

RESPONSE

by

Sheriff David N Mackie

to

Scottish Civil Court Review Consultation Paper

[1] This response is limited to aspects of **Chapter 4** concerning the **Structure and Jurisdiction of the Civil Courts**. The purpose of the response is to promote the preservation, support and development of small, local Sheriff Courts where they exist and to discourage the development of specialist civil centres covering wider geographical areas if that will be at the expense of the smaller Courts. I raise the notion of regionalising the Court of Session at first instance. A secondary aim of this response is to encourage consideration of transferring into the administration of the larger Sheriff Courts the model of the small local court.

[2] My response to the Consultation Paper is unequivocally born of my experience of being the only resident Sheriff in Alloa for the last three years. I perceive benefits and advantages of the small court model in both managerial and judicial terms.

Managerial advantages of the small court model

[3] The most obvious advantage is the immediacy of contact between the Sheriff Clerk and Sheriff leading to fast decision making on administrative issues, flexibility in management and better avoidance of managerial and administrative problems. The more or less daily contact between Sheriff and Sheriff Clerk, Depute Sheriff Clerk and the office staff allows the Sheriff to be kept informed of management issues and to be consulted where necessary in dealing with them. Three years experience as an All of Scotland Floating Sheriff provided me with the benefit of an insight into the functioning of all but 13 of the Sheriff Courts in Scotland with sustained periods in Aberdeen and Dundee Sheriff Courts and numerous visits to Glasgow. This experience has taught me that nothing like the same level of contact between Sheriffs and Sheriff Clerks exists in larger courts and in certain of these Courts was virtually non-existent with management decisions being often intimated to Sheriffs by the Sheriff Clerk or Sheriff Principal with often no real opportunity for Shrieval input. Contact with shrieval colleagues and the comparing of notes invariably leads to expressions of envy from those sitting in larger courts and acknowledgement of the benefits from those, like me, sitting in smaller courts.

[4] There arises a greater opportunity for the Sheriff to have some input into the organisation of the Court diary and, by informal daily discussion, to liaise with the

Sheriff Clerk in avoiding the overloading of certain courts, civil or criminal, at certain times of the year, to co-ordinate the Sheriff's business with his annual leave requirements and avoid unnecessary continuations or callings in that regard, through familiarity with the business and local practitioners to avoid a wide range of misunderstandings which might lead to unnecessary continuations, callings or delays in business.

[5] It was demonstrated by the Sheriff Principal of Tayside Central and Fife that in relation to summary criminal business the Sheriffs with the highest throughput of business within the Sheriffdom of Tayside, Central and Fife were those in the smaller courts with Alloa being apparently the most efficient to the extent of about one third in comparison to Dundee. This, in my submission, said nothing about the individual qualities of the Sheriffs concerned but everything about the sheer efficiency of the smaller courts and the model of a Sheriff having, more or less, his own dedicated Clerk and support staff.

[6] The small court model leads to a sort of team spirit which directly affects the motivation, commitment and morale of the staff. Despite being, apparently, the most efficient court in the Sheriffdom Alloa is also the one struggling most with an excessive workload for the resources available. This has led to unacceptable delays in summary criminal business with consequential delays in civil business. Almost insurmountable difficulties in the allocation of diets and timetabling of business arise repeatedly with, for the Sheriff Clerk, the concomitant and consistent failure to meet SCS targets. These are factors which, by their chronic nature, might be expected to dampen the enthusiasm and morale of the staff but, on the contrary, they rise to the challenge and demonstrate a level of commitment and mutual support which I doubt is reflected at all levels in the larger courts. I believe that but for the benefits I have outlined the delays and difficulties arising from the relatively high volume of business would be worse. In pure managerial terms one might say that the smaller model introduces greater levels of personal accountability to all members of staff and the Sheriff.

[7] The excessive workload on the summary criminal front in Alloa is being addressed by the formation of a second courtroom capable of handling criminal business and there is confidence that with the regular support perhaps one day per week of a visiting Sheriff, floating or part time, the summary criminal backlog will be addressed. It is interesting to note, however, that by the use of part time and / or floating Sheriffs this hard pressed small Court can still accommodate civil proofs of several days' duration albeit that the accommodation for such hearings in the Jury Room or, *in extremis*, Solicitors' library is sometimes less than adequate

[8] In my personal experience the Courts at Elgin, Tain, Dingwall, Fort William / Oban, Haddington¹, Lanark, Jedburgh, Selkirk, Duns and Stranraer are good examples. So too are Arbroath and Forfar within Tayside Central and Fife though they seem to carry a less challenging volume of business. Dunfermline is a Court with two Sheriffs but is one which in my experience demonstrated many of the factors I have outlined and this is reflected in its level of efficiency and throughput of business. So much for the

¹ Not really a direct comparison as its solemn business is handled in Edinburgh.

administrative and managerial advantages of the small court model. Let me say something of what might be termed the judicial advantages.

Judicial advantages of the small court model

[9] The judicial advantages arise entirely from a combination of the Sheriff dealing with all aspects of civil, criminal and administrative (eg. Adults with incapacity, licensing etc.) business and a familiarity with the parties involved. Even in the larger Sheriff Courts certain individuals appear with such regularity and are so familiar that the resident Sheriffs cannot claim true impartiality. In small courts the syndrome is more pronounced but this is, in my respectful opinion, more an advantage than a drawback. The intellectual and theoretical issues in relation to judicial independence and impartiality with possible Human Rights implications under Article 6 are obvious but it is a practical fact of life in the Sheriff Court at all levels.

[10] Where the resident sheriff is confronted by an accused whom he has previously disbelieved as a witness or convicted at trial he can readily make a judgement as to whether to disqualify himself from conducting a trial. In civil business an over familiarity with parties after prolonged litigation in relation to children and repeated child welfare hearings might lead him to feel unable to adjudicate wholly impartially in a subsequent proof. In these circumstances another Sheriff can be brought in. By and large, however, there is an advantage in dealing with issues of contact and residence to have also been involved in dealing with a referral from the Children's Hearing or an appeal from the Hearing. It can be an advantage in dealing with an undefended repossession action by a Housing Association or the local Council to be aware of ongoing contact issues with children which a party representing himself without the benefit of advice does not realise may be relevant. The handling of a criminal matter arising from domestic violence may be constructively informed by a familiarity with a referral from the Children's Hearing and / or associated civil proceedings. An application for review of special conditions of bail against contact with a spouse or family members may equally be informed by a familiarity with connected civil proceedings and contact with parties at child welfare hearings. I respectfully agree wholeheartedly with the observation in the Consultation Paper that a familiarity with both civil and criminal business is advantageous especially, on the criminal side, in domestic abuse / violence issues. It is difficult to know, in fact, how such issues can be properly addressed after conviction without a grasp of family law. It is always regrettable to hear criminal practitioners unfamiliar with modern family law still using the pre 1995 Act terminology of 'access' and 'custody'; it would be more regrettable if Sheriffs were to be as ill informed. By the same token, on the civil side, a Sheriff should properly understand the interaction between community based disposals (probation orders, SACRO domestic abuse groups, alcohol and drugs counselling, DTTO's etc.) and measures to ameliorate, mediate or adjudicate arrangements for the care, upbringing of and contact with children.

[11] Regular contact, formal and informal, with the criminal justice social work team at a local level, the envy of shrieval colleagues and criminal justice social workers in larger towns and cities, can lead to benefits extending beyond the immediate criminogenic needs of an individual and a heightened awareness of the needs of that

individual or members of his family in other judicial contexts. The Criminal Justice Teams are part of a unified structure of social work services and can act as a portal to other services. It is right that the Sheriff Court should continue be empowered to adopt a holistic approach as well, especially as the political and social impetus is increasingly in the direction of community based alternatives to custody.

[12] On a much more mundane but practical level the knowledge that a particular individual or out of town correspondent is usually represented by a particular agent who is not immediately available can allow for a common sense solution and avoid unnecessary further procedures.

[13] The previous devolved administration lauded the concept of the Community Court. In my respectful view we already have them in the small Sheriff Courts I have mentioned and the potential to introduce a similar concept in the management of the larger courts.

What is the small court model and how transferable are its merits?

[14] In essence the qualities of a small court are a single Sheriff dealing with all business civil and criminal with the potential to call on occasional Shrieval support to overcome timetabling issues or conflicts of interest. That Sheriff will have a dedicated Clerk, their own caseload and mastery over the Sheriff's diary. Ideally the Sheriff would have his own courtroom. At the risk of sounding facetious but with no such intention motor manufacturers have found the benefits of small teams building the whole car rather than workers working anonymously on a part of a production line and there is a recognised managerial concept of small being beautiful. I would respectfully urge consideration of these factors before an irretrievable commitment to centralisation, specialisation and fragmentation of the role of the Sheriff. It would be a shame if Scotland were to go down that line just as other influential parts of the world are waking to the advantage of a judicial office with such a wide jurisdiction. In the wider political context it seems to me not irrelevant that in the fields of health and education policy developments are towards personalisation of services. I respectfully suggest that a similar approach to the administration of the Courts is justified.

[15] An adherence to the wide scope of duties of a Sheriff both civil and criminal highlights the need for greater resourcing and provision of judicial training and a review of the qualities and professional experience of Shrieval candidates under selection.

Chapter 4 questions

1. Yes. I have nothing to add to the observations in this regard already touched upon in the Consultation Paper.
2. No. While there may be merit in Judges or Sheriffs with particular expertise being utilised in their field of special knowledge I consider that all Judges and all Sheriffs should have the capability of dealing with all matters within the jurisdiction of their Court. Specialisation through the formation of specialist

Courts raises different considerations and offers, in my respectful view, a more appropriate basis for judicial specialisation.

3. No. I refer to the discussion above for my reasons.
4. Some specialisation may be justified and supportable in the larger Courts. It would in my view be wrong to try to replicate such large centres and thus artificially create a basis for specialisation. Better to allow specialisation in the large Courts (Glasgow, Edinburgh and Aberdeen) and resource those centres in such a way that they could be drawn upon by the smaller courts when required. This is especially so if the Court of Session is to develop as a largely appellate Court. To quote a slightly cynical but realistic Senior District Judge from Victoria, Australia, "At our level people just want to know if they've won or lost". I doubt if specialisation will either assist the throughput of business or reduce the number of appeals. It is liable, however, to lead to longer judgements.
5. Being no longer in private practice I find it difficult to comment with any authority on this question except to suggest that there may be a perception, sometimes misplaced depending upon the type of case, length of proof and whether counsel are involved, that the Sheriff Court will offer a speedier, cheaper and more straight forward outcome. It should but inadequate resourcing and the burden of criminal business undermines this aspiration. The convenience for parties and witnesses of a Court situated locally may be an advantage but I recognise that it may be a disadvantage to persons who do not want to wash their dirty linen in public and who would prefer the anonymity of the higher court. I have reservations as to whether a Civil Centre will offer the same benefits of the higher court but believe that this is one factor which encourages a retention by the Court of Session of a first instance function.
6. No comment.
7. No. I believe there are strengths in the separation of these Courts which outweigh the possible managerial and administrative benefits. This question is linked to question 5, the factors which cause people to resort to litigation in the first place and the choice of forum. It is also linked to question 8 and should probably come after it.
8. A question about turning the Court of Session into a court of appeal only is also a question about turning the Sheriff Court into the only civil court of first instance in Scotland. Such a development would lead, in my view, to a requirement to have differential levels of jurisdiction within the Sheriff Court. If in reality the concept is of regionalising the Court of Session at first instance in recognition of its capacity and resources in Edinburgh being inadequate to meet the demands made upon it then so be it. What are proposed as Civil Centres might more appropriately be called the Court of Session or the Court

of Session on Circuit or the Circuit Court thus allowing a maintenance if not an enhancement of the benefits of more localised Sheriff Courts.

9. £30,000.
10. Yes.
11. See my answer to question 8.
12. “----- do -----“
13. It has advantages. Please see the general discussion above to which I have nothing further to add except to say that for litigants on benefits or low income the requirement to travel to a civil centre would be a comparatively burdensome imposition and likely to lead to more difficulties arising from parties and witnesses not turning up than already occur.
14. Yes.
15. Yes.
16. No comment.
17. There is a case for the regionalisation of the Court of Session and a maintenance of the current and historically robust division of labour at first instance and appeal between the Sheriff Court and Court of Session. There is a case for maintaining the appellate function of the Sheriffs Principal especially on procedural matters and matters of a more local and administrative nature such as licensing. This would be compromised by a nationalisation of the Sheriff Court.
18. Yes. I can think of no disadvantages to this but many advantages.
19. This question addresses issues which reinforce the notion of regionalising the Court of Session. There seems little point in developing the facility to transfer between fora and thus risk taking up increasing amounts of valuable court time on unnecessary procedural issues if clear and long understood jurisdictional demarcations are maintained between the Court of Session and Sheriff Court subject to revisal of the privative jurisdiction of the Sheriff Court.
20. Yes.
21. It should be retained. See my answer to question 17.
22. Yes.

23. No comment.
24. The main advantage is of allowing flexibility in meeting demand when a resident Sheriff or Senator is absent through illness or annual leave or to cope with unusual peaks in demand for judicial resources. It is a means of providing prospective judicial candidates with experience. It is also a means of allowing senior judges or sheriffs nearing retirement or who have in fact retired a means of winding down while still making a valuable contribution of their knowledge and experience. An over reliance on part time help undermines the authority of the Court and is perceived by the public, practitioners and possibly the judiciary as justice on the cheap. It can lead to a lack of consistency for example in sentencing at a local Sheriff Court level.

Sheriff David N Mackie

*Alloa,
9th January 2008*