

# **Scottish Trades Union Congress**

## **The Civil Justice Review**

### **Introduction**

The Scottish Trades Union Congress welcomes the opportunity to submit this response to the Civil Justice Review

The STUC represents over 635,000 trade union members in Scotland, with members in 39 affiliated organisations. We speak for trade union members in and out of work, in the workplace and in the community, as workers and as citizens. Our affiliated trade unions have members in every sector of the economy and across a broad range of occupations.

Individual trade unions provide legal representation for members, seeking justice and fair reparation for those injured or made ill at their work. Trade unions cases represent the vast majority of personal actions initiated in the Court of Session every year and, as such, our affiliated organisations should be regarded as major users of our Supreme Court.

### **The Civil Justice Review Process**

The STUC remains concerned that trade unions have not been properly consulted or involved in the process. This is particularly unfortunate given two key factors which will be well known to the Civil Servants assisting the review if not the members of the Review Board or Policy Board themselves. Firstly, trade unions in Scotland are a major user and major stakeholder in the Civil Justice System. We would estimate that at least 50% of the personal injury cases presently raised at the Court of Session in Edinburgh are cases supported by and advanced on behalf of trade unions and their members. The Trade unions therefore have a vast knowledge relevant to the Review and also have a significant interest which ought to be properly recognized. Moreover, because of the way the trade unions fund their cases and their commitment to their members receiving 100% of their damages it cannot and should not be assumed that the views and interests of the Trade unions are the

same as other users of the Courts for the purpose of advancing personal injury cases. The second factor is that it is very well documented that the trade unions and the STUC particularly have been very vocal on the issue of Civil Justice and Civil Justice reform for many years. They have engaged with Politicians and Civil Servants at all levels on this issue and ought therefore to have been involved centrally within the process from its outset. Our affiliates are not opposed to any review of the civil justice system providing it is fully inclusive and calls on the experiences of major court users as part of the review, not purely as consultees.

Trade unions are concerned that, for some reason two groups, the Scottish Consumer Council and the Scottish Mediation Network have been part of the review team from the outset at the expense of other stakeholders including unions, asbestos groups and community law centres. We would argue that trade unions and these aforementioned organisations have far more direct experience of accessing the justice system for the benefit of members and clients. The STUC is opposed to any concept that access to our Supreme Court should be measured by value and treated like any other item a consumer may wish to purchase. Our concern in relation to the inclusion of the Scottish Consumer Council at the expense of court users is that their area of specialism, consumer rights will influence the outcome of this process and that securing justice will no longer be a citizen's right, it will be treated as a commodity.

It could also be suggested that the Scottish Mediation Network, with an interest in alternative dispute resolution, has an interest in the outcome of the review, especially in cases being resolved through mediation.

While we recognize that mediation may have some role to play we have two major reservations on the issue of mediation. Firstly, mediation should never be compulsory and should never be used as a gateway or a barrier to preventing our affiliate's members exercising their right to pursue their claims through the Court process. Mediation can only work if both parties genuinely want mediation. "Compulsory mediation" is an oxymoron.

We have monitored closely how our affiliate's member's cases have progressed since the introduction of the Voluntary Pre-Action Protocol in relation to personal injury cases. Given both the letter and spirit of the rules of the Protocol we would suggest that if a matter cannot be resolved through this process mediation would have very little effect indeed other than in the rarest of occasions.

Having monitored cases which have progressed under the Protocol it is perfectly clear that in personal injury cases many, and indeed we would suggest the majority, of insurers are not looking at the cases and dealing with the cases in the way in which the Protocol was intended. That is to say, they are not quickly admitting liability and making full and proper offers in cases where they ought to so do. Instead, it is our observation that under the Protocol many insurers repudiate in cases where there is no basis for doing so; or where they show a willingness to settle, advance and stick to offers below the judicial rate. This means that we have observed that our affiliates continue to require to litigate a large number of cases on behalf of their members to obtain proper recompense for them. We have read with interest the articles in the Journal of the Law Society of Scotland in January and February of 2008 dealing with this matter and we would advise that our observations echo and square with the sentiments in both of those articles.

We would therefore submit that rather than enforcing mediation upon parties a better approach would be for the Protocol to be given teeth to stop insurers from acting this way. We are proposing that there ought to be appropriate and substantial increased of costs awards against Defenders in cases where they have followed the Protocol and unreasonably repudiated or made unreasonably low offers.

Our second caveat to mediation is in relation to who bears the cost of mediation. Our system is based upon the entirely correct notion that "the loser pays". This is the position that applies where a case settles through discussions between insurers and solicitors. It is also the position that applies in a Court action. If mediation is to be used at all that can only be done if it follows the same model. In other words, if mediation results in settlement of a claim the insurer must meet all of the costs of the mediation process.

Finally, in relation to the process we would question why the review group contains four judges, including the Chair, Lord Gill. In our view this is a high compliment. We would not dispute their important role in our judicial system but we would see the contents of this review being related to political, commercial, social and economic policy. The STUC is concerned that many users have been excluded at the expense of judicial decision makers where it might have been more appropriate for their view to have been considered as part of the consultation process.

The STUC views access to civil justice as a right and have concerns that the review appears to focus heavily on moving cases deemed to be of low monetary value out of the Court of Session being the underlying reason for the exercise, ignoring the fundamental rights of individuals.

We have experience and knowledge of cases which although may be considered to be of a low monetary value have had a profound affect upon improvements in health and safety in both individual workplaces and upon the health and safety culture across all workplaces in Scotland. It was through one of our affiliates, Unison, litigating a number of needlestick cases which in each case attracted damages of only £1000-2000 that resulted in dramatic improvements to procedures for handling needles across the NHS throughout Scotland. We would therefore submit that because of the affect that they have upon health and safety all personal injury cases ought to be properly viewed as of a high value irrespective of the level of financial compensation which they attract. We would in turn therefore submit that all personal injury cases ought to be capable of being pursued at our country's Supreme Court, the Court of Session, to reflect their importance and high value.

Forcing personal injury cases out of the Court of Session and into the Sheriff Court would have a significantly negative impact upon health and safety standards. We do not accept that there would be a consistency of approach or consistency of standard of justice throughout all of the country's Sheriff Courts. There would be competing and conflicting judgments which would in turn send entirely the wrong message regarding health and safety to would be negligent employers.

The starting point for the Review's consideration of Civil Justice appears to be the issue of legal costs and some notion of proportionality of legal costs. We do not accept that that is the appropriate starting point for such an important or fundamental Review as the one being undertaken. Instead we would submit that the Review ought to proceed from an analysis of our rights. The fundamental question is whether or not our Civil Justice system presently serves, protects and promotes our rights as individuals within society? If it is asked which rights the Civil Justice system ought to protect and how any system ought to handle apparently competing rights, the answer is obviously found within the European Convention of Human Rights.

It is that Convention which ought to be the starting point for the Review.

### **European Convention of Human Rights**

As outlined earlier we believe that any review that does not proceed from a starting point of protecting the existing rights of individuals is fundamentally flawed. Our "bill of rights" is found in the European Convention of Human Rights and the various articles making up that convention. There is a duty on the Scottish Government to ensure that all legislation complies with the ECHR. However, it is not enough to simply comply with the convention, new legislation should be designed to promote the rights within the convention and allow individuals to exercise their individual rights within the articles making up the ECHR. We do not believe this review, as it stands, will lead to legislation that would be compliant with the ECHR.

While, as we have set out in some detail above, we would strongly question as a matter of policy and politics whether or not the perceived monetary value of a case ought to be the basis for deciding whether or not it should be heard at the Court of Session, we would also suggest that taking such an approach would be potentially in breach of the European Convention of Human Rights.

We would suggest that there are problems with the Civil Justice Court system which presently exists which can be properly addressed and

revised on an ECHR approach. There are additionally proposals within the Civil Justice Review document which, if enacted, we would certainly believe would be in breach of the Convention. We will deal with some of these issues below.

### ***Article 2 - the right to life***

The STUC feels that an individual's right to life has to be the most fundamental of all our human rights. The importance of this right is evidenced by its prominence in the ECHR, coming first in the hierarchical order of the seventeen articles. In our view this right is too often ignored by employers, placing their own monetary values of profitability, before their workers right to life. Currently around thirty five Scottish citizens are killed every year in the course of their employment.

Given that the right to life is the most important article within the convention we believe that all matters and legal issues in connection with this article, including investigation of workplace fatalities should be progressed through our Supreme Court, the Court of Session. This would clearly include Fatal Accident Inquiries; a move that we believe would encourage employers throughout Scotland to pay attention to reports arising from FAls and ensure any recommendations are implemented.

This article clearly goes further than providing the right to life, it also serves to protect the right to life and, as such, all issues in relation to workplace health and safety that seek to protect the lives of workers fall within article 2. The STUC believes that there should be no restriction placed on such matters being pursued through the Supreme Court, the Court of Session, reflecting their importance in the workplace and wider society and ensuring our civil justice system complies with article 2, the fundamental right to life.

The trade union movement has an established record in fighting for recompense for members injured at work and ensuring that, in the most serious cases often involving workplace deaths, members or their families receive justice and answers as to why workplace tragedies happen. However, trade unions also value the importance of using the results to improve health and safety in individual

workplaces and throughout Scotland. The singular mention of trade unions in the review reflects a lack of understanding that trade union litigation can have on protecting the right to life and we feel strongly that the review should have recognized this fact.

Equally we feel that the civil justice system does not currently provide adequate mechanisms for our affiliates to raise Court actions where the individual's rights to protection of life have been infringed. Allowing trade unions to take employers to Court for forcing unsafe workplaces on workers before an accident or tragedy has occurred would help us protect the right to life, seeking legally enforceable resolutions to health safety failures and appropriate sanctions before accidents happen.

### **Article 6 - The Right to a Fair Trial**

As mentioned earlier trade unions view the role of the civil justice system as, not only to provide for reparation for members suffering, but also to secure justice for the members as a result of the failure of employers to provide for their health and safety. This sense of justice can often be extremely important to trade union members and their families as, clearly, only a small proportion of health and safety failures result in a criminal trial under health and safety legislation. This is in fact a very important point to remember. Statistics clearly show that it is only in a very small percentage of cases where Criminal proceedings are brought against an employer for a breach of health and safety legislation. Accordingly, in terms of deterrence and a force for making workplaces safer, we would submit that it is personal injury cases and bringing those cases successfully through the Courts and particularly at the Court of Session, which is the driving force behind workplace health and safety improvements. The reward of Scotland's Trade unions making workplaces and the country as a whole safer is one which the STUC and all of our affiliates are rightly proud. It is for this reason that the trade union movement in Scotland insists that the Civil Justice Review will not do anything which will damage our ability to continue to pursue personal injury cases on our member's behalf in the way in which we have done for decades. As things stand we are very conscious of the fact that certain aspects of the proposals contained within the Review would do exactly that and could indeed cause the death of trade

union Legal Services. The proposals in relation to the Personal Injury Assessment Board and removing personal injury cases from the Court of Session are the two proposals which would most acutely have this affect.

The ability to access justice should be the cornerstone of any civil justice system and the ability and freedom of Scottish citizens should be far more important a value for this review than the nominal value or the cost of pursuing a claim.

Our current civil justice system has, unfortunately, developed a number of problems which mitigate against access to justice which the current review has failed to address.

The trade union movement has campaigned for a number of years against privatisation of the Court and any moves preventing access to justice. The moves by the last administration and the current Scottish Government to allow access to justice on a user pays basis are, we believe inequitable, and go against the right for all citizens to have access to justice. This means that justice is now no more than a commodity, only available to those who can afford to access and use the Court rather than a publicly funded justice system that is open at all.

It has also been brought to our attention that the review highlights the disparity between recovery of legal fees for successful litigants in Scotland compared to England and Wales. In Scotland a trade union, following a successful action, will only recover 57% of their Solicitors legal fees compared to 89% for a successful case in England and Wales. This means that accessing justice comes at a greater cost for trade unions in Scotland than for cases in England and Wales. We believe this is inherently unfair and should be reviewed.

We would in fact question the statistic in relation to England and Wales. We would suggest that that statistic is now out of date. Due to the position of fee recovery in England and Wales we would submit that the true position is that there is now 100% recovery for successful cases certainly in relation to Plaintiff personal injury case.

Anecdotal evidence alone should be enough to establish the point: It is well known that in England and Wales it would seem as if every provider of personal injury services, whether they are solicitors, insurers, claims companies or claims farmers all offer to guarantee the victim that they retain “100% of their damages”.

We should not be required to remind the Review body that our system of personal injury litigation (as is the case in England and Wales) is based upon the concept of restitution. Restitution can only be achieved where the victim retains 100% of his damages. Due to the cost recovery system in Scotland at present whereby only 57% of legal fees are paid by the losing party there is in fact institutional pressure which militates against and in the majority of cases prevents 100% recovery. In other words the legal cost recovery system denies victims restitution.

If our law determines that justice in personal injury cases means restitution it must also therefore ensure full legal cost recovery or the system shall institutionally prevent access to justice.

Exactly the same argument applies to the Personal Injury Assessment Board. It is entirely untenable and unacceptable in our submission for victims of accident, injury and disease to be forced to seek compensation from an Assessment Board while being denied (through the cost process) access to independent legal advice. Any step in that direction, in terms of a civilised Civil Justice System would be retrograde at best. Such a move would not be an improvement in access to justice but would instead be a clear act of denying access to justice.

The use of the Personal Injury Assessment Board would also remove completely one of the main roles which pursuing personal injury cases on behalf of trade union members serve, and which we have of course set out at length above. That is to say the Personal Injury Assessment Board would remove completely the role that pursuing personal injury cases have in improving health and safety throughout the country. There would be no legal argument defining and setting the boundaries of what an employer can and cannot do in terms of health and safety; decisions would be taken behind closed doors; and there would no longer be any direction at all as to what the law will

permit and what the law demands in terms of health and safety from a reasonable employer.

## **Article 8 – The Right to Respect for Private and Family Life**

The STUC believes that in order to have a private and family life an individual must be able to have a safe and secure home. Our current civil justice system does little to protect the right to a home and this review does not appear to consider this issue.

It is concerning that, in the 21<sup>st</sup> century thousands of Scottish people lose their home through eviction each year following court action. It is far too easy to evict vulnerable individuals and their families from a home for only a small amount of arrears. Of even greater concern is that these legal evictions, albeit extremely unfair, tend to take place following action by local authority landlords or housing associations. Govan Law Centre point to an increasing amount of clients requiring their assistance following illegal eviction often involving acts of harassment by, or on behalf of private landlords, and this should be a matter of concern for any civil justice review.

In order to be compliant with the ECHR, in particular the requirement of proportionality, it is essential that the cost of representation for legal representation should be met. Again Govan Law Centre point to anomalies in their funding arrangement where a person losing their house will have their costs met. However if the representatives manage to prevent eviction then the cost may not be met. This seems ludicrous and we believe that this review should have looked at funding for community law centres, ensuring that vulnerable individuals have a right to representation.

## **Public Policy and Civil Justice**

The stated intention of the Scottish Government is to eradicate homelessness by 2012, a deadline less than five years away. However following discussions with Govan Law Centre, as outlined above, and other community legal service providers it is clear that our civil justice system does not provide adequate representation for vulnerable individuals facing eviction. This review provided the

opportunity to suggest changes to make legal evictions far harder. Perhaps refusing all applications for eviction where the arrears are under £2000. It should also have considered how it makes it easier for individuals facing illegal eviction to access legal representation, therefore ensuring that exploitation of vulnerable private landlords can be challenged. Without considering the continuing problem of large scale eviction, many illegal then this review is clearly in conflict with Scottish Government public policy to eradicate homelessness by 2012.

This review also places emphasis on empowering individuals to represent themselves in certain Court actions. The STUC does not believe that this would be the view, or the wish, of the majority of individuals in society other than those equipped with the knowledge, skills and confidence to do so. The STUC recognizes a large proportion, around 25%, of the Scottish population lack basic adult and literacy and numeracy skills. The STUC do not believe that providing legal education for individuals already struggling basic skills is unrealistic and will inevitably lead to, an already vulnerable proportion of the Scottish population, feeling increasingly excluded from society and from the justice system. The increase in the Small Claims Limit to £3000 has allowed those who can afford expensive consumer goods easier, and more affordable, access to justice without the need for representation. On the other hand an individual staying in sub standard accommodation, more likely to be one of the 25% lacking literacy and numeracy skills, wishing to raise a housing complaint, no longer has access to legal aid and will not have, and likely never will have, the knowledge and confidence to represent themselves at the Small Claims Court.

The STUC believes this is an example of how our civil justice system is now places more focus on protecting the rights of the consumer at the expense of the vulnerable in society, showing that placing monetary values on access to justice rather than rights is extremely exclusive and divisive.

### **What is the agenda behind this review?**

The STUC is concerned that there appears to underlying agenda on the part of the authors of this review that seeks to promote the rights

of section sections of society to the detriment of others. It would appear that part of this agenda is to remove all, or most of personal injury cases from the Court of Session. This is clearly a matter of great concern to the trade union movement and we believe that the Supreme Court should continue to be the Court of first instance for personal injury claims. This will ensure that trade unions can continue to use successful claims to strive for healthier and safer workplaces.

The authors of the review appear to be promoting a consumer agenda, where individuals can take proceedings on their own behalf, without representation and without the fear of having to meet legal costs if unsuccessful. If this is the case then our concern is that such an agenda only serves articulate, generally middle class and confident individuals with the necessary knowledge and skills and will, by no stretch of the imagination benefit all “consumers”.

It also appears to be that the authors of the review are also promoting changes in the Civil Justice system to enhance the commercial Court procedure at the Court of Session at the expense of excluding major users of the courts in Scotland.

The STUC are also concerned that the use of mediation and other methods of alternative dispute resolution are also seen as important in the eyes of the authors of the report. If the review sees Article 6 of the ECHR as being of any importance than there is no place for compelling litigants to use such procedures at the exclusion of access to our Supreme Civil Court and our Civil Justice system.

The concern of the STUC and many of the affiliated trade unions and other organisations we have consulted on this issue is to what extent this review was concluded before the consultation began and the extent to which these agendas will be followed irrespective of the consultation response.