

ITEM 5: CIVIL COURTS REFORM

Purpose

1. To provide the Committee with a summary of the key proposals contained in the draft Courts Reform (Sc) Bill 2013 which are expected to have implications on the practice and procedure to be followed in personal injury actions.

Discussion

2. The Scottish Government consulted on a draft Courts Reform Bill in spring 2013. The Scottish Civil Justice Council (SCJC), having been established towards the closure of the consultation period, has not responded to the consultation. As indicated in the Scottish Government's update to the Committee, it is anticipated a Bill will be introduced to the Scottish Parliament in early 2014.
3. The Court Reforms (Sc) Bill ("the draft Bill") is essentially an enabling Bill which leaves much of the detail of the reforms to be developed through court rules. In order to facilitate the wider implementation of civil courts reform, a "Rules Rewrite" project has been initiated under the remit of the Making Justice Work programme. At its meeting of 10 June 2013 the Scottish Civil Justice Council agreed to establish a Rules Rewrite Working Group (RRWG), tasked with establishing the "methodology" of the rules rewrite project. That work will include the development of an annual rules rewrite programme enabling specific phases of rules to be prioritised.
4. Arrangements for the establishment of the RRWG are currently being taken forward and it is envisaged that the RRWG will report to the SCJC in spring 2014. The Group's considerations will assist in the development of the yearly business programme for the SCJC and, therefore, the forward work plans for SCJC committees.
5. A forward work programme is being developed for consideration by the SCJC when it next meets in September. Pending approval of the programme and the outputs of the RRWG Group, this paper provides an overview of the key proposals contained in the draft Bill 2013 which are expected to have an impact on personal injury procedure (to a greater or lesser extent) and aspects of which the Committee may therefore be asked to consider in due course. Except where specifically stated, this

paper does not seek to provide an analysis as to the efficacy of the draft provisions nor a view on whether the provisions meet the policy aims described in the Scottish Government's consultation paper.

Specialist Personal Injury Court

5.1 The SCCR recommended that an all-Scotland jurisdiction for personal injury actions be conferred on Edinburgh Sheriff Court (SCCR recommendation 32, Chapter 4). Section 40 of the draft Bill provides for the creation (by way of an order made by the Scottish Ministers, having first consulted the Lord President) of specialist courts, allowing for any sheriff court to be given all-Scotland jurisdiction in specified types of proceedings.

Judicial Specialisation

5.2 Sections 33 and 34 of the draft Bill provide for the designation of judicial office holders as specialists in categories of cases, to be specified by the Lord President, in the sheriff court. The Scottish Government's consultation paper envisages that specialist PI sheriffs could sit outwith the PI Court.

Civil Jury Trials

5.3 The SCCR considered that civil jury trials should be retained in the Court of Session and therefore extended to the new specialist personal injury court, but not to the other sheriff courts (SCCR recommendations 34 and 35, Chapter 4). Section 61 of the draft Bill provides for the availability of civil jury trials in designated specialist courts under section 40 (where that would have been available if raised in the Court of Session but for the proposed new limit of the exclusive competence of the sheriff court). Sections 62 to 69 make further provision for civil jury trials in an all-Scotland sheriff court, based the arrangements for civil jury trials as provided for under the Court of Session Act 1988 (at sections 9, 11 to 17, 29, 30 and 31 of that Act).

Exclusive competence of the sheriff court

5.4 The SCCR proposed increasing the privative jurisdiction of the sheriff court from £5,000 to £150,000 (SCCR recommendation 20, Chapter 4). The draft Bill

provides for this new limit under section 38 and for it to be renamed the “exclusive competence” of the sheriff court. Subsection 38(5) provides that the Scottish Ministers may by statutory instrument substitute the figure of £150,000 for another amount.

5.5 The draft Bill further provides at subsection 38(7) that the calculation of the value of the claim (which is currently set out in case law) is to be specified by rules of court.

5.6 Subsections 81(1) and (2) provide that a sheriff, on application by any party may remit to the Court of Session cases of “importance or difficulty” to which the exclusive competence of the sheriff court does not apply (except for cases subject to simple procedure). The decision of the sheriff may be appealed to the Sheriff Appeal Court (under subsection(9)).

5.7 Subsections 81(3) and (4) provide that a sheriff, on application by any party may remit to the Court of Session cases within the exclusive competence of the sheriff court (except those subject to simple procedure), if the sheriff considers there are “exceptional circumstances justifying such a remit” and where the Court of Session “on special cause shown” allows it. The Bill does not provide for a right of appeal against the decision of the sheriff or of the Court of Session in this regard, although further applications are possible under subsection (12).

5.8 Under section 82 the Court of Session must remit a case where it considers, at any stage, that the value of any order granted in the proceedings is likely to be less than the value of the exclusive competence. The Court is to assume that liability is established and that “there will, where appropriate, be no deduction for contributory negligence.” Section 82 also provides that the Court may, on application by any party or of its own accord, remit any case to an appropriate sheriff if the Court considers that the nature of the proceedings makes it appropriate to do so (under subsection (5)).

Sheriff Appeal Court

5.9 The SCCR recommended the establishment of a national Sheriff Appeal Court which would hear summary criminal appeals from justices of the peace and the sheriff courts and civil appeals from the sheriff courts. The draft Bill

provides at section 45 for the establishment of a Sheriff Appeal Court consisting of judges to be known as Appeal Sheriffs and, at section 47, for its decisions to be binding in proceedings in lower courts (section 88(1) specifically provides against appeals from the sheriff to the sheriff principal). Under the draft provisions, the existing sheriffs principal would automatically become Appeal Sheriffs and the Lord President would be able to appoint sheriffs (of at least 5 years' standing) as Appeal Sheriffs.

- 5.10 A President and Vice President of the Sheriff Appeal Court are to be appointed from the ranks of the sheriffs principal under sections 52 and 53, with (largely administrative) functions set out at section 54.
- 5.11 Section 56 makes provision for the Appeal Sheriffs to refer an appeal to be heard by a fuller bench. In contrast with the SCCR recommendation that civil cases should be heard by a bench of three, the Scottish Government is of the view that flexibility in this regard is required and proposes (at section 86) that court rules may make provision, in civil proceedings, for the quorum for sittings of the Sheriff Appeal Court and determining which Appeal Sheriff is to preside at such sittings (section 86(2)(o)). Part 4 of the draft Bill (sections 88 to 93) makes separate provision for appeals in civil proceedings, including to and from the Sheriff Appeal Court.
- 5.12 The Scottish Government indicates in its consultation paper on the draft Bill, its intention to ensure "as much flexibility around location [of the Sheriff Appeal Court] as possible" and section 55 of the draft Bill provides that the Sheriff Appeal Court may be held at any place where a sheriff court may be held.

Summary sheriffs

- 5.13 The SCCR recommended the creation of a new tier of judicial officer to hear summary criminal proceedings and the following civil matters: actions with a value of £5,000 or less, housing actions, family actions (having concurrent jurisdiction with the Sheriff), appeals and referrals from children's hearings and with the ability to hear urgent motions for interim orders in ordinary actions (SCCR recommendations 37, 39-41, 46, 47, 57, 72, 79, 85, 88 and 91, Chapter 5). Section 5 of the draft Bill creates the new judicial office of summary sheriff (which the SCCR termed 'district judge'). Sections 10 and 11

provide for the appointment of part-time summary sheriffs. Sections 42, 43 and Schedule 1 of the draft Bill provide for the summary sheriff's jurisdiction. In civil proceedings, the Scottish Government proposes that summary sheriffs will have concurrent jurisdiction with the sheriff, restricted to the matters listed at schedule 1: certain family actions, domestic abuse proceedings, children's hearings, diligence proceedings, simple procedure cases and the granting of certain warrants and interim orders. The summary sheriff will exercise all of the powers and competence of the sheriff in relation to summary criminal proceedings.

5.14 Section 26 provides that cases with concurrent jurisdiction will be allocated to either a sheriff or summary sheriff by the Sheriff Principal (this contrasts with the SCCR proposal that the pursuers should choose the forum (SCCR, Chapter 5, para. 87).

Simple procedure

5.15 The SCCR recommended a new simplified procedure, replacing small claim and summary cause procedure, for claims under £5,000 (SCCR recommendations 79-84, Chapter 5), designed with party litigants in mind. Sections 75 and 76 provide respectively for the transfer of cases to and from simple procedure.

5.16 Section 72 of the draft Bill specifies that the power to make rules of court (at section 86 of the draft Bill) is to be exercised with a view to achieving certain matters in order to enable "an interventionist and problem-solving approach" (para. 106 of the Explanatory Notes to the draft Bill).

5.17 The draft Bill would allow personal injury cases to be heard under simple procedure. It would also enable court rules to make different provision for different types of simple procedure cases (section 70(12)).

Rule-making powers

5.18 The Scottish Government proposes at Chapter 6 of its consultation paper that a number of measures to improve procedures should be taken forward by court rules rather than by making provision in primary legislation. The draft Bill makes provision for the Court of Session's rule-making powers at

sections 85 (in respect of Court of Session procedure) and 86 (in respect of sheriff court and Sheriff Appeal Court procedure). The Scottish Government has stated that the rule-making powers need to be “sufficiently wide to ensure they can sufficiently regulate court processes and procedures “, that they “need to enable the SCCR recommendations on case management” and are “future proofed as far as possible: to allow...court procedures to evolve and adapt; and, to avoid the need for new legislation to have to cater for particular types of procedure” (para. 144 of the consultation paper).

5.19 The measures which were recommended by the SCCR which the Scottish Government proposes should be left to court rules and which will be of particular interest to members are:

- a) **The creation of compulsory pre-action protocols:** (SCCR, recommendations 102 to 106, Chapter 8): the SCCR considered that existing pre-action protocols in relation to personal injury and industrial disease claims should be compulsory (recommendation 102), that in principle the protocols should apply to all categories of personal injury claim (recommendation 103), that a protocol on clinical negligence actions should be developed (recommendation 104) and that the court should have power to make orders in relation to expenses and interest for non-compliance with pre-action protocols (recommendation 106). The draft Bill specifies that the Court of Session’s power to make court rules includes power to make provision for “encouraging settlement of disputes...[and] action to be taken before such proceedings are brought by persons who will be party to the proceedings” (in respect of Court of Session procedure, at new subsection 5(2)(b) of the Court of Session Act 1988, introduced by section 85, and in respect of sheriff court and Sheriff Appeal Court procedure, at section 86(2)(b)).
- b) **Enhanced judicial case management** (SCCR, recommendations 113 to 134, Chapter 9): the SCCR made several recommendations for increasing judicial powers of case management including in relation to: abbreviated forms and adjustment of pleadings; giving the court power to order disclosure and lodging of documents relating to an action; for the arrangements for expert evidence; the timetabling of cases; arrangements relating to expert evidence; for court rules to confer on the court the power to impose sanctions for non-compliance with a rule or court order; and actions involving party litigants and vexatious litigants.

- c) **Alternative Dispute Resolution:** under the draft Bill, new section 5(2)(b) of the Court of Session Act 1988 (introduced by section 85) and section 86(2)(b) would enable court rules to be made on the use of alternative dispute resolution procedures.
6. Work is currently underway to identify which aspects of the proposals contained in the draft Bill might appropriately be taken forward pending the outcome of the consultation on the draft Bill, consideration of the recommendations of Sheriff Principal Taylor's Independent Review of the Expenses and Funding of Civil Litigation in Scotland, and the report of the RRWG in terms of the overall framework for the rules rewrite project. It will also be necessary to consider also which of the SCCR recommendations not to be taken forward through primary legislation might be capable of being implemented. The Secretariat will revert to the Committee on all these matters in due course, and, on the implementation of the remaining SCCR recommendations, following the Scottish Government's final decisions on legislative proposals following its consideration of the consultation exercise on the draft Bill.

Recommendation

7. The Committee is invited to:

- a) **note the summary of the proposals contained in the draft Courts Reform (Sc) Bill 2013 which are expected to have implications on procedure in personal injury actions as outlined at paras. 5.1 – to 5.19;**
- b) **give initial consideration as to whether are any discrete aspects of the proposals outlined in this paper which might be capable of being taken forward in the short-term and separately from the Rules Rewrite project;**
- c) **note that the Secretariat will revert to the Committee in due course on the matters discussed at para. 6.**

Scottish Civil Justice Council Secretariat

August 2013