Justice Committee

Courts Reform (Scotland) Bill

Written submission from Keith Stewart QC

I attach my comments relating to the Courts Reform (Scotland) Bill (SP Bill 46).

I commence with preliminary observations before commenting on the bill under reference to paragraphs in the accompanying policy memorandum.

Preliminary observations

1. The efficiency of a legal system cannot properly be assessed under reference to criteria devised in relation to businesses or other models. In particular, it cannot be evaluated properly where there is disproportionate reference to monetary cost, any more than can a health service. The process of doing justice is, seen from a cost perspective, inherently ‘inefficient’. Extreme caution must therefore be exercised when reference is made to cost savings. It is essential that the system must obtain and retain the confidence of the public at large. It will not do so where a false interpretation of efficiency is applied in shaping rules of procedure. It will not do so where it is clearly the case that the best lawyers are available in most cases only to the wealthy, or to the State.

2. The policy memorandum adopts Lord Gill’s view that minor modifications to the status quo are ‘no longer an option’, (and vid. § 27) and that the adoption of only part of his recommendations would somehow compromise their integrity. But the policy memorandum fails to make this case. There is no inviolable connection, for example, between the proposals to introduce a new grade of inferior sheriff, and the proposal that the sheriff court should have its exclusive jurisdiction increased from £5,000 to £150,000. There is no link between the two proposals so intimate that if one but not the other of these measures were to be thought worthy of adoption, the absence of the other would render the one adopted unworkable. There is no reason why an equivalent to Chapter 43 of the Rules of the Court of Session should not be put in place in sheriff court procedure, to see whether alteration to procedure can achieve, by way of election, outcomes which the bill would propose to achieve by compulsion.

3. Contrary to the views expressed in the policy memorandum, it is highly desirable that change to something as important as a legal system should proceed incrementally: allowing for the gradual testing of new measures to ensure that they work as intended, and that they carry the support of the public and the profession. Institutions are repositories of wisdom and memory. There is a humility in recognising that there are limits to the abilities of individuals or groups of individuals, at specific times, to assert the desirability of wholesale change, and to foresee its results. Recent history teaches otherwise. The upheaval caused to local government by ‘regionalisation’ was justified by all sorts of savings and benefits which would occur. Yet within less than a generation the policy had been abandoned. The contents of the policy memorandum demonstrate an unreasonable confidence in the value of its proposals, in the face of calls for caution from those
best placed to advise. I disagree with Lord Gill’s view that piecemeal reform has obstructed ‘true progress in civil justice’. Incremental change is the result of measured consideration, occurring with the benefit of full consideration of causes and effects, conducted on a practical rather than a theoretical basis, and a concentration upon what works.

4. The policy memorandum rehearses Lord Gill’s description of civil justice in Scotland as ‘slow, inefficient and expensive’. If that is truly the case, the problem lies overwhelmingly in the court system, not with the legal profession. Delays in individual cases are more readily addressed by the court than the structural delays created by the lack of availability of courts. As regards expense, however desirable the aspiration that the court service be ‘cost neutral’, that goal is unachievable in the face of the growth in fields such as immigration.

5. The policy memorandum is inaccurate in proposing that there are only two options, implementation of Lord Gill’s review and maintenance of the status quo. This is a false opposition.

6. The policy memorandum frequently endorses steps which tend to elevate the administrative convenience of the court above the wishes and interest of litigants and their advisors, for example in the proposal that an all-Scotland jurisdiction might be conferred by the Scottish Ministers on a sheriff sitting in a particular court or dealing with specific types of proceedings: § 29; or the obstacles placed in the way of litigants seeking to bring proceedings in the Court of Session. The Courts are the servants, not the masters, of the public.

7. The proposals envisage a fundamental shift in balance in the legal profession (in terms of numbers and importance) away from independent practitioners at the Bar or in the solicitors’ branch, towards the judiciary. In the passage dealing with access to the court by party litigants, this is recognised expressly. The creation of a further tier of sheriff, inferior to existing sheriffs, encouraged to act as an inquisitor, moves the Scottish legal system towards the adoption of a continental-style inquisitorial system. It moves away from the common law’s belief that truth and justice are best arrived at through the process of having parties present their evidence and arguments, and test the evidence and arguments of the other side. If this is the ultimate objective of the present Scottish Government, it ought to declare that objective openly.

8. The tone of the policy memorandum displays an unwarranted distrust of the legal profession, as though hundreds of years of disinterested service and professionalism were to be easily ignored, and calls for caution dismissed as self interest.

Specific observations

§ 29 The creation of a new inferior form of sheriff, to be known as a summary sheriff, multiplies the tiers of the court system in a manner which will cause appeals to proliferate, increasing delay and cost.
§ 34 The creation of more salaried ‘judicial officers’ is advanced as tending to assist the desired goal of having a much more diverse judiciary in Scotland. Rather, it will increase the numbers of judges who will for better or for worse believe that their advancement will lie in conformity to what they believe are the aims and objectives of the system at any given time, to the detriment of the independence and exercise of discretion of the bench; thus the suppression of alternative views and interpretations, and alternative approaches to the facts and circumstances of cases. The judiciary will become (at least potentially) more diverse only in the sense of the backgrounds of the holders of judicial office, with the summary sheriffs working within an increasingly narrow range of outcomes. Diversity of background may- be increased: but at the expense of uniformity of outlook. Ultimately the proposals risk reducing the scope for testing the common law position and legislation by a sheriff of the necessary ability, before time consuming and lengthy appeals.

§ 35 This paragraph contains the suggestion that cases are dealt with inefficiently through coming before ‘over-qualified’ judges. This is an odd concern: the more readily a matter comes before an able judge, the more readily will its features be identified. The more qualified a judge is, the better, at any level.

The expression ‘judicial officer’ which appears is an ugly one and risks leaving the impression that the ultimate intention is the de-skilling of aspects of the work carried out by judges and sheriffs, taking them from the judicial sphere into the administrative sphere.

§ 36 In advocating the transfer of business from the Court of Session to the sheriff court, the policy memorandum bears to recognise that low value and apparently straightforward cases nonetheless may give rise to complex and difficult legal questions, but fails to afford adequate weight to these considerations. Rather than it being a self evident need that cases are directed to the lowest level that they can competently be dealt with, the true need- and the objective of a legal system which truly aspires to efficiency- is that cases should be heard as rapidly as is consistent with thorough preparation, and fairness: and it is by no means self evident that this is consistent with hearing before a lower grade, inexperienced inferior sheriff. The assertions at § 37 that adequate protection for the public interest is afforded by these summary sheriffs being ‘fully qualified’ lawyers, with ‘suitable’ experience, recommended by the Judicial Appointments Board and trained as required by the Judicial Institute, are inadequate. They grossly overestimate the value of judicial training and the results which it can achieve with inadequate pupils.

§ 42 Abolition of honorary sheriffs, and proposals concerning magistrates, proceeds not he basis that Scotland should have a fully professional, legally qualified judiciary. This undermines the value played by lay people in the judicial system, removing the desirable voluntary aspect of service to the community which informs such lay participation, and further removes the mechanisms of justice from the public. It is inconsistent with what is ostensibly the Scottish Government’s objective of promoting ‘diversity’ on the bench.

§ 54 The observations about the place of residence of ‘judicial officers’, and their being aware of local circumstances in the areas where the courts in which they sit
are situated, are unexceptionable, but fly in the face of policy decisions already taken concerning the closure of sheriff courts.

§ 65 Specialisation of sheriffs, and the creation of pools of specialised sheriffs, is not of itself undesirable, but the tone of the policy memorandum underestimates significantly the ability of the able generalist rapidly to master the essentials of points, even in areas of law with which he or she is not immediately familiar.

§ 67 The ‘powerful demand’ for specialisation can already be met at present by Sheriffs principal, such as in the creation of family and commercial sheriffs in Glasgow.

§§ 79 et seq.

Proposals to shift work from the Court of Session to the sheriff court tend to overestimate the general levels of ability on the shrieval bench, and the ability of judicial training to address this.

The impression gained from recent visits to sheriff courts, and discussions with sheriffs, sheriff clerks, and solicitors practising there, speaking candidly, is of a system substantially unprepared for the body of work which the Bill envisages will be shifted there, as well as the body of work which will be transferred on the closure of neighbouring courts. The bill underestimates substantially the inefficiency of the sheriff court. It presumes an overall level of competence amongst solicitors and procurators-fiscal deputes, which is not borne out in practice.

The Bill and the policy memorandum ignores the fact that Scotland already has a national personal injury court - the Court of Session, which boasts experienced and skilled judges, a body of highly experienced and expert counsel and solicitors, with high quality resources and infrastructure in the form of the Advocates’ Library and the Judicial Library. There is no need to create a new court from scratch; this would involve an unnecessary and undesirable duplication of resources and concomitant expense. The Faculty and the Court of Session are moreover institutions which have developed and evolved over centuries in the service of the nation, and as a result possess an institutional strength and independent spirit, things which are (presumably) thought desirable.

§ 80 The paragraph asserts that the Court of Session is ‘flooded’ with claims. The overall tone of the paragraph is undesirable. As noted elsewhere, the courts must consider themselves at the service of the public, and if the public chooses to litigate there, that is their concern and should be their right. Clearly they do so because they find the system convenient and speedy, as opposed to using the sheriff court. If this is deemed problematic, the remedy lies in the improvement of the quality of all aspects of the sheriff courts, such as by adoption of procedure analogous to Ch. 43 R.C.S., so that people litigate there through election rather than compulsion.

§ 81 If other litigants are indeed deterred from litigating in the Court of Session by the volume of personal injuries work conducted there, then the ready remedy lies in the hands of the court and the Keeper of the Rolls. It would be a straightforward exercise to address this perceived difficulty by affording priority to types of action
over other types, or among actions within the same category. This would of course proceed alongside proper scrutiny of progress in actions by judges such as the procedures of the Court of Session have always permitted, even where judges have not made proper use of them. This is a proportionate response and far less expensive than the creation from scratch of a new court.

§ 83 The fees paid to lawyers reflect their hard work and the unavoidable cost of maintaining a skilled profession, which is overwhelmingly in the public interest.

§ 85 The word ‘abuse’ is inappropriate in the context of the selection, by a competent professional, of the appropriate forum to serve the interests of a litigant in the particular circumstances of a case.

§ 87 With the ‘churn’ effect of low value business removed, it is hoped that higher quality work will be attracted to the Court of Session… This is mere aspiration and, in the context of profound and unprecedented change to the legal landscape in Scotland, is deplorably vague. The public is entitled to know what work the Scottish Government conceives the Court of Session carrying out in future; what matters will be heard there once the Court no longer has to deal with disputes which the Bill considers beneath its dignity. Historically, the range of work conducted before the Court of Session has included matters of very modest value. It is not correct to assert that the historical mission of the Court of Session is somehow restricted to the most ‘serious’ or ‘difficult’ cases.

§ 92 The paragraph refers to Sheriff Principal Taylor’s findings that actions raised in the sheriff court are ‘very often’ conducted by solicitors in a most efficient and competent manner. But very often actions are not conducted in such a manner, and junior counsel at present carry out much work of revisal and amendment to inadequate pleadings, focussing the issues and ensuring that justice can be done expeditiously between parties. No one doubts that some sheriff court actions are conducted efficiently- or that many are- perhaps, most are. If that is the case, it is no more than would be expected of solicitors acting professionally. But it scarcely follows from that assertion that all are, so as to justify the obstacles placed in the way of instructing counsel to place actions on a proper footing.

§ 94 The Scottish Government does not believe that its proposals will interfere with access to justice. This assertion of belief in the policy memorandum is left unsupported.

The Scottish Government appears to have adopted Lord Gill’s conclusion that only by adopting his proposals as an ‘integrated solution’ policy memorandum appears to have accepted that piecemeal approach would not address the problems which are identified. That being the case, there is room for querying whether the present exercise of inviting comment is genuine.

§ 95 The court already has the power to regulate expenditure which it considers unnecessary, by awards of expenses. The policy memorandum asserts that it cannot be right that the costs of employing counsel are recoverable in all cases: indeed, the costs of employing counsel are not recoverable in all cases, the sheriff must sanction the case for counsel’s employment.
§ 97 It is disingenuous to assert that opportunities to employ counsel will not be reduced drastically, to the detriment of those litigants unable to pay the higher fees of larger firms of solicitors, if the bill is passed in its present form. The consequences would be a restriction of the scope of litigants to be represented by lawyers with equivalent ability and experience to wealthier litigants; and to counsel’s services being substantially restricted to the wealthy and to large corporate organisations, including the Scottish Ministers.

§ 103 It is readily foreseeable that the fees of practitioners in a specialist personal injuries’ court will rise to reflect their specific expertise.

§ 124 The existence of conflicting decisions in different sheriffdoms is not entirely a bad thing. Such conflicts can bring ambiguities in the law sharply into focus; the existence of contra authority results in fuller argument; and the position is reviewed and analysed more thoroughly before passing to the Court of Session. The matter is better dealt with by the speeding up of appeals procedure from the Sheriff Principals to the Court of Session.

§ 129 An undesirable consequence of introducing a fresh tier of appeal hearings is the unavoidable duplication which will follow.

§ 139 The aim of achieving sentencing consistency is not desirable per se if it impedes the exercise of judgment and discretion by sheriffs in individual cases.

§ 137 Experience suggests that ‘simple’ procedure will inevitably grown more complex.

§ 157 As noted above, the passage hints at a fundamental shift away from an adversarial to an inquisitorial approach. Courts already offer considerable assistance to party litigants, in terms of offering explanations of practice, and by paraphrasing their submissions in order to extract propositions of law. But such assistance is always offered in the context of doing justice between the parties, rather than directing the investigations by parties of their respective cases.

§ 171 Given that judicial review petitions frequently concern the acts of the Scottish Government, the Scottish Government should for sake of fairness decline to render the bringing of petitions more difficult. The proposals are too restrictive, given that they are likely to bear upon individuals drawn from disadvantaged groups within society, frequently less certain of their rights, such as serving prisoners. A filtering procedure should permit the petitioner to state the nature of the conclusions sought, and the factual background, in general terms, otherwise the proposals create a disproportionate advantage in favour of respondents.

§ 193 The proposal that the Court of Session should be able to take into account its own business and operational needs in considering remits from inferior courts is a further example of the elevation of the administrative convenience of the court above the interests of litigants.
I question the need for new rules of court where existing and indeed repealed procedure permitted regular scrutiny of progress of cases, by judges hearing them by Order. This also permitted informal ‘case management’, long before the term became fashionable. That these provisions allowing close scrutiny of cases were not in the past taken, is not the fault of the profession.

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