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Civil Courts Review Team
Scottish Executive
Edinburgh
By email

Dear Sirs,

Response to Scottish Civil Courts Review Consultation

1. I write to respond to this consultation paper ("the paper"). My comments are limited to one area covered in the paper. I have no objections to this letter being published.
2. At paragraphs 2.18 and 4.50 of the paper, reference is made to alternative means of dealing with *inter alia* housing cases in the sheriff court. The use of tribunals is mentioned. Reference is also made to the difficulties created by party litigants at paragraph 6.74 (albeit mainly in the context of appeals).
3. In my view, there is a sound case for taking housing cases out of the sheriff court entirely. By housing cases I include principally actions for recovery of possession and ejection. I would also include actions relating to repair of residential accommodation (in respect of both specific implement and damages); discrimination on the grounds of

sex, race etc in relation to the provision of residential accommodation; a miscellany of summary applications available under the Housing Acts (for example, disputes about the type of tenancy offered; refusal of permission to sublet etc); actions relating to breach of residential tenancy conditions (including return of deposits); and succession disputes (at least in the case of assured and Scottish secure tenancies).

4. I also believe that there is a case for taking other types of housing cases from the forums where they are presently dealt with and having them dealt with together with other housing cases. I have in mind principally homelessness cases where the only judicial means of resolving disputes is through judicial review in the Court of Session. Other types of cases that might also be usefully dealt with in another forum might be disputes relating to the right to buy (currently dealt with in the Lands Tribunal).
5. The reasons why I believe there is a case for taking housing cases out of the courts are set out at length in a publication authored by myself and Suzie Scott (then of Glasgow University): A Housing Tribunal for Scotland: Improving Rented Housing Dispute Resolution, published by the Chartered Institute for Housing in Scotland in 2004. That report is available on the CIH website: www.cih.org/scotland/policy/resproject014.pdf . Reference is made to the full terms of that report for the analysis and conclusions.
6. In brief, we concluded that while the system of resolution of housing disputes had certain strengths, it was nevertheless in need of reform. The principal problems that we identified were: lack of specialism on the part of the court; lack of skilled representation and advice; lack of consistency in decision-making; excess of formality; the adversarial nature of the process; multiplicity of procedures and forums; the high number of unrepresented litigants; lack of speedy resolution

(sometimes); relatively high cost and the absence of a built-in mediation/conciliation procedure.

7. We concluded that reform could be achieved by adopting one of two strategies. The first we termed the piecemeal approach which would involve a series of individual tweaks and adjustments while maintaining the same essential structure. The alternative approach was the creation of a specialist housing tribunal for Scotland which would have jurisdiction over all housing disputes.
8. The CIH, which is the pre-eminent association for housing professionals in the UK, adopted the alternative approach as its policy. The formal, unpublished, response of the Scottish Executive to our report did not rule out the creation of a housing tribunal but found that a lack of evidence based research on tribunals made it difficult to draw conclusions as to the desirability of a housing tribunal. Furthermore, it remained unclear whether the problems with the current system lay with the court structures themselves or with other aspects of dispute resolution.
9. Since our report was published, a new tribunal, the Private Rented Housing Panel ("the PHRP") has been created by the Housing (Scotland) Act 2006. That tribunal subsumes the Rent Assessment Committee, and its jurisdiction, and acquires a new jurisdiction relating to disrepair disputes in the private sector. I am a member of that body.
10. In my view, the PHRP might well be a suitable basis for the creation of housing tribunal with a much broader jurisdiction. The manner in which such a tribunal would work, and jurisdiction, is explored in our report at paragraphs 5.30 onwards. The creation of such a tribunal would address a number of the principles identified by the consultation paper which should underlie reform. Such a tribunal

would meet the test of proportionality as defined at paragraph 5.2 of the consultation paper in that the legal and judicial resources would be focused on the specialist issues raised by housing cases whilst recognising the fundamental importance of housing disputes, especially where repossession is sought. It would improve access to civil justice through procedures better designed to accommodate party litigants and lay representatives. The provision of expert decision makers will improve quality and consistency of decision making. It would ease the burden on the courts, particularly the sheriff court, thus releasing their resources for cases better suited to the experience and formality of the traditional courts. Through in-built mediation and conciliation processes built into the rules of procedure, early resolution of disputes may be encouraged and facilitated.

11. I would add three further points which I consider to be of importance. The first is that legal aid should continue to be available in principle, subject to the usual tests of reasonableness and means. The second is that, as with the Mental Health Tribunal for Scotland (in civil cases) appeal from the tribunal should be to the sheriff principal and not the sheriff. A housing tribunal would be exercising a judicial function, equivalent to that of the sheriff court at present and appeal should be to the same level as appeals from the sheriff. Alternatively, as with the employment tribunal, a specialist appeal tribunal could be set up with an appeal from that to the Inner House. Thirdly, even in a specialist tribunal, expert qualified representation is of great importance in my view. Resources should be made available for the proper training and accreditation of such representatives, whether they have full legal qualifications or not, to help ensure the quality of justice in such a tribunal.

12. I have nothing else to add at this point. I would be very happy to elaborate further on any of the above should that be desired.

Yours faithfully

Derek O'Carroll

Advocate.