

OBSERVATIONS

by the

HUMANIST SOCIETY of SCOTLAND,

relative to the

SCOTTISH CIVIL COURTS REVIEW

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1. The Humanist Society of Scotland is wholly committed to the principles of human rights and the concepts of social and political justice. Consequently the Society warmly welcomes this review of the civil courts system in Scotland as it is of the opinion that the present system does not provide adequate access to justice for the population as a whole, and particularly for those suffering from various mental, physical or social disabilities or of limited financial resources. Similarly, the Society supports many of the ideals expressed in the Consultation Paper, which clearly recognizes a number of these problems.

2. In relation to the review procedure, however, there is one preliminary point which causes the Society some concern, namely, the marked imbalance in favour of the legal establishment in the membership of the Project Board, Policy Group and Review Team, most of the members of which appear to be directly employed either in the legal profession or by the Scottish Court Service. While one would obviously expect a substantial representation from both the legal profession and the civil service in reviewing an issue of this kind – and, indeed, many of the questions posed in the Consultation Paper will undoubtedly require expert legal input – nevertheless, the preponderance in this instance does seem rather excessive and the Society is concerned as to whether more than a small minority are fully conversant with the day-to-day problems facing the lay person contemplating legal action. Indeed, this emphasis on the role of the legal profession and a perceived – albeit no doubt unintentional – disdain for the general public, is also evidenced in the phraseology of the Consultation Paper itself by the use of expressions such as ‘op. cit.’, ‘ibid’, ‘Shrieval’, ‘decerniture’ etc. most, if not all, of which will be quite incomprehensible to the average lay person. Unfortunately, such factors, may well be deemed by many as contrary to the view expressed in the Consultation Paper – (Para. 1.14) – that the aim is to improve the system for the benefit of those whom it is intended to serve, rather than for those who work within it.

Accordingly, it is the Society’s view that the Board and its ancillary groups would be greatly strengthened, and assisted in the attainment of its objectives, by the inclusion of more members with personal experience of the initial approach to legal problems, such as advisers in the employment of the Citizens Advice Bureaus, Legal Protection Insurers, Consumer Protection Agencies etc. Similar considerations would also apply to the suggestion (Para. 6.27) that lay members should be appointed to the Rules Councils.

3. It appears to the Society that one of the more intimidating factors in court appearances by unrepresented lay persons is what appears to them to be a cosy relationship between the Bench and legal representatives – again, frequently involving phraseology which they do not understand or fully appreciate. In this connection, despite Lord Glennie’s comments Para. 6.79) the Society has difficulty in finding any valid reason to exclude unqualified representatives whom party litigants wish to appear on their behalf and who, whatever their shortcomings, may be more experienced, better educated or articulate and better able to present the case than the party litigants themselves. Finally, on this point, it is not unknown for judges to adopt a rather autocratic and imperious attitude – particularly towards unqualified litigants or representatives – and both of these factors must obviously militate

against the lay person appearing in court and in the attainment, and the perception of attainment, of justice. These are clearly problems which individual judges must ensure are eliminated.

4. This raises the question of the selection and training of judges. At present, it would seem that the selection of judges is based very largely on the individual's experience of court procedure and knowledge of the finer points of law, rather than on his or her general experience, maturity and innate ability. The Society takes the view that specialized experience in this field is not the most important factor in the appointment of a judge, especially as the assistance of an experienced clerk is normally available, and that personal ability and understanding of the problems faced by the public at large is a more valuable asset in arriving at a just and equitable decision. Indeed, in the Society's opinion, too many cases are determined on a nice interpretation of a fine point of law or legal precedent, rather than on the basis of a decision that is just and fair to all parties. A classic example of this approach is the case of *Barrie Tonner & Anr. v Reiach & Hall* in 2007 (Para. 5.9), to which reference is made in the Consultation Paper (Para 5.9), where, after apparently endless – and no doubt extremely expensive – debates before the Lord Ordinary and in an appeal to the Inner House, the decision was finally reached to dismiss the case, a decision which, with respect, might have seemed obvious to a layman from the outset.

5. The foregoing points are, of course, particularly apposite in Small Claims cases which the Society considers should be conducted in as informal a manner and informal surroundings as possible. The Society are also strongly of the view that the existing upper limit of £750 for claims in the Small Claims Court in Scotland is much too low and that, in order to make the service as widely available as possible, the upper limit for such claims should be extended to at least £5000, as is the case in England for all except personal injury and housing disrepair claims. This low limit before moving on to summary causes – which themselves call for almost as much legal expertise in their initial presentation as ordinary causes – creates little difficulty for commercial concerns which, in all probability, would employ solicitors, but provide yet another difficulty in the way of an unqualified litigant in seeking the assistance of the court to establish a claim. Some useful research was conducted on Small Claims limits in England under the auspices of the Department for Constitutional affairs, which considered the view of litigants and district judges on this subject and a summary of which is available on the Department's web-site.

6. In this connection, reference is made in the Consultation Paper to the provision in the USA, Australia etc. of in-court advice to unqualified litigants. This seems to be an excellent idea and well worth extending to Scotland although, of course, some advice and assistance is given to such litigants in this country at present by court staff. While the Society would be reluctant to recommend U.S. court procedures in general for adoption in Scotland, there does seem to be certain aspects of their Small Claims system - the upper limit for which varies among different States from about \$2400 to \$15,500, the average being in the region of \$5000 – which merits consideration, particularly the emphasis on informality, opportunities for negotiation and mediation, conducting the hearing in a relatively relaxed and friendly atmosphere and, in some States, unless special permission is granted by the court, the exclusion of solicitors or other professional representatives.

7. As the Consultation Paper points out, one of the principal difficulties which limit access to the courts is that many people, particularly among the poorer and middle-income members of society, are deterred from doing so by the expenses which can be incurred. These can, in certain circumstances, be virtually unlimited and include not only the immediate expenses incurred by the litigants themselves which, as is also pointed out, can often exceed any award made to a successful litigant, but also the expenses of the other party. Even more alarming to potential litigants is the possibility of an award against them of the expenses of a subsequent appeal or appeals which, of course, can be astronomical, the fear of which might well, and almost certainly does, deter those with a legitimate claim. Extending the remit of the Small

Claims Court, where the right to appeal is greatly restricted, and the exclusion of professional representatives would obviously greatly reduce the extent of this problem and, indeed, one wonders whether, with capable judges at appropriate levels, rights of appeal at all levels should be further restricted and limited only to instances of malice, corruption or other serious irregularity. In cases where there is a successful appeal and the finding of the lower court is overturned it would appear to be only just that the Courts Service should meet the entire costs of the appeal.

8. One further point on the question of expenses, which is mentioned in passing in the Consultation Paper (Para. 3.21), is legal expenses insurance. Various types of legal cover exist and, although, each type normally has a number of exceptions to the level of cover, it is, nevertheless, relatively inexpensive and, in addition to the cover, usually also includes legal advice on a wide variety of matters, whether covered by the policy or not. The individual premium on this type of policy normally varies quite sharply depending on whether it is taken out by an individual or by a group (i.e. Trade Union, company, employee organization etc.) and it would almost certainly be extremely inexpensive on an individual basis if, for example, the government were to negotiate contracts covering all adults and adding the individual cost, for example, to National Insurance contributions, although whether this would be politically acceptable is something on which the Society is unable to comment.

9. The value of legal education in assisting the public to assess and process a claim would seem to be beyond dispute. Again, however, the extent and manner of provision would depend on the finance which the government would be prepared to provide for this purpose.

10. As for mediation, negotiation, etc., this, in the Society's view, should be encouraged by the courts and the relevant regulatory bodies at every stage in the process. In this connection, consideration might be given to the provision of a mediation service for certain monetary claims similar to that currently provided by ACAS in relation to employment matters, and possibly subject to sanctions, such as enhanced/reduced expenses, for those refusing to participate, should the case subsequently come to court. In order to minimize additional expense, the service could, perhaps, be provided by the present Consumer Advice agencies, whose powers are, at present, extremely limited and who can frequently merely advise the party complaining to consult a solicitor. In addition, if these offices were also given greater powers in relation to consumer claims – as, for example, to cancel the ability of offenders to grant credit or even simply to place them on an official blacklist – expenses could presumably be further reduced by a reduction in the number of such claims which would otherwise reach the courts.

11. Finally, the Society would strongly support any proposals to reduce the formality and complexity of court proceedings and to eliminate any unnecessary delays. While Lord Penrose, in his Review of Inner House Business (Para 6.77) concluded that appeals involving party litigants in the Inner House absorbed a disproportionate amount of court and judicial time on procedural business, the relevant Research (Annex E) indicated that it might be more appropriate to attribute this to ignorance, rather than inefficiency in the observance, of the Rules of Court. Any simplification of the Rules and the relevant procedures would obviously be of considerable assistance in reducing the prevalence and impact of such problems.