation** go to Q3

INDIVIDUALS

2a. Do you agree to your response being made available to the public?

- Yes (go to 2b below)
No

2b. Where confidentiality is not requested we will make your response available to the public on the following basis (please tick one of the following boxes)

- Yes make my response, name and address all available
Yes make my response and name available but not my address
Yes make my response available but not my name or address

ON BEHALF OF GROUPS OR ORGANISATIONS

3. The name and address of your organisation will be made available to the public. Are you also content for your response to be made available?

- Yes
No we will treat your response as confidential