

SCOTTISH EXECUTIVE

JUSTICE DEPARTMENT

AGENCY REVIEW OF THE SCOTTISH COURT SERVICE

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL11/05)**

AUGUST 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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REVIEW OF THE SCOTTISH COURT SERVICE

Executive Summary

- While APIL is generally supportive of the Coulsfield rules within the Court of Session, we believe there needs to be more flexibility in relation to the need for pleadings to be lodged by a certain date.
- APIL believes that there needs to be more judges made available to handle civil cases.
- APIL is generally supportive of how the courts are currently administered and operate, yet we are concerned about the operational responsibilities of sheriffs and judges within the system.
- APIL considers that whilst the independence of the Judiciary must be zealously safeguarded, there is a need to introduce accountability into the current judicial system in order to ensure transparency for both court users and stakeholders.
- APIL is disappointed to learn that the Scottish Executive has recently down-graded the position of Clerk of the Court, which has resulted in new applicants entering the system at a lower level. This change can be seen to be partially responsible for the fact that, as of the end of the last court term, the Court of Session had lost and not replaced several key members of staff. This has in turn caused considerable problems in relation to the subsequent administration of the courts.
- In the context of the review, and its focus on the effective administration of the Scottish court service, APIL feels that the changes to the status of Clerks of the Court illustrates a lack of proper consultation with appropriate stakeholders and users.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Scottish Executive's consultation on the *'Agency review of the Scottish Court Service'*. Please note, however, that as APIL represents the civil justice interests of people injured through the negligence of others, our response will concentrate on the handling of personal injury cases within the SCS.

Flexibility in Coulsfield rules regarding proceedings

2. APIL is generally supportive of the Coulsfield rules within the Court of Session as they have made a huge difference in terms of the number of cases which are litigated, with the majority of cases now settling prior to reaching court. APIL believes, however, that there needs to be more flexibility introduced into the rules in relation to the need for pleadings to be lodged by a certain date. As it currently stands if this pleading date is missed the case is called, sometimes needlessly. While APIL supports the use of a strict timetable for actions, we feel that there are instances where adherence to this timetable is simply not possible. APIL proposes that there should be flexibility in certain circumstances where there is a 'reasonable excuse' for this missed deadline and, as long as the other side has no objections, the pleading date should be temporarily extended rather than the case being called. This suggestion will save costs in terms of people having to appear in court, as well as judicial and court time being taken up unnecessarily.

Availability of judges

3. APIL believes that there needs to be more judges made available to handle civil cases. APIL members report that a recurring difficulty in courts relates to the unavailability of judges to hear civil matters as the vast majority of judicial time is now occupied by criminal matters. This often leads to long delays as practitioners have to wait all day for a judge

to become available. APIL understands that a scheme was previously trialled where a judge would be allocated to deal with civil judicial matters only. This allowed his time to be 'ring-fenced' so that he was not diverted to other criminal matters. This initiative appears not to have been taken any further. APIL proposes that such a scheme should be reintroduced in order to ensure that civil matters are dealt with in an orderly and efficient fashion, leading to less time being wasted waiting at court for a judge to become available.

4. In addition, APIL understands that in the Court of Sessions proofs are heard on a Tuesday of every week. The current practice is for 60 or 70 proofs to be set-down every week with the assumption that the vast majority (i.e. 95 per cent) will settle prior to reaching the court. Naturally, however, there are instances where this does not happen and various hearings take place. APIL suggests that there should be a dedicated judge to deal with matters outside of the hearing of proofs – i.e. miscellaneous matters – in order to keep court business moving. Indeed these miscellaneous matters may often only take about 10-15 minutes to deal with, and will mean that practitioners do not have to return to court in the following weeks to get a relatively straight-forward matter heard.
5. APIL is concerned that due to the apparent lack of judges there is an over reliance upon temporary or part-time judges. APIL believes that the SCS should make a decision as to whether these part-time judges are good enough to be full-time judges, and if so, appoint them as such, although it is recognised that some may choose not to apply for full time positions. In addition, it appears that these part-time judges are primarily dealing with criminal work, therefore still leaving a gap in the provision for civil matters. For example, anecdotal evidence suggests that where sheriffs, or senior advocates, are drafted in to be part-time judges it is usually to fill the need to deal with criminal work, rather than civil work. APIL suggests that more civil part-time judges should be appointed in order to supplement the current lack of full-time civil judges.

Management by judges and sheriffs

6. APIL is generally supportive of how the courts are currently administered and operate, yet we are concerned about the operational responsibilities of sheriffs and judges within the system. The fact that senior judicial figures have years of legal and judicial experience does not necessarily mean that they have the corresponding expertise in management. APIL also wonders whether it is appropriate for senior members of the judiciary to have their valuable court and opinion writing time detracted by management and operational duties. We feel that it would more appropriate for such members of the judiciary to be applying their legal knowledge in the performance of judicial functions. In relation to APIL's earlier concern about the lack of judges, the reduction of management responsibilities from both the Sheriff Principal and the Lord President will mean they will be able to devote more time to hearing cases. This, in turn, will alleviate the potential backlog of cases caused by the lack of judicial resources.

7. APIL would recommend that the operational duties of the Sheriff Principal and the Lord President be reviewed, in order to see if it is possible to allow them more time to deal with direct judicial duties. Indeed APIL recommends that it may be appropriate for operational functions to be placed in the hands of an executive manager. It would be part of the Executive Manager's responsibility to raise issues with the Sheriff Principal, such as time-keeping by sheriffs. While APIL recommends the use of an executive manager to deal with aspects of the operational duties of running the courts, we do still feel that the Sheriff Principal needs to be involved to ensure that the decisions taken are in the best interests of justice and the court service itself. The main benefit which an Executive Manager would bring to the operation of the court might be that matters could be dealt with in a more structured and business-like fashion, with sheriffs and judges being monitored in terms of their time-keeping and work rate. Fundamentally, however, no action

against any judicial figure would occur without there first being consultation with either the Sheriff Principal or Lord President.

8. APIL proposes that in tandem with operational responsibilities being diverted away from senior judicial figures, there needs to be a move towards transparency and accountability within the court system. There is a general perception amongst both the public and practitioners that sheriffs and judges are not held responsible for problems arising out of operational matters – i.e. time-keeping, etc. For example, a recent poll in the legal periodical ‘The Firm’ asked members of the Scottish legal profession – i.e. advocates, solicitors, etc. – about their opinions on judges and sheriffs in relation to time keeping, courtesy, quality of judgments, etc. In response both the sheriffs and the judges expressed their displeasure and indicated that such measurements were unscientific. Regardless of the criticism which can be levelled towards the article in question, the response of the judiciary and the response by the publishers illustrate the considerable unresolved tensions at present on either side regarding judicial accountability.

9. APIL considers that whilst the independence of the Judiciary must be zealously safeguarded, there is a need to introduce accountability into the current judicial system in order to ensure transparency for both court users and stakeholders. This can be seen to be partially driven by the public culture of openness which means that people expect transparency in many, if not all aspects, of public service, the court service being no exception. One way of ensuring that accountability and transparency are maintained is for performance indicators to be introduced into the operational elements of the judiciary. APIL believes that such transparency in relation to performance criteria – such as the length of time it takes to produce a judgment – will not only highlight deficiencies in the provision of justice by some judges and sheriffs, but also highlight the judges and sheriffs who are performing well. APIL is acutely aware of the difficulties involved in a judicial role and feel that transparent

performance criteria will also have the benefit of highlighting efficient performance.

Changes to the Clerks of the Court

10. APIL is disappointed to learn that the Scottish Executive has recently down-graded the position of Clerk of the Court, which has resulted in new applicants entering the system at a lower level. This change can be seen to be partially responsible for the fact that, as of the end of the last court term, the Court of Session had lost and not replaced several key members of staff. This has in turn caused considerable problems in relation to the subsequent administration of the courts. APIL believes that it is manifestly unjust that clerks' wages and status are being downgraded to the detriment of the court service as a whole. Indeed Clerks of the Court act as highly effective links between legal representatives and the judge, allowing the court to run smoothly and judicial time to be allocated on an appropriate basis. The experience of APIL members is that it is hugely beneficial to have experienced clerks at court as it allows for matters to be dealt with more efficiently and effectively, resulting in savings in both time and money. With the downgrading of clerks, more responsibility will be placed on judges to organise and arrange various aspects of court business – a move which would offset any reduction in the operational responsibilities of senior judicial figures as suggested above.

11. In the context of the review, and its focus on the effective administration of the Scottish court service, APIL feels that the changes to the status of Clerks of the Court illustrates a lack of proper consultation with appropriate stakeholders and users. This lack of consideration can be seen to illustrate an area where there has been a breakdown in the administration of the Scottish Court service. APIL would therefore recommend that any further changes to the administrative functions of the court service – in particular possible changes affecting the

administrative personnel within the court service – should be more widely consulted upon.