

# REPORT OF THE SCOTTISH CIVIL COURTS REVIEW

## THE REVIEW AND THE REPORT

### **Background to the Review**

In February 2007 the then Minister for Justice, Cathy Jamieson, asked the Lord Justice Clerk, the Rt Hon Lord Gill, to undertake a wide ranging review of the civil courts system in Scotland. The remit of the Review was as follows:

To review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to

- the cost of litigation to parties and to the public purse;
- the role of mediation and other methods of dispute resolution in relation to court process;
- the development of modern methods of communication and case management; and
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts;

and to report within 2 years, making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.

The Scottish Executive's report '*Modern Laws for a Modern Scotland*', which can be found at [www.scotland.gov.uk/Resource/Doc/165338/0045028.pdf](http://www.scotland.gov.uk/Resource/Doc/165338/0045028.pdf), explained the background to the decision to embark upon the review. It set out the key issues which the Review was expected to address and the principles that the Executive considered should underpin its work.

### **The Project Board, the Policy Group and the Review Team**

The Review began its work in April 2007, when the Lord Justice Clerk was joined on the Project Board by:

- The Hon Lord McEwan;
- Sheriff Principal James Taylor, Sheriff Principal of Glasgow and Strathkelvin; and
- Sheriff Mhairi Stephen, Sheriff at Edinburgh.

The Board was assisted by a Policy Group comprising individuals with particular knowledge and expertise in various aspects of civil justice. Administrative and research support was provided by the Review Team headed by Lindsey Nicoll, as Secretary to the Review. Further details may be found in the Report, Chapter 1.

## **Consultation**

In November 2007, the Review issued a wide-ranging Consultation Paper and received over 200 responses, from: the legal profession; local government; voluntary organisations; insurers; trades unions; and others. Apart from where confidentiality was requested, all responses to the consultation, as well as the Consultation Paper itself, may be found on the Civil Courts Review website at <http://www.scotcourts.gov.uk/civilcourtsreview/publications.asp>. The Board and Review Team also held a number of meetings with interest groups, practitioners, court managers and the judiciary, and undertook fact finding visits to England and Ireland where they visited courts and met key players in the civil justice systems of these jurisdictions.

## **Principles underpinning the Review**

The Review adopted as its overarching aim the goal of ensuring that the civil courts provide the public with a high quality system of civil justice. The principles by which such a system should operate can be summarised as follows:

- it should be fair in its procedures and working practices;
- it should be apt to secure justice in the outcome of disputes;
- it should be accessible to all and sensitive to the needs of those who use it;
- it should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice;
- it should make effective and efficient use of its own resources, allocating them to cases in proportion to the importance and value of the issues at stake; and
- it should have regard to the effective and efficient employment of the resources of others.

It is essential that the courts have at their command sufficient judicial, administrative and physical resources to meet the demands upon them in a manner consistent with the above principles.

The courts, as public authorities, must act in a manner compatible with the European Convention on Human Rights. This too has underpinned the Review's work, and the Review considers that all its recommendations meet that test.

## The current system

A number of key themes emerged from the consultation. These are discussed in detail in the Report, in particular in Chapter 2, to which reference should be made.

- *The pressure of criminal business.* Civil cases are routinely deferred or interrupted to make way for criminal business, causing unacceptable delay and expense. Respondents complained of lengthy waiting periods before cases were heard, and of delays in issuing judgments in the Court of Session. (Chapter 2, paragraphs 4-10)
- *The need for a greater degree of judicial specialisation.* Practitioners and court users were strongly in favour of a greater degree of specialisation in the sheriff court, principally in family law, commercial law, personal injury, consumer and housing cases. The current system makes specialisation and judicial continuity difficult to achieve. (Chapter 2, paragraphs 11-12)
- *The hierarchy of the courts and appropriate use of judicial resources.* The jurisdiction of the Court of Session and sheriff court largely overlap, with parties free to choose where to litigate regardless of the importance or complexity of the case. With the exception of small claims and summary causes there is an unrestricted right of appeal to the Inner House. The current allocation of business is wasteful and inefficient, and does not promote effective delivery of justice. (Chapter 2, paragraphs 13-16)
- *Over reliance on temporary resources.* Part-time and temporary members of the judiciary increasingly form an integral part of the court programme in both the Court of Session and sheriff courts. There were complaints of lack of experience and commitment. There were also concerns as to the appropriateness of a practising solicitor or advocate both appearing and sitting in a judicial capacity in the very same court. (Chapter 2, paragraph 17)
- *The need for effective case management and reformed procedures.* The overwhelming majority of respondents thought the court, rather than the parties, should control the conduct and pace of litigation. There was support for greater case management powers and sanctions for parties who behave unreasonably or fail to comply with court rules. (Chapter 2, paragraphs 18-21)
- *Investment in information technology.* Respondents were strongly of the view that the court system is currently not taking full advantage of the opportunities that information technology offers to improve the efficiency of the conduct and management of civil business. (Chapter 2, paragraph 22)
- *Party litigants and a new forum or method for dealing with lower value cases.* For litigants who do not have legal representation, even those court procedures designed with them in mind may be inaccessible. Respondents

also noted that party litigants may cause unnecessary expense and delay through unfamiliarity with procedures or disruptive behaviour and that firmer measures are sometimes required to deal with those who pursue claims without merit or behave unreasonably. (Chapter 2, paragraphs 23-24)

- *Problems relating to the cost and funding of litigation.* Respondents drew attention to the cost of litigation and observed that only those with considerable wealth or who are eligible for legal aid can afford to litigate. There were concerns about the shortfall between what clients have to pay their legal advisers and what they can recover in expenses from the other party, and also about the taxation of judicial accounts. (Chapter 2, paragraphs 25-28)

## **Recommendations**

The Review proposes a package of structural and functional reforms to address the problems identified. These are discussed in detail in the Report, which contains a full list of recommendations and to which reference should be made. The main recommendations are summarised below:

### *Structure of civil court system (Chapter 4)*

- The Scottish Court Service should plan for the elimination of part-time judicial resources, which should be available for emergencies only (see paragraph 30).
- A system should be introduced whereby a number of sheriffs in each sheriffdom should be designated as specialists in particular areas of practice, including solemn crime, general civil, personal injury, family and commercial (see paragraphs 64, 66).
- A national Sheriff Appeal Court should be established, to hear summary criminal appeals and civil appeals from district judges (see below) and sheriffs. The Report goes on to make detailed recommendations on the structure and composition of the new court (see paragraph 79).
- The privative (i.e. exclusive) jurisdiction of the sheriff court should be increased, from its current level of £5,000 to £150,000 (see paragraph 123).
- A specialist personal injury court should be created, based at Edinburgh Sheriff Court but with jurisdiction throughout Scotland. Pursuers will thus have the choice between local access to justice or the advantages of a sheriff court with an all-Scotland jurisdiction (see paragraph 154).
- A new judicial office should be created, that of district judge. A district judge would sit in the sheriff court and hear summary criminal business and civil claims of modest value (see paragraph 176).

### *A new case management model (Chapter 5)*

- A docket system should be introduced in the Court of Session and sheriff court. A case would be allocated to a particular judge or sheriff, who would deal with all hearings in that case (see paragraphs 44, 45, 62, 72, 73).
- With certain exceptions, all actions should be subject to judicial case management. A case management hearing should be fixed shortly after defences are lodged. It would normally take place by means of a telephone conference call. The Report makes detailed provision for the matters to be dealt with at the case management hearing, such as the exchange of information and the focussing of issues by parties' representatives. The main exception would be personal injury actions, for which special case flow management provisions have already been made (see paragraphs 48, 74, 77-81).
- In the sheriff court actions will be transferred to a court in which a sheriff with the relevant specialism is resident. Procedural business will be conducted by email, telephone, video conferencing or in writing (see paragraph 61).
- District judges will have jurisdiction to hear housing actions, actions for payment of £5,000 or less, and referrals and appeals from children's hearings, and concurrent jurisdiction with sheriffs in family actions (see paragraph 71).
- There should be a single new set of rules for cases for £5,000 or less (called 'the simplified procedure'). The new rules should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. The rules should be written in plain English and drafted for party litigants rather than legal practitioners (see paragraphs 125-127, 131).
- The Scottish Government should develop and extend in-court advice services, including services offering specialist help in housing matters, as part of a broader strategy to improve and co-ordinate the provision of publicly-funded civil legal assistance and advice generally (see paragraph 147).

### *Information technology (Chapter 6)*

- The Report supports the increased use of IT and makes detailed recommendations including: the use of email as a means of communicating with the courts and the judiciary; video and telephone conferencing; and the digital recording of evidence (see paragraph 84).

### *Mediation and other forms of dispute resolution (Chapter 7)*

- The Report recognises the value of Alternative Dispute Resolution, and makes proposals such as a free mediation service for claims under the new simplified procedure (see paragraphs 37-39).

### *Facilitating settlement (Chapter 8)*

- There are detailed recommendations on the compulsory use in personal injury cases of pre-action protocols aimed at ensuring early exchange of information and enabling cases to be settled early, fairly and, if possible, without litigation (see paragraphs 33, 34, 53).
- Either party should be able to make a formal offer in settlement of a claim (currently only defenders can do so). The Report discusses the implications for expenses that may follow from refusing such an offer (see paragraphs 85-91).

### *Enhancing the court's case management powers (Chapter 9)*

- The guiding principle of the rules of court should be that their purpose is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner and with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court (see paragraph 13).
- The Report makes recommendations for enhancing the court's case management powers, including early disclosure of documents (see paragraph 38), greater use of witness statements in place of oral testimony (see paragraph 47), abbreviated written pleadings (see paragraph 60) and the appropriate use of expert evidence (see paragraphs 78-91).
- Either party should be able to ask the court to dispose of a case summarily (i.e. without proceeding to a full hearing) if the other party has no real prospect of success and there is no other compelling reason why the case should proceed (see paragraph 103).
- There are recommendations for efficient management of court time, such as requiring parties to agree a timetable for presenting evidence (see paragraph 117) and the greater use of written arguments (see paragraphs 119, 126).
- The court should have a general power to impose sanctions for failure to comply with rules or court orders. An extensive list of sanctions is proposed, including granting decree against the defaulting party, dismissing the case or making orders in relation to expenses (see paragraphs 146, 148).

- The court should have power to find all those with rights of audience (solicitors, advocates, etc.) personally liable for expenses occasioned by their own fault, or where guilty of an abuse of process (see paragraph 149).
- The Report recommends enhanced powers for the courts to make orders restricting the ability to litigate of parties who persist in conduct amounting to an abuse of process (see paragraph 190).

### *Judgments (Chapter 10)*

- Recommendations include an online register of cases in which judgment has been outstanding for more than three months: the judge should be required to provide an explanation for the delay (see paragraph 35).

### *Access to justice for party litigants (Chapter 11)*

- There are recommendations for the promotion of public legal education (see paragraph 8), improved online provision of information for members of the public (see paragraphs 22, 24), the development of in-court advice services (see paragraphs 36-38) and the rights of lay representatives (or 'McKenzie friends') of party litigants (see paragraph 53).

### *Judicial review and public interest litigation (Chapter 12)*

- The current law on title and interest to sue is overly restrictive and should be replaced by a single test, namely, whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings (see paragraph 25).
- Petitions for judicial review should be brought promptly and, in any event, within a period of three months (see paragraphs 38-39).
- A requirement to obtain leave to proceed with an application for judicial review should be introduced. The test should be whether the petition has a real prospect of success (see paragraphs 51-52).
- The court should have power to make special orders in relation to expenses in cases raising significant issues of public interest. This could include an order made at the outset or during the course of proceedings to the effect that the petitioner would not be liable for the expenses of the action, even if unsuccessful, or that the expenses of the successful party will be capped at a particular amount (see paragraph 73).

### *Multi-party actions (Chapter 13)*

- The Report recommends that there should be a special procedure for dealing with multiple claims which give rise to common or similar issues of fact or law, for example, litigation arising out of a mass disaster or liability for defective products. Detailed recommendations are made regarding the features that such a procedure would have, including special funding arrangements for multi-party actions to be administered by the Scottish Legal Aid Board (see paragraphs 64-119).

### *The cost and funding of litigation (Chapter 14)*

- Detailed recommendations are made on the recovery of expenses. The cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland (see below); pending which the Scottish Government should set up a Working Group to look at the issue of expenses (paragraphs 50-67).
- The offices of Auditor of the Court of Session and sheriff court auditors should become salaried posts, subject to the usual rules regarding public appointments. The Report makes further recommendations on the qualifications, role and remuneration of auditors (see paragraph 83).
- There are recommendations aimed at improving the system for taxing accounts, such as greater use of IT (see paragraph 85).
- While no recommendations are made on speculative fee arrangements pending the outcome of a review in England and Wales, it is recommended that this issue should urgently be addressed by the proposed Working Group on Judicial Expenses (see paragraphs 125-127).
- The Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance (see paragraph 140).

### *A Civil Justice Council for Scotland (Chapter 15)*

- A Civil Justice Council for Scotland should be established with responsibility for drafting the rules of court. Its remit would be similar to that of this Review: to keep under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. The Civil Justice Council for Scotland would monitor the implementation of this Report; receive representations and proposals for reform; have the power to commission research; and keep abreast of reforms and developments in other



jurisdictions. In this way, reform and improvement of the civil justice system would be an ongoing process (see paragraphs 51-59).

## **The Report**

The Report is published in two volumes. Volume 1 contains the Chairman's introduction, an introduction to the Review (chapter 1), a summary of issues identified and recommendations made (chapter 2), a short overview of the structure of the civil court system in Scotland, which is aimed at lay readers (chapter 3) and chapters 4 to 9 with their annexes. Volume 2 contains chapters 10 to 15 with their annexes, a list of meetings held during the Review, a copy of the report by the Rt Hon Lord Penrose on the business of the Inner House and a bibliography. For ease of reference, both volumes contain the full list of recommendations made by the Review and contained in the Report.

The Report has been presented to the Cabinet Secretary for Justice, Kenny MacAskill MSP. It will be for the Scottish Ministers to decide how to take forward the recommendations that the Review has now made.