



# **Scottish Civil Courts Review**

**UNISON Scotland's response to the Scottish Civil Courts Review  
consultation paper**

**March 2008**

## **Introduction**

UNISON Scotland welcomes the opportunity to respond to the Scottish Civil Courts Review consultation paper. UNISON is Scotland's largest public sector trade union representing over 160,000 members delivering public services. We are a significant user of the civil courts representing our members in a range of civil actions. We also have a wider citizenship interest in access to justice.

## **Procedural aspects of the review**

UNISON Scotland is primarily concerned over the lack of engagement and involvement or one of the major stakeholders in Civil Justice – the trade union movement and affiliated and related organisations. Trade unions are mentioned once in the entire review paper and even then the reference is wrong. UNISON Scotland handles over 500 personal injury cases every year and whilst a number do not reach the courts this still makes us a significant stakeholder ignored by this review to date.

We also have concerns over the makeup of and appointments to the review team. Why is the pressure group, the Scottish Consumer Council that has a strong ideological position a member of the team and no other stakeholder has been invited to take part? Why have parties with the commercial interest in the use of mediation been invited onto the team?

We would also question why the review team so heavily dominated by Judges? Much of the issues being discussed and determined by the review are political, commercial and involve issues of social and economic policy. Judges serve a very important role within our society but determining and advising on economic and social political policy is not one of them.

## **Review Principles**

The starting point for the review paper is that the basic function which the review must serve is to address issues of costs and the proportionality of costs associated with Civil Justice. It assumes that the only "value" that can be placed on a civil court action is the financial value of the damages sought and obtained.

This is not the correct starting point for an entire review of the Civil Justice system. The review should start with the most fundamental aspect of Civil Justice by looking at people's rights and considering which rights ought to be protected, advanced and exercised through the civil courts. This means that the starting point for the analysis should be our modern day constitution – the European Convention on Human Rights.

The "value" of a case is not the financial compensation obtained but the role that the case played in a wider context. The value of the personal injury case is that it can make one workplace safer for all of its employees or in certain circumstances every workplace safer for every Scottish worker. A number of personal injury cases successfully supported by UNISON Scotland have resulted in important changes to working practice including needlestick injury, stress and violence at work. Many of these cases had a small value to the individual but a much wider impact on workers in encouraging employers to adopt safer working practice. This collective impact, fundamental to the role of trade unions in our society, appears to be little understood by the judiciary and organisations like SCC that appear to dominate the review.

## **Role of the ECHR in the Review**

The Civil Justice System should be reviewed on a rights based analysis. It can properly be said that in Scotland, as throughout the whole of your Europe, our “bill of rights” or modern day constitution is found in the European Convention on Human Rights and the various articles which make up the convention. In addition the Scotland Act requires that all Scottish Legislation be ECHR compliant.

More than that our political leaders must, and society demands, that we not only comply with our duties under ECHR but positively promote our peoples rights as enshrined in the convention. Accordingly, while reviewing our Civil Justice System and deciding what changes require to be made to it we must ensure that our Civil Justice System not only complies with ECHR but that it is specifically designed to promote and allow individuals to fully exercise each right enshrined in the convention.

Some examples of ECHR rights relevant to this review include:

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

The convention is organised in a hierarchical way and this is the most important right of all. Accordingly all matters and legal issues which impact upon this article ought to be handled in our Supreme Court, The Court of Session. This includes all investigations into workplace deaths, including FAIs.

It is recognised by the European Courts and is in any event entirely logical that the article does more than serves to provide the right to life. It is an essential element of that article that it also serves to protect the right to life which in turn means that all issues of workplace health and safety, which fall firmly within protecting the right to life, ought to be given the highest priority in our Civil Justice System. This means that they are open to being pursued without restriction or barrier in the Court of Session as a recognition of their importance to both society and the terms of the convention.

As highlighted above the trade union movement have always used every personal injury case which they advance in behalf of their member not only a means of obtaining just recompense for that member but just as importantly as a means for improving health and safety either in an individual workplace or on a more broad and wide spread manner and this ought to be recognised by the review as a cornerstone of Civil Justice.

Equally the review ought to consider providing robust means by which trade unions and individual workers can advance Court actions where individuals rights to protection of life have been infringed through unsafe workplaces but before an accident has actually taken place. For example, through interdict or a similar means but perhaps with proper and effective sanctions attached.

### ***Article 6 - the right to a fair Trial***

This article goes beyond a criminal trial and is more properly called the right to access to justice. Access to justice is, of course, at the heart of any civil justice system and is the principal which far outweighs any notion of cost or a perceived financial value for a Court case.

Access to justice should mean being able to exercise your rights in an appropriate legal forum of the pursuer’s choosing. This includes appropriate legal assistance and representation irrespective of the financial resources.

There are problems which presently exist within the civil justice system which militate against access to justice which the review paper has not picked up on or sought to improve and additionally the paper itself makes proposals which will reduce access to justice. These include:

- Privatisation of the Courts – it is now necessary for a party wishing to pursue a civil case to pay for the Court and the judicial system on a “pay as you go basis”. This has turned the

Court into a commercial commodity where one is required to pay for and consume rather than being a public service funded by our taxes. This goes against the principal of access to justice and must be reversed.

- Recovery of legal fees – the review paper provides statistics which show that successful party in a civil Court action will only recover 57% of his Solicitors legal fees from the other side in Scotland. In England that figure is 89%. This inequality between Scottish users of the Court system must immediately be redressed. More importantly the system of compensation for personal injuries is based upon the principal of restitution which means that the injured party is only supposed to be put into the same position they were in before the accident through the compensation. If the injured party requires to pay 46% of Solicitors fees out of damages then they will not have obtained restitution. There should be full legal fee recovery for personal injury cases.
- Mediation/Personal Injury Assessment Board – the Civil Justice review paper on mediation contemplates a personal injury assessment board. There is not access to justice in terms of the ECHR if pursuer's are forced institutionally down the tribunal/mediation route. Access to justice means access to the Courts with proper representation and cost recovery.

### ***Article 8 – right to respect for private and family life***

The cornerstone of private and family life is the home and the right to have a home. The Civil Justice System presently does not do enough to protect this right and the Civil Justice review does nothing to remedy the situation.

It is too easy to evict people from their homes for very small arrears in rent and the law does not entitle such people (who are surely at that point in their life some of the most vulnerable people in our society) the right to legal representation. Indeed because of the Court limit the absurd position which presently exists is that if a party in that situation instructs a solicitor to protect them against losing their home the solicitors fees will be paid if he is unsuccessful in saving the parties home, but will not be paid if the solicitor is successful in saving the parties home.

### **Public Policy Issues**

The Scottish Government aim to eradicate homelessness by 2012 and yet, as described above, under the present Civil Justice System it is relatively easy to evict people from their homes and there is no proper provision for vulnerable people in that situation to receive proper legal representation.

It is recognised by the Scottish Government that one in four adults in Scotland lack basic numeracy and literacy and efforts are being made to resolve this problem. In stark contrast to this fact, one of the basic principals behind the Civil Justice review seems to be about empowering individuals to pursue certain Court actions on their behalf without legal assistance (and indeed financially there is no opportunity for them to receive legal assistance in many circumstances). Clearly, the 25% of our nation who lack basic literacy and numeracy skills will gain little benefit from being so empowered and instead should be given every access to legal help and support.

It appears to UNISON Scotland, that as so often is the case, a consumerist approach to public services is designed to empower the articulate middle and upper classes at the expense of working people. This risk has been recognised in other public services in Scotland and has resulted in a distinctive Scottish public service model. This review is clearly not consistent with that approach.

There would appear to be a clear underlying agenda on the part of the authors of the Civil Justice Review to remove all, or nearly all, personal injury cases from the Court of Session. This would undermine decades of work by trade unions to recompense members who have suffered injury and prevent such injuries happening in future.

Personal injury cases are often of small value. For example around 70% of UNISON Scotland cases are settled for under £5000, but as highlighted above they can still be important in protecting workers from future injury by developing better workplace safety. UNISON Scotland carefully monitors our personal injury case statistics to identify trends and then respond with briefings and negotiating guidelines for our branches and safety representatives.

There would appear to be a clear underlying agenda on the part of the authors of the Civil Justice Review to remould the Civil Justice System principally to benefit users of the commercial Court procedure at The Court of Session. We are aware that the insurance companies have long lobbied for personal injury cases to be removed from the privative jurisdiction of the Court of Session for their own vested commercial reasons that have nothing to do with the safety of workers.

There would also appear to be an underlying agenda to promote mediation and alternative forms of dispute resolution and to make those mechanisms compulsory to Court users to the exclusion of access to the Civil Courts and access to Civil Justice. It may well be that some members of the judiciary find personal injury cases less than interesting. However, the job satisfaction of judges should not be the primary public policy driver of the Civil Justice Review.

## **Conclusion**

UNISON Scotland has very significant concerns not only about the content of this review but over the process and underpinning principles upon which the review is based. We are concerned that key conclusions in the Civil Justice Review have been reached before the issue even went to consultation. We are therefore equally concerned over the extent to which this agenda will be followed irrespective of the consultation response. The narrowly drawn membership of the review, excluding other key stakeholders, gives us little confidence in the review outcome.

UNISON Scotland would therefore urge that the review starts with a rights based approach to civil justice that recognises the wider public policy considerations that we have outlined above.

### **For further information please contact:**

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