

Justice Committee

Courts Reform (Scotland) Bill

Written submission from Scottish Civil Justice Council

The SCJC welcomes the opportunity to provide evidence to the Justice Committee on the implications of the Courts Reform (Sc) Bill 2014 (“the Bill”). The SCJC was established in May 2013 and met for the first time in June 2013. As such, it did not respond to the Scottish Government’s consultation on the draft Bill.

As many of the Bill provisions will require court rules for their implementation, the SCJC, which has responsibility for preparing draft rules of procedure for the Scottish civil courts, will be one of the key delivery bodies in this landmark programme of civil courts reform in Scotland. The SCJC notes that the Scottish Government’s rationale for establishing the SCJC prior to bringing legislative proposals for courts reform to the Scottish Parliament was to allow the SCJC to make the necessary preparations to enable the early implementation of civil courts reform.

In light of all of this, the evidence provided by the SCJC focusses on matters relevant to implementation, the SCJC’s role and the provisions in the Bill relating to the Court of Session’s (“the Court”) rule-making powers in respect of the Scottish civil courts. In particular, the SCJC has considered whether the rule-making powers are drawn broadly enough to enable implementation of the Bill and the Scottish Civil Courts Review recommendations.

Determining the value of a claim - sections 39 (Exclusive competence) and 70 (Simple procedure)

Rules will be required in respect of the proposed increase in the privative limit (renamed in the Bill as the “exclusive competence”) of the sheriff court and in respect of the new simplified procedure for claims of value of £5,000 or less. In particular, rules will need to make provision as to how the value of a claim should be calculated. The SCJC is content that the Bill contains sufficient rule-making powers in this respect.

Simple procedure - section 72 (Rule-making: matters to be taken into consideration)

The Bill makes specific provision in relation to the Court’s power to make rules relating to the simple procedure, specifying that the power must be exercised with a view to ensuring, among other things, that the sheriff hearing a simple procedure case may assist parties in reaching a settlement (including negotiating with parties) and may adopt a procedure appropriate to the particular circumstances of a case.

The SCJC must, in carrying out its functions, have regard to the principle that “rules relating to practice and procedure should be as clear and easy to understand as possible” and that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted” (section 2(3)(b) and (d) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (“the 2013 Act”). The SCJC considers that these principles are well reflected in section 72 and it is supportive of the Review

recommendation that the proposed summary sheriff should take a more interventionist approach. The SCJC welcomes the Bill provisions in this regard.

Simple procedure - section 73 (Service of documents))

The SCJC considers that the power to be conferred on the Court to make rules providing that the sheriff clerk may effect service of documents on behalf of parties in a simple procedure case is useful. It is derived from similar provisions in the Sheriff Courts (Sc) Act 1971 relating to small claims.

Lay representation – section 94 (Lay representation: supplementary provision)

Section 94(1) provides that the Court may make provision in the rules in relation to granting permission for lay representatives to conduct proceedings on behalf of non-natural persons (e.g. companies). The proposed power is consistent with the existing powers of the Court to make rules in relation to lay representation by natural persons (by virtue of section 5A of the Court of Session Act 1988 (“the 1988 Act”). The SCJC considers these powers are a necessary complement to the provisions enabling lay representation for such parties, as there is a need to ensure procedures can be adapted in line with changing circumstances.

Rules of procedure in the Court of Session and the sheriff court - sections 96 (Power to regulate procedure etc. in the Court of Session) and 97(1) (Power to regulate procedure, etc. in sheriff court and Sheriff Appeal Court)

The SCJC has considered whether the general rule-making powers contained at section 96 and 97 are sufficient to enable implementation of the Bill and the recommendations of the Scottish Civil Courts Review.

The SCJC considers it essential that management of litigation transfers to the courts, and that judges and the judicial system take a proactive stance in managing the progression of cases through the courts. It considers that sections 96 and 97 will enable this. In particular, new section 5(2)(b) of the 1988 Act and section 97(2)(b), (which will enable the Court to make rules encouraging settlement of disputes and the use of alternative methods of dispute resolution, and in relation to pre-litigation behaviour by parties) will support implementation of civil courts reform. Under those provisions, pre-action protocols, for example, could be made compulsory – a matter which is currently being considered by the SCJC’s Personal Injury Committee.

The SCJC welcomes the inclusion of new section 5(2)(c) and (d) of the 1988 Act and section 97(2)(c) and (d), which clarify that rules may provide for the use of technology in proceedings and for the simplification of proceedings.

Being of the view that ensuring adherence to the rules will be critical to the success of the procedural reforms the SCJC is tasked with delivering, the provisions at new section 5(2)(i) of the 1988 Act and section 97(2)(i), which make it clear that the Court may make rules in relation to the steps which may be taken where there has been an abuse of process, are particularly welcome.

The SCCR recommended that the common law system of judicial tenders should be replaced by a rule regulating the making of formal offers by any party and specifying the

detail of the rules. The Court of Session's rule-making powers as they stand do not currently extend to the regulation of offers as recommended by the SCCR.¹ It is not clear whether section 5(2) of the 1988 Act, as amended by the Bill, would enable such provision to be made by court rules and the SCJC would be grateful for the Scottish Government's views in this regard.

The SCJC considers that these provisions are in keeping with the guiding principles it must have regard to when carrying out its functions under the 2013 Act.

Power to regulate fees - Sections 98 (Power to regulate fees in the Court of Session) and 99(1) (Power to regulate fees in the sheriff court and the Sheriff Appeal Court)

Sheriff Principal Taylor has recommended that “the SCJC form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses.” (Recommendation 14). These fees instruments are currently prepared by the Lord President's Advisory Committee (LPAC) before being submitted to the Court for approval. We consider that to be able to properly fulfill its statutory function to “keep the civil justice system under review” (subsection 2(1) of the 2013 Act), the SCJC should have responsibility for the preparation of fees instruments. However, it is considered that there is a question as to whether the SCJC's statutory functions extend to the preparation of fees instruments. The SCJC is therefore of the view that primary legislation would be desirable, if not necessary, to give full effect to Recommendation 14.

The SCJC believes that the reform of legal expenses is a necessary complement to courts reform and as such that consideration should be given to Sheriff Principal Taylor's recommendations as a matter of priority, as part of a consistent and coherent package of reform. It is therefore of the view that it would be helpful if the question of the SCJC's functions in relation to the preparation of fees instruments were to be put beyond doubt in primary legislation and it is considered that the Bill provides an opportunity to do that. This would allow it to begin work in this regard in early course.

The SCJC considers that detailed consideration is required in respect of any implementation of the remaining Taylor recommendations. The Costs and Funding Committee of the SCJC is currently working with others, including the Scottish Government and LPAC, to identify where responsibility of different aspects of the Taylor recommendations lies, in particular as to which of them might be capable of being carried forward through rules of court and which might require primary legislation. The SCJC notes that the Bill does not allow the Court to regulate the fees of advocates, and this reflects the current position that generally speaking the Court does not regulate advocates' fees. However, the Bill proposes to give the Scottish Ministers power, by order, to extend the Court's powers to regulate fees to persons beyond those specified within the Bill. The SCJC suggests that this is a matter which the Scottish Government will require to consider.

¹ Chapter 34A (Pursuers' Offers) was introduced in 1996 following the Cullen Review of Outer House Business in 1995. In *Taylor v. Marshalls Food Group Ltd* (No. 2) 1998 S.C. 841 (First Div.), the provision in Rule 34A.6 for the pursuer to be entitled on beating his own offer to a sum equal to the taxed expenses, was held to be *ultra vires* and the Chapter was subsequently revoked.

Appeals - section 109 (Appeals: granting of leave and assessment of grounds of appeal)

The SCJC has considered the powers (as proposed by section 109 of the Bill, inserting new section 31A into the 1988 Act) of the Court to make rules for a single judge of the Inner House to grant leave or permission to appeal and for a single judge to assess the grounds of appeal. It considers that the matters that any rules must make provision for (specified at new section 31A(3)(a) of the 1988 Act) are appropriate.

Modification of the 2013 Act - Schedule 4, paragraph 18

The SCJC notes the amendments to the 2013 Act to bring civil proceedings in the Sheriff Appeal Court within the SCJC's remit.

Scottish Civil Justice Council
18 March 2014