Making Justice Work – Courts Reform (Scotland) Bill

Consultation on the treatment of civil appeals from the Court of Session
Ministerial Foreword

This paper follows on from the proposals in our recent consultation on the Courts Reform (Scotland) Bill to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland.

This paper proposes that the current arrangements - which provide an appeal route from the Inner House of the Court of Session to the United Kingdom Supreme Court on the certification of two counsel - should be replaced by leave to appeal.

I believe reform of these arrangements is overdue. I hope you will submit views on our proposals and look forward to receiving them.

Kenny MacAskill
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COURTS REFORM (SCOTLAND) BILL - CONSULTATION ON THE TREATMENT OF CIVIL APPEALS FROM THE COURT OF SESSION

Responding to this consultation paper

We are inviting written responses to this consultation paper by 23 August 2013. Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

courtsreform@scotland.gsi.gov.uk

or

Courts Reform Bill – Consultation
Scottish Government
Area 2W, St Andrew's House
Regent Road
Edinburgh
EH1 3DG

If you have any queries, contact Hazel Gibson on 0131 244 4830.

We would be grateful if you would use the consultation questionnaire provided as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.

The Scottish Government has an email alert system for consultations, http://register.scotland.gov.uk. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form which forms part of the consultation questionnaire (Annex A) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.
Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library in the Autumn. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision. We aim to issue a report on this consultation process during the Autumn of this year.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Hazel Gibson using the contact details above.
Consultation on the treatment of civil appeals from the Court of Session

Introduction
1. This consultation follows on from the Scottish Government’s recent consultation on the draft Courts Reform (Scotland) Bill to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. It seeks views on proposals to change the way civil appeals are dealt with from the Court of Session to the United Kingdom Supreme Court (“the UKSC”).

Background
2. Section 40 of the Court of Session Act 1988 provides for civil appeals to the UKSC in all civil cases other than devolution cases. Leave is not needed:
   - where the Court of Session judgement is on the whole merits of the case.
   - where there is a difference of opinion between judges in the Court of Session judgement.
   - where the judgement sustains a technical defence (called a “dilatory defence”), e.g. that a procedure is inappropriate, and dismisses the action.
   - where the Inner House of the Court of Session grants or refuses an application for a new civil jury trial.

3. However, the appeal must be certified by two counsel as “reasonable” before it can be heard in the UKSC.

4. A similar issue arises in relation to civil devolution cases. Where no other appeal right applies, an appeal lies to the UKSC against decisions of the Inner House only with leave of the Inner House, or, failing such leave, with leave of the UKSC. However, in practice, these leave provisions do not operate because an appeal right already exists under section 40 of the 1988 Act - and so devolution appeals are taken through the certification by Counsel route.

5. The current arrangements have been the subject of adverse comment in a number of cases, most recently by the UK Supreme Court in Uprichard v Scottish Ministers. Lord Reed observed in a postscript to this judgement:

   “Although of importance to those affected by the outcome, the appeal did not on examination raise any arguable point of law of general public importance. It was not an appropriate use of the time of this court. This is not the first occasion in recent months when the court has made observations to this effect in respect of a Scottish appeal:..”

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1 Making Justice Work - Courts Reform (Scotland) Bill - A consultation paper: http://www.scotland.gov.uk/Publications/2013/02/5302
4 Ibid, at paragraph 58.
6. Lord Reed went on to discuss the comparative position in the rest of the UK (beginning with an explanation of the current arrangements):

“…subject to certain statutes under which an appeal from the Court of Session lies only with the permission of the Court of Session or the Supreme Court, the general rule is that an appeal against a judgment on the whole merits of a cause lies to this court from the Inner House of the Court of Session without leave. That is a privilege which is not enjoyed by litigants in any other part of the United Kingdom. Appeals against any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court. In practice, the Court of Appeal normally refuses permission so as to enable an Appeal Panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues.

The public interest is served, in relation to appeals from England and Wales and Northern Ireland, by the rule that permission to appeal is granted only for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground: Supreme Court Practice Direction 3.3.3. The reasons for adopting that approach were explained by Lord Bingham of Cornhill, at the time when the final court of appeal was the House of Lords, in *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228:

“In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.””

The Scottish Government’s proposals
7. The Scottish Government’s previous consultation set out proposals to implement the majority of recommendations of the Scottish Civil Courts Review (the “SCCR”)6, led by Lord Gill.

8. The SCCR however did not consider what was to happen to civil appeals from the Court of Session to the UKSC.7 Professor Neil Walker was commissioned separately to set out a range of options for the development of final appellate

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5 Ibid, at paragraph 59 and 60.
6 [www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review](http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review)
7 At the time of commissioning the SCCR, the then Scottish Executive did not ask Lord Gill to consider this matter.
jurisdiction in the Scottish Legal System. Of the various options discussed, Professor Walker favoured a “quasi-federal” model where cases would be eligible for appeal to the Supreme Court only where they raised issues of wider relevance within the UK.

9. In its response to the SCCR, the Scottish Government stated it was considering Professor Walker’s report, noting that one of the aims of the SCCR was to focus the Court of Session on the most important business. It went on to say that:

“It may be consistent with this affirmation of the status and significance of the Court of Session that appeals onward from that Court should be restricted to cases of real significance. Furthermore the approach Lord Gill adopts generally is of proportionate allocation of judicial resources with appeals subject to sifts and tests of legal merit. In principle, the Scottish Government believes that this approach should also be adopted in relation to appeals onward to the Supreme Court.”

10. In the context of appellate work, the Scottish Government firmly believes that the current arrangements - allowing for admission of civil appeals from the Court of Session to the UKSC on the certification of two counsel - do not satisfy the principles outlined above: instead, the Scottish Government believes the decision on leave to appeal should be taken by the courts.

11. The Scottish Government therefore proposes:

- The current provisions for appeals under section 40 of the Court of Session Act 1988 should be replaced by a more general provision to the effect that it is competent to appeal against a judgement of the Court of Session to the UKSC, but only with the permission of the Inner House, or, failing such permission, with the permission of the UKSC.

- The new right of appeal would be subject to any other enactment restricting an onward appeal to the UKSC.

- The new right of appeal would not interfere with rights of appeal under other enactments which confer rights to appeal to the UKSC directly.

12. The Scottish Government believes these proposals would properly respect the role and standing of the Court of Session; and, in line with the principles of the SCCR of proportionality in the civil justice system, would ensure that only cases which are properly within the countenance of the UKSC are heard by that court. They would also result in the Court of Session being treated similarly to the Court of Appeal in England and Wales and to Northern Ireland.

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8 “Final Appellate Jurisdiction in the Scottish Legal System”, Professor Neil Walker, 2010  

9 Scottish Government response paragraph 114. Available at:  
http://www.scotland.gov.uk/Publications/2010/11/09114610/0
13. Moreover, the proposals would align the leave procedures with the procedure for determination of civil and criminal devolution issues under paragraph 13 of Schedule 6 to the Scotland Act and the new compatibility appeals introduced by the Scotland Act 2012.

**Questions - The treatment of civil appeals from the court of session to the United Kingdom Supreme Court**

Q1A. Do you agree that the current procedures for appeals to the UK Supreme Court under section 40 of the Court of Session Act should be replaced with a leave stage? If not, why not?

Q1B. If you agree, on what basis do you consider leave should be granted? Why?

Q1C. What impact do you consider the Scottish Government’s proposals will have on future civil appeals to the UK Supreme Court? Why?
COURTS REFORM (SCOTLAND) BILL - Consultation on the treatment of civil appeals from the Court of Session

RESPONDENT INFORMATION FORM
Please Note this form must be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation
Organisation Name

Title  Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname
Forename

2. Postal Address

Postcode  Phone  Email

3. Permissions  - I am responding as...

Individual  /  Group/Organisation  Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?
   Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis
   Please tick ONE of the following boxes
   Yes, make my response, name and address all available
   Yes, make my response available, but not my name and address
   Yes, make my response and name available, but not my address

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).
   Are you content for your response to be made available?
   Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?
   Please tick as appropriate  Yes  No
CONSULTATION QUESTIONS

Questions - The treatment of civil appeals from the court of session to the United Kingdom Supreme Court

Q1A. Do you agree that the current procedures for appeals to the UK Supreme Court under section 40 of the Court of Session Act should be replaced with a leave stage? If not, why not?

Yes ☐ No ☐

Comments

Q1B. If you agree, on what basis do you consider leave should be granted? Why?

Yes ☐ No ☐

Comments

Q1C. What impact do you consider the Scottish Government’s proposals will have on future civil appeals to the UK Supreme Court? Why?

Yes ☐ No ☐

Comments
ASSESSING IMPACT

This consultation is also designed to give you the opportunity to share your views on the potential impacts of the proposals set out in this paper.

Please use the questions below to highlight any potential impacts of the proposals. This is also your opportunity to highlight any broader equality or economic issues.

Equality

Q1. Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

Business and Regulatory

Q2. Please tell us about any potential economic or regulatory impacts, either positive or negative, you feel any or all of the proposals in this consultation may have.