



# FOIL UPDATE

October 2009

## The Gill Reforms

### Gilbert Anderson reports on the recommendations of Lord Gill for reform of the Scottish Civil Justice System.

On Wednesday 30 September the Report of the Review Team of the Scottish Civil Courts Review headed by the Lord Justice Clerk, the Right Honourable Lord Gill, was formally launched and presented to the Scottish Cabinet Secretary for Justice.

The Report is the first systematic review of the structures and procedures of the Scottish Civil Courts in modern times. It follows a remit from the then Minister for Justice in February 2007, to carry out a wide-ranging review of the civil court system in Scotland, including the 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.

There was a lengthy consultation process involving the legal profession, local government, insurers and other major users of the courts, and representative bodies such as FOIL and the Royal Faculty of Procurators. A number of meetings were held with the relevant interest groups.

A number of common themes emerged from the consultation process, such as the raising of cases of moderate to low value in the Court of Session, the delays and inefficiencies in the system caused by the pressure of criminal business and, to an extent, the lack of specialisation and formal case management, particularly in the sheriff court.

The Review proposes a package of both structural and functional reforms to address these problems.

The main recommendations are, in relation to structural reforms:-

- The privative, i.e. exclusive, jurisdiction of the sheriff court should be increased from its current level of £5,000 to £150,000. This will also represent the minimum level at which an action may be brought in the Court of Session, subject to a number of limited exceptions.

#### **The Key Recommendations:**

- *Privative jurisdiction of Sheriff Court to be £150k.*
- *An all-Scotland PI court to be based in Edinburgh.*
- *Jury trial provisions to be extended to the PI Sheriff Court.*
- *New 'third tier' judicial role of 'District Judge' to be created for cases with value up to £5,000.*
- *Specialist Sheriffs to be available in every sheriffdom.*
- *'Docket system' will allocate cases to specific judges.*
- *Active case management to apply to most cases, with sanctions.*
- *Summary cause and small claims procedures to be simplified.*
- *PI pre-action protocols to be compulsory.*
- *Pursuers' offers to be introduced.*
- *Civil Justice Council to be established as a standing review body.*
- *Public awareness of legal expenses insurance to be improved.*

- An all Scotland Personal Injury Court to be based at Edinburgh Sheriff Court. Pursuers are to have the option of raising actions there or at a local sheriff court. The Review seems to have been persuaded by arguments that a body of expertise and resources was centred in Edinburgh. This is one conclusion that would benefit from further consultation and representations due to the success of the Glasgow Sheriff Court Pilot Scheme. We suspect however that one reason for this recommendation is that Edinburgh Sheriff Court is relatively underused in civil cases and thus has additional capacity. Of some concern is the proposal that the existing jury trial provisions of the Court of Session be extended to the Personal Injury Sheriff Court. If civil juries are to be retained (and there is a strong view within FOIL that they should be abolished on grounds of inconsistency and unpredictability thereby precluding lawyers from being able to give clear advice to clients) there is a strong view that they should be available in all sheriff courts in which specialist personal injury sheriffs will sit.
- For the first time there is to be a third tier judiciary in Scotland to be known as a district judge. It is envisaged that a district judge will hear small claims and other actions with a financial limit of up to £5,000, together with summary criminal business, consumer matters and housing disputes. The idea is that the office of Sheriff will thereby be empowered to deal with more significant cases, likely to be transferred downwards from the Court of Session.
- The Report recommends that there should be a number of specialist sheriffs in each sheriffdom in particular areas of practice to include personal injury and commercial work and that these specialist sheriffs should be available to all court users in the particular sheriffdom. The review has not accepted submissions made to it that there ought to be a unified all Scotland Sheriff Court or in turn that there ought to be a specialist centre at one or more locations such as Glasgow, Aberdeen, Inverness or Edinburgh.

A number of other important recommendations have been made in relation to functional and procedural aspects.

- A "docket" system should be introduced in both the Court of Session and sheriff courts whereby cases are assigned from the outset to a particular judge or sheriff who would deal with all hearings in that case.
- With certain exceptions, all actions should be the subject of judicial case management and for that purpose, greater use should be made of telephone and video conferences and other IT facilities. What is contemplated here is active case management by a judge as opposed to what is often termed "case flow management" such as that currently found in the personal injury rules of the Court of Session and soon to be introduced in the sheriff court. In case flow management the parties are required to observe a timetable with the court otherwise monitoring the process and dealing with defaults. The Review felt that case flow management remained the best form of procedure for personal injury actions but for the first time parties will have the option of seeking additional active judicial case management.
- The complex, overlapping and unnecessarily legalistic summary cause and small claims procedures in the sheriff court will be replaced with a new simplified procedure before the district judge. Steps will also be taken to increase the services provided to witnesses and party litigants and other user groups such as those dealing with debt, housing and family cases.
- There are recommendations on the compulsory use in personal injury cases of pre-action protocols in place of those currently utilised on a voluntary basis.
- There is a recommendation that the common law system of offers and tenders be codified with procedural rules entitling defenders both to tender sums in settlement as at present but also for pursuers to make formal offers to settle as is the case in

England. The Report recognises that careful drafting will be required in order to avoid the pitfalls associated with the short-lived pursuer offer rules some years ago.

- There are to be new rules allowing the court to control the progress of the litigation and to create sanctions against not only parties but solicitors and counsel, similar, we imagine, to the wasted costs provisions in England and Wales.
- Whilst the Report recognises the value of alternative dispute resolution and mediation, it has come down against making the use of mediation compulsory. Ultimately, the Review Board's view was that citizens were entitled to direct access to the court and that mediation works best in a conciliatory environment and of consent.

The other major recommendation is that a new body be established, the Civil Justice Council for Scotland, which will effectively be a standing review body, overseeing the ongoing provision of civil justice and the formulation and review of rules of court. The idea seems to be that this body will combine the implementation of policy, as well as the inevitable ongoing process of review, historically carried out on an ad hoc basis by different bodies, such as the Sheriff Court Rules Council and the Court of Session Rules Council, often without much coordination. The Report proposes that the Civil Justice Council be empowered to look further at the whole system of the cost and funding of litigation, standing the major review currently being conducted by Lord Justice Jackson in England and Wales. At the launch of the Report Lord Gill highlighted that a major area of concern was the cost and funding of litigation. However, having explored the many issues involved it had become clear to the Review that this topic was a huge exercise in itself and to do justice to it would have skewed the focus of their recommendations. It was with regret therefore that the Review concluded that they did not have the resources to carry out the investigations necessary to do justice to the subject. Many references are made in the Report to the ongoing major review of litigation costs in England and Wales being conducted by Lord Justice Jackson. The Review has recommended that at an early date the cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland and that meanwhile the Scottish Government should set up a Working Group to look at the whole question of expenses of speculative fee arrangements. Given the massive problems which have arisen out of CFAs and referral fees in England and Wales it is hoped that Scotland does not go down that particular route! It should be emphasised that legal aid is still currently available for personal injury cases in Scotland.

The Report does make a number of important recommendations in relation to raising the general public awareness of legal expenses insurance, recommending that the Scottish Government explore this issue further with insurance providers. This echoes submissions made both by the Royal Faculty of Procurators and by FOIL in Scotland that there ought to be an expansion of the uptake of legal expenses insurance, possibly even of a compulsory nature, and that there are significant opportunities here for insurers.

At the Seminar on the Gill Report organised by the Royal Faculty of Procurators in Glasgow on 19 October the Cabinet Secretary for Justice, Kenny MacAskill, suggested that it would be entirely appropriate to progress those recommendations which would not require primary legislation. This is reasonably encouraging for insurers.

We greatly welcome the proposals to raise the minimum threshold for Court of Session actions, for the introduction of district judges, for the specialisation of sheriffs and for greater case management. We will continue to highlight the arguments which we feel justify the abolition of civil jury trials. We shall also continue to explore whether there is scope for the proposed all Scotland personal injury sheriff court to sit in any sheriff

court in Scotland but especially in Glasgow given that the majority of reparation work emanates from Glasgow and the surrounding area.

There is no doubt that implementation of the key recommendations of Gill will hugely improve the efficiency of the Scottish civil court structures and procedures, along with the quality of justice provided. One of the underpinning principles behind the recommendations is that a high quality system of civil justice should be accessible to all. Undoubtedly the "middle income trap" is a serious problem. If the benefits to the civil justice system in Scotland which will undoubtedly arise from Lord Gill's recommendations are to be meaningfully available to all who seek to vindicate their rights in the civil courts, then it is essential that as a matter of urgency solid and reliable research is carried out to find a funding solution which is fair, transparent and affordable.

We shall be closely monitoring the response to the Gill Report.

**If you have any comments on the Report or the proposals please contact Gilbert Anderson on [gilbert.anderson@andersonsllp.co.uk](mailto:gilbert.anderson@andersonsllp.co.uk) or Shirley Denyer on [shirley.denyer@foil.org.uk](mailto:shirley.denyer@foil.org.uk)**

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