Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Traprain Consultants Ltd

This Bill is welcome for seeking to rationalise the making of Rules within the civil justice system in Scotland, and in providing in the Council a body capable of taking an overview of the entire civil justice system. The comments below are by way of clarification and should not be taken as objecting to the overall approach in the Bill.

Please note that we have not commented on the Criminal Legal Assistance elements of the bill, as we have not particular expertise in this field.

The particular points on which we would like to comment concerning the draft Bill, are as follows:

2(3)(b) This approach is welcome, but it is suggested that the Council could also be encouraged to have rules written in accessible language. Much of the terminology within the Scottish civil justice system is difficult to understand for people for whom English is their first language, much less for foreigners who may be wanting to utilise the system for dispute resolution. By taking the opportunity to clarify the language, the justice system will become more accessible and more attractive to users.

2(3)(d) This approach is also to be welcomed, but it is suggested that the wording of (d) implies that such alternative dispute resolution methods should be entirely separate from the courts. The existing pilots in the Sheriff Courts (notably that of Edinburgh with which the writer was involved) have shown that mediation services can provide a useful function within the existing civil justice system. It is accepted that this could still be brought within the strict wording of (d) but the phrase “do not involve the courts” could be taken to mean that the two processes are to be dealt with exclusively which is felt not to be helpful.

3(2)(b) It is understood that the intention is that the Court of Session will make rules by act of Sederunt, covering both that court and the civil jurisdiction of the Sheriff Court. Assuming our understanding is correct, the intention to combine the two functions is welcome, and should prevent any conflict in approach. This is also consistent with the directions given to the Council in 2(3)(c)

4(1)(b)/(c) Given the requirement of the Council to publish its recommendations, under 3(2)(g) it would seem appropriate that the Court of Session should be required to publish the reason why it has made any modifications under 4(1)(b) or rejected any proposals under 4(1)(c) so that the process is fully transparent. This would also assist the Council in understanding why these proposals had not been accepted in whole or in part.

4(3) While it is understood that this power must be retained, it is suggested that in such cases, the Court of Session could exercise its powers in consultation with the Council, not least to prevent the two bodies working at the same time on identical issues.

6(1) If all of the numbers in paragraphs (a) through to (i) are added together they come to 20 which is the maximum number allowed under 6(1). In these circumstances the various statements of “at least” seem otiose, since if more than the number prescribed in any paragraph were to be appointed, this would automatically lead to the 20 being exceeded. It is suggested that from a drafting point of view it would be sensible just to state, for example, 4 judges at (e) rather than “at least”. Having said that, the spread of people appears to be satisfactory, although it is to be hoped that the six persons to be appointed by the Lord President would include a number of those who are active users of the court system, other than the consumer interests covered by (h). There is a preponderance of the legal profession within the Council which is understandable but may lose sight of the fact that the users of the system are in fact the litigants not the lawyers. The writer has practised as a lawyer in another jurisdiction and been a litigant in a corporate capacity in Scotland and elsewhere. Too often the focus appears to be on ensuring that the system works efficiently for the judiciary and the practising lawyers and less on cost and efficiency for the litigants. Both should, in fact, be taken into account, and the only way in which there is going to be representation from the people who would, with respect, actually pay the bills, appears to be through the six LP members appointed under (i).

8(3)/(4) We wonder whether three years is a long enough period for an appointment. It is likely that the consultation process on any substantive change to the civil justice system is going to take some time and it would obviously be helpful if the same people were involved throughout the process. We would suggest that a period of five years might be more appropriate but accept that this is a matter of judgment, and have no very strong views on this point.

9(1) We are unsure why election to any of the posts mentioned should automatically exclude somebody from being a member of the Council. In particular it is difficult to see why being a member of a local authority is problematic in the respect. It may exclude a number of competent and useful members of the legal profession, and those from outside (consumer and LP members) and it is not understood why this part of the legislation is felt to be necessary.

11(2) While again this is perhaps not a major point, it is difficult to see why the person chairing the meeting who presumably will have no second or casting vote and is merely there to ensure the efficient process of the meeting itself, has to automatically be a member of the judiciary.

In summary, this seems a positive move, and we welcome the proposed legislation, and look forward to seeing the Council in action in due course.

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