

SCOTSS

Trading Standards in Scotland

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The Lord Justice Clerk
Rt Hon Lord Gill

CivilCourtsReview@scotcourts.gov.uk

Dear Sir

Response to Scottish Civil Courts Review: A Consultation Paper

The Society of Chief Officers of Trading Standards in Scotland, SCOTSS, is the professional body representing the lead officers for Scottish Local Authority Trading Standards Services. On behalf of the Society I welcome the opportunity to respond to the review.

I am happy for this response to be shared widely with relevant stakeholders and to be published and trust that you find the Society's comments constructive and worthy of further examination.

Yours sincerely,

David Thomson

David Thomson,
Chairman,

Society of Chief Officers of Trading Standards in Scotland

Response to Scottish Civil Courts Review: A Consultation Paper

Answers to the consultation questions

We do not propose to respond to all of the questions in the consultation paper, but will focus our attention on consumers, small claims and local authority advice centres. We will follow the numbering system contained in the consultation.

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?

We agree that there is a need to find more proportionate ways of dealing with disputes, as identified in *Modern Laws for a Modern Scotland*, while increasing access to justice for consumers. Cases should be dealt with as early as possible, at the lowest appropriate level of the system.

While most people who are involved in disputes agree that the courts are an important way for people to enforce their rights, on the whole they are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than necessarily enforcing their legal rights.

A greater emphasis on resolving disputes informally at an earlier stage and the provision of better advice and information for the public, coupled with a less adversarial decision-making forum with a greater case management role, is likely to increase access to justice in a more effective and proportionate way than simply providing sufficient resources for everyone to be legally represented in court.

Chapter 2: Access to Justice

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

We believe that public legal education can play a very important role in ensuring that more people have access to justice. If people are to exercise their legal rights, they need firstly to know what those rights are, and how the legal system works. Many people do not currently have access to justice either because they do not recognise in the first place that they are involved in a dispute, or because they do not know what to do, or where to go for help, about the dispute.

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?

We do not believe that it would be proportionate for everyone to be legally represented in every case. We believe that the way forward is to make dispute resolution procedures less formal and more user-friendly, reducing the need for parties to be represented. Bearing in mind the underlying principle that court should be a last resort, we would hope to see a system where most disputes could be resolved through less formal processes.

Court processes and procedures are complex and often very difficult for non-lawyers, even well educated and articulate individuals, to follow. While our strong preference would be for an entirely new user-friendly process, we consider that, at the very least, there should be a comprehensive overhaul of all current court procedures, to make them easier to use and simpler to understand. At present, these can be confusing, intimidating and even frightening for parties, particularly those who are unrepresented, and also for other court users, such as witnesses. Under current sheriff court procedures, there are a plethora of court forms which require to be used by, or served on, parties to a dispute. If the current procedures were broadly to be retained, there would need to be a complete overhaul of these forms. Although attempts have been made in recent years to make some of these forms, such as the small claims summons, more user-friendly, they are still not easy for many people to understand. Other court forms may cause people to be distressed and upset. The standard witness citation forms, for example, are written in a very formal tone, informing the witness that if they fail to attend court, a warrant will be granted for their arrest.

The small claims procedure, which was intended to be an informal forum where consumers could take cases without the need for legal representation, has in practice operated much more formally than was originally envisaged. We have welcomed attempts which have been made in recent years to make it easier for people to make a small claim. In 2002, the rules were simplified and a glossary of legal terms added, while plain English guidance was produced for party litigants. Despite these improvements, the procedure remains complex and adversarial, and is governed by the usual rules of evidence. In those cases where they actually get as far as the hearing, party litigants are very often faced with a solicitor representing the other side, within an intimidating and formal setting dominated by lawyers wearing formal dress and using legal language. Overall, the whole court experience can be very off-putting for those who are not represented. The formality, together with the need to take time off work and possibly having to return for several further hearings, when only a small amount of money may be at stake, is likely to deter many people.

We believe that a new more user-friendly process for lower value cases would help to address these difficulties.

While the current small claims system is far from perfect, recent increases in the jurisdiction limits should at least in the short term ensure that fewer unrepresented individuals are required to appear in the summary or ordinary cause courts, which are more complex and formal, while exposing parties to potentially significant expenses.

Representation

While we would hope that any new process for lower value claims can be designed in such a way that most people will not require representation, there will still be cases where representation is necessary. Representation by a solicitor, however, will not always be required: other advisers can and do represent people in certain types of court proceedings. Representation by non-solicitors is currently permitted, subject to certain conditions, in certain types of case, such as

small claims, summary cause first callings and proceedings under the Debtors (Scotland) Act 1987, and will soon be introduced in relation to sequestration proceedings and time order applications under the Consumer Credit Act.

A 2004 survey carried out by the Scottish Sheriff Court Users' Group also found that only 1 in 4 of its member organisations (including citizens' advice bureaux, local authority advice services, law centres and other advice agencies) who responded, provided court representation more than 10 times in a year.

The introduction of less formal procedures may help to encourage greater representation where necessary, while it is likely that greater exposure to in-court advisers in some sheriff courts has reinforced to sheriffs the potential benefits of representation by non-solicitors for both parties and the courts.

The commencement of sections 25-29 of the Law Reform (Miscellaneous Provisions) Act 1990 allow suitably qualified non-lawyers to apply for rights of audience in Scotland's courts, ending the monopoly previously enjoyed by solicitors and advocates.

We welcomed the commencement of these provisions as being in the interests of consumers. To date, no professional or other body has been awarded rights of audience under the provisions, but we hope that in future they will lead to increased choice of legal representation for consumers.

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?

While recent increases in the small claims' limits are very welcome, and simplified forms and procedures would be a definite improvement on the current situation, we think that much more radical reform is required in relation to cases involving lower monetary value. It must be stressed that while such claims may involve sums of relatively low financial value in terms of the broad spectrum of cases dealt with by the courts, they may well be of considerable importance to those who are involved in them.

The small claims procedure was introduced in 1988 as an informal and simple means for individuals to bring consumer claims to court without representation. In reality, however, the procedure has come to be dominated by undefended debt cases brought by large companies or public bodies with legal representation, often against other companies, but also against individuals.

One possibility might be to separate out consumer cases from debt cases and deal with each within a separate forum. With regard to debt cases, there is a need for a specialist forum which can ensure that debtors are protected so far as possible. While the debt arrangement scheme has gone some way towards this, it has not been taken up to the degree anticipated. In addition to cases currently dealt with under the small claims and summary cause procedures, such a specialist forum could also deal with ordinary cause money claims involving individuals.

It may also make sense to include other related types of case, such as creditor sequestrations and consumer credit cases relating to unfair relationships and time orders, within such a forum. Unrepresented parties are currently forced to appear in the ordinary cause court for such cases, and it is likely that some do not appear in court due to the complexity of the forms and procedures and the intimidating surroundings.

A specialist forum for consumer cases could take a much more active case management role than the courts do at present, taking into account any imbalances of power between the parties, and providing greater assistance to unrepresented litigants.

We are not convinced that such a process would need to be within the direct jurisdiction of the courts, although there would of course always have to be provision for a right of appeal where necessary to a higher decision-making body. Consumer and debt cases could perhaps be presided over by either legally qualified decision-makers similar to tribunal chairs, or even non-legally qualified justices with a legally qualified clerk, along similar lines to the district court in criminal cases.

3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

Current proposals to increase certain court fees in Scotland, if implemented, may have the effect of deterring more people from going to court. While we agree with the Scottish Court Service that it is inequitable that well resourced commercial litigants in the Court of Session should be subsidised to a greater degree than day-to-day users of the sheriff courts, some of the proposed increases are quite considerable. It is proposed that the fee for small claims cases, for example, should rise by 48%, in order to reflect the recent increase in the jurisdiction limit. This is a significant rise, particularly for cases at the lower end of the scale.

4. Are the current rules for recovery of judicial expenses satisfactory?

As recorded in the Report by the Research Working Group on the Legal Services Market in Scotland, we express concern that the tables of fees are set by the Lord President's Advisory Committee, which is chaired by a judge and comprised of lawyers, and does not include any consumer representation.

Chapter 4: The Structure and Jurisdiction of the Civil Courts

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?

We would particularly wish to see specialist and more appropriate processes outside the courts for consumer and debt cases.

9. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

Our primary concern in answering these questions is to ensure that the interests of consumers are adequately protected. It seems to us to make sense to rationalise the administration of sheriff court business in the interests of efficiency, provided that this does not have a negative impact on members of the public who may need to use the courts. It is vital that institutions for resolving disputes are easily accessible to those who need to use them. While we would wish to see increased specialisation where possible, it is important that disputes are handled as locally as possible for the ease and convenience of the parties, and to minimise delay and expense. A local court is also likely to have a greater understanding of local circumstances and local customs and practices.

This is recognised by the current court system, within which there are 49 sheriff courts in Scotland, in every city and in most towns, and which deal with the vast majority of civil business in Scotland.

At present, there are clear rules as to which sheriff court has jurisdiction in a particular case: the general rule is that a defender must be sued in his or her local court. There are, however, some exceptions to this rule: perhaps the most important for individual users relates to consumer contracts, where the consumer may sue in his or her local court, regardless of where the other party is based. We consider that these rules are clear and fair so far as individuals are concerned (although we have been made aware in the past of instances where English companies have sued Scottish consumers in the English courts). We assume that, given their origins in European law, these would not change, whatever the future structure.

The need for local dispute resolution mechanisms is likely to be particularly acute in rural areas, where distances can be large and public transport may not be easily available. It will be important that steps are taken to ensure that local communities are involved in discussions on any proposed changes to the services provided in such areas. We have recently pointed out the need for increased 'rural proofing' of new policies to assess their impact on rural communities.

It is important to emphasise that *accessibility* and *proximity* are not the same. While it is important that courts and other dispute resolution mechanisms are located close to where people live (proximity), they must also be accessible. Accessibility does not simply relate to physical access, but also means that courts should be open during hours when people are able to get to them, that they should be affordable, and that processes should be simple and easy to understand.

We consider that a central administration could have advantages, provided that provision is made for easily accessible local courts and other dispute resolution mechanisms. This could, for example, lead to greater consistency in the way in which cases are administered within different courts. Increased use of information technology will be important in ensuring that any centralisation is carried out effectively.

It is worth noting too that the geographical proximity of civil justice institutions is likely to become less important in the future, with the increasing use of IT. The Sheriff Court Rules Council has, for example, proposed the submission of court

documents by electronic means, and envisaged a 'virtual court', where undefended cases can be dealt with electronically, without involving expense by the other parties in attending court, and saving court time. The use of IT will be particularly important in rural and remote areas of Scotland.

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

We believe that effective use can be made of IT in providing advice and assistance for unrepresented litigants. We also consider that IT could potentially transform the way in which the courts are administered, particularly within the context of a Scotland-wide sheriff court.

7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?

If the present methods of procedure were largely to be retained, we would support any attempt to simplify the current complex set of procedures within the courts. It is difficult to see any justification for retaining four separate sets of procedures in the sheriff court.

If such a rationalisation of the rules were to be carried out, it would be necessary to ensure that the rules were completely overhauled and re-written in simple and accessible language, in order to ensure that unrepresented court users can understand them. It would be necessary to ensure that sufficient resources were made available for this huge task, and to ensure that consumers themselves, and consumer and advice organisations, were fully consulted as part of this process.

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

To date, the debate about reform of the civil courts in Scotland has focused almost entirely on providing mechanisms for individual redress. We believe, however, that there will need to be much greater emphasis on collective forms of redress in the future.

The legal system in Scotland, unlike that in England and Wales, the United States and other jurisdictions, does not provide for a procedure for class actions. At present, where there are a large number of people with a similar grievance against the same company or individual, each of them must take their case separately through the courts.

We believe that the introduction of a class actions procedure in Scotland's courts would make it easier for ordinary people to pursue claims against big businesses. The review must recognise current UK government initiatives, emanating from Europe, which are designed to encourage the use of representative actions by consumer bodies and others on behalf of groups of consumers with claims against the same defender. Under the Unfair Terms in Consumer Contracts Regulations 1999, for example, a number of regulatory and consumer bodies

have the power to seek interdicts against those who use unfair contract terms. Part 8 of the Enterprise Act 2002 gives powers to certain bodies to apply to the courts for enforcement or 'stop now' orders to stop traders infringing a wide range of consumer protection legislation where those infringements harm the collective interests of consumers.

A similar list of 'designated bodies' can take action for damages on behalf of consumers before the Competition Appeals Tribunal. Which? recently took such an action against a major sportswear retailer in relation to the alleged cartel overpricing of replica football strips. We believe that the use of this type of action is likely to grow in the future. The Office of Fair Trading (OFT) consulted recently on further extending the scope of representative actions under competition law, and the UK Department for Business, Enterprise and Regulatory Reform is shortly expected to consult further on this.

The UK government has also recently consulted on the introduction of a representative actions procedure throughout the UK which would allow certain bodies to take court action on behalf of consumers against businesses which are in breach of consumer protection laws. This growing interest in collective redress within the UK government and the European Commission stems from the introduction of such procedures in a number of European and other countries, and increased high-profile enforcement activity by the OFT on issues such as bank charges and airline fuel surcharges.

We believe that representative actions could significantly increase access to justice for large numbers of consumers who are entitled to compensation, but who do not wish to take individual claims for relatively small amounts of money.