Justice Committee  
Courts Reform (Scotland) Bill  
Written submission from Society of Solicitor Advocates

Introduction

According to the Policy Memorandum, adopting the words of the Scottish Civil Courts Review (“SCCR”), the Scottish civil courts are "slow, inefficient and expensive" and structural and functional reforms are required (para 2). It is the contention of this response that

1. The Bill addresses none of these problems effectively – there is little evidence to support the proposed changes.
2. Access to justice requires access to advice and access to representation – the Bill favours the rich and powerful over the ordinary citizen.
3. Any financial savings will be small and disproportionate to the detriment the changes will bring about.

Slow, inefficient and expensive

What the Bill does/doesn’t do

(a) Speed – the Bill does not address the speed of civil court proceedings and the Policy memorandum itself only mentions the pace of proceedings in connection with the quote from the SCCR. Transferring the vast majority of first instance civil business from the Court of Session to the sheriff court will not speed things up. Leaving aside summary causes and small claims, the timescale between the start of a case and the start of the full hearing of a case is similar whether the case is in the Court of Session or the Sheriff Court. The main difference is that in the Court of Session cases are scheduled to run to a finish, whereas in the sheriff court only a first day is normally allocated, meaning cases which start their full hearings often take longer. Introducing the intermediate Sheriff appeal step also means important cases which are appealed will inevitably take longer if they have to go through several appeals to arrive at an authoritative decision.

(b) Inefficient – what is predominantly said to be inefficient is highly or over qualified judges dealing with minor criminal cases or low value civil actions. Raising the exclusive competence of the sheriff court will remove the vast majority of first instance from the Outer House. Presently the Court of Session deals with substantially less than 10% of civil actions raised in Scotland (see financial memorandum para 65 Chart 1). The Bill would reduce this to around 2% (para 73 table 11) and, without an influx of new work, Outer House judges would each have to hear only about one proof or debate a year. The introduction of a lower tier of judges in the Bill would also, it is said, release the better qualified judges to concentrate on the more serious and higher value cases. However the lower tier are expected to be as legally experienced as their “over qualified” superiors, be specialists in that lower tier of work, and accept significantly lower salaries. We question whether it is realistic that candidates of appropriate quality, likely to get decisions right first time, can be found. The Civil Justice Advisory Group
final report (pages 20-23) pointed out that poor quality first instance decision making simply leads to appeals, delay and expense.

(c) Expense – The main basis for the proposal to increase the exclusive competence of the sheriff court was an analysis of 93 Court of Session and 94 sheriff court personal injury cases drawn from the period 2004-07 and submitted to the Scottish Civil Courts Review by one firm of solicitors representing insurers. It was said to be disproportionate if the legal expenses incurred by one side or both sides combined exceeded the value of the settlement. Those figures showed that even in the sheriff court the majority of low value claims resulted in higher expenses than settlements. However there was no evidence at all to compare the costs incurred with settlement values in other types of case in either the Court of Session or the sheriff court, so no conclusion could be drawn in general about the relative expense of litigating in one forum or the other. The analysis also provided no information about the negotiation process – what the initial offer was compared to the final settlement – and no comparison could be made about the value added by the use of one court or the other. Most importantly, the analysis made no comparison between the value of the settlement and the resources of the parties. A £10,000 settlement would be equal to around 40% of the annual income of someone on average earnings but only 0.00002% of the annual income of a major insurance company. The importance of the work done by those who have to investigate and bring claims on behalf of injured people relative to an injured person’s own resources should be taken into account in considering what is or is not proportionate.

What the Bill could do

(a) Separate first instance civil from criminal business completely – the SCCR noted that the priority given to criminal business meant that criminal business interfered with the prompt disposal of civil business. However it made no recommendations to resolve the problem and neither does the Bill. We have been calling for this issue to be addressed since the start of this debate. If there is to be specialization of the judiciary at first instance then the obvious first step is to have judges who are full time on civil or criminal and who are not available to be called upon to fulfil other work at the expense of what they are appointed to do. Since the Government has rejected the SCCR recommendation to abolish the part time judiciary, there ought to be no need to use full time judges, allocated to do civil or criminal work, to fill gaps in the opposite specialism to the detriment of progress in their ordinary work.

(b) Introduce a unified rules structure - many of the issues which led to the setting up of Lord Woolf’s review in England in the 1990s were similar to the problems identified in Scotland. The principles to be applied to the solutions were also similar yet the method adopted was entirely different. The focus in England was on the procedure to be followed. The Civil Procedure Rules were the result – a unified code to be applied in all civil courts. Although in Scotland we have edged towards having similar rules in the sheriff courts as in the Court of Session, the courts have remained separate and will continue to be so if the current proposals are implemented. Having one set of rules for all civil cases in all courts would make it far easier for a case to be transferred up or down the ladder as a case progressed. This would also mean that the proper judge to hear the matters ultimately in dispute could be left until the issues have crystallised.

Access to justice requires access to advice and access to representation
We have two principal concerns both of which raise questions about equality of arms
1. Removal of the automatic right to specialist representation in a large number of civil and criminal cases
2. Removal of an effective right to representation in simple procedure cases.

(a) The automatic right – we have concerns about representation in summary criminal appeals before the proposed sheriff appeal court. At present an appellant has to instruct a solicitor advocate or an advocate for an appeal to the High Court. Usually this means a fresh pair of eyes considering the merits of the appeal. This frequently results in advice being given about the prospects, which in turn limits the number of appeals which would otherwise come forward. The proposals state that there will be no automatic sanction for the employment of specialist pleaders in the sheriff appeal court. If that is so, it is likely to have an adverse impact on the administration of justice. Many important appeal decisions in recent years have come in summary cases. Important points may not be identified if they are dealt with at a lower level and there also may be problems with consistency of decisions for the same reason. Downgrading the forum and representation for most criminal appeals is likely to increase delay and expense. Moreover, if, as proposed, criminal appeals in the sheriff appeal court are dealt with centrally in Edinburgh, the Crown’s side will be likely to be handled by Crown Office with access to advocates depute. The appellant, on the other hand, will have to make do with his local solicitor.

Audit Scotland noted in its overview of criminal justice in 2011 that a fundamental principle in a democratic society is separating the power of the state from the processes of maintaining and upholding the law. Designing a system of justice which favours government, with its resources and ability to call upon and pay for the best quality representation, over the citizen risks offending against that principle.

Courts rely on the quality of the representation of parties to arrive at correct decisions. Specialist pleaders are an important feature of a quality justice system. The Bill explicitly aims to limit the opportunities for specialist pleaders (solicitor advocates and advocates) to exercise their skills as of right. This means more parties will have to conduct their cases without the benefit of such representation and more courts will have to arrive at their decisions without the benefit of the best submissions. There is likely to be a reduction in the quality of justice available in Scotland and there are likely to be more appeals. In civil cases, one party is frequently an arm of government or an institution, such as a bank or insurance company, with the resources to pay for the highest quality representation. Ordinary litigants, on the other hand, if they wish to match that representation, will have to be prepared to pay for that representation, irrespective of success or failure. We have already drawn attention to the huge inequality in the resources of typical litigants. The court structure should ensure that those inequalities do not dictate the result of litigation.

(b) The effective right – for the lowest value civil cases, the aim is for more parties to represent themselves. Those who seek advice and representation from lawyers will have to pay for it irrespective of success or failure. Is this really the type of justice system we want? Here are two examples.

A recent university graduate starts her first job and buys a second hand car for £4,500 from a major dealer so she can get to work. The car is faulty and after carrying out some ineffective repairs the dealer refuses to do any more without payment or replace the car.
An elderly man has a chairlift installed in his home at a cost of £4,750 because he can no longer get upstairs to the bathroom or bedroom without it. The lift is poorly installed and falls off the wall. The company refuses to fix it.

Apparently people in this position ought to be able to take these cases to court themselves. Imagine if the defender in each case offers them half the outlay as a compromise out of court settlement. The alternative is they have to go to a lawyer, knowing that whatever improvement in the terms they receive will be reduced by the amount of the lawyer’s fee. Or suppose they do go to court themselves relying on the judge being more inquisitorial? If a better offer is made but still short of what they ought to get, no matter how inquisitorial, the judge cannot advise them to accept or reject.

A £5,000 claim is a very substantial sum for people on ordinary incomes and it is not appropriate that they should be forced to lose out one way or the other because the cost of representation will be irrecoverable.

**Savings disproportionate to detriment**

The financial memorandum demonstrates there will be significant one-off costs but that savings will be slow to materialize. If the savings do not materialize, litigants will have to pay higher fees for lower quality justice. In addition, the statistics belie the basis of the justification for the most significant proposed change – the increase in the exclusive competence. If only two specialist sheriffs will be necessary to dispose of all personal injury cases transferred to the specialist personal injury court, how is it that those cases present such a problem for the Court of Session to dispose of with 34 judges (three of whom are committed to a smaller number of commercial cases)? Personal injury practitioners are sceptical that two judges can deal with all of the cases. If only two judges are appointed, cases are likely to be substantially delayed.

The changes proposed favour organisations, in particular government and major commercial entities, over the ordinary citizen. This is not the type of justice system which Scotland deserves.

Society of Solicitor Advocates
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