

# Why this review is a threat to our civil court system

A dose of medicine for the patient could turn into surgery so radical the patient is unlikely to survive, says **FRANK MAGUIRE**

**L**ORD GILL, the Lord Justice Clerk, is currently heading a review of our civil courts system, which is supposed to ensure that the civil justice system continues to provide an effective and efficient service for any individual, families, communities and businesses who have cause to use it.

But, by the looks of the recently issued consultation paper together with other developments in the civil courts, the eventual prescription will not be a dose of medicine for the patient but surgery so radical the patient is unlikely to survive, at least in a recognisable form.

The first problem is that the review is judicially led. That, on the face of it, may seem unsurprising. However, here the judges are not performing a judicial function in applying the law but reviewing our civil courts system. They will be coming to conclusions as to what the priorities are and where resources should be applied. They have no greater claim on the priorities and resources of our courts system than any of us. Indeed, in doing so they are stepping into what is essentially a political process. It may be said that judges have experience of our courts and would, understandably, have something to say about it. They do, however, have limitations. Their backgrounds as lawyers and then judges do not necessarily qualify them in operational or administrative matters such as running a business or an organisation.

We should also be mindful that the judges who preside over a court review will inevitably have their own perspective.

Another expected characteristic of a judicially led reform is an open and balanced approach. As the review progressed, certain structures became apparent, namely a project board (all judges), a review team and a policy group which includes some judges but half of which is employed by the government. We are not told how these groups

came to be selected or why, for example, the Faculty of Advocates and the Law Society of Scotland were not included.

An organisation that appears on the policy group is the Scottish Consumer Council. This is a lobbying and campaigning group that, quite rightly, promotes the interests of consumers. By any stretch of the imagination, however, it cannot be said that someone whose loved-one has died in a works accident or someone with problems in relation to adoption should be considered to be a consumer. They are the very people most in need of access to our courts and they also have, in any event, their own organisations to represent their interests. And yet, it has not been explained to us why the consumer lobby is given this privileged position.

The impression, of course, is that those leading the review favour, or certainly give the impression that they favour, what that particular lobby has to say, namely what is good for consumable goods is good for everything else.

In addition, there is considerable discussion about the plight of commercial cases. There is a clear intention

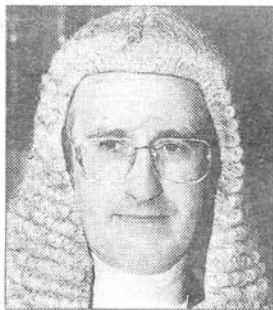
to improve commercial actions in order to retain the business of companies in Scotland.

However, an expert group called The Business Experts and Law Forum has recently been announced by the Cabinet Secretary for Justice. It has as one of its goals the improvement of our legal system so that businesses choose Scottish legal services and choose to use our courts to litigate and for dispute resolution. The latter objective may mean that we end up dealing with cases that have nothing to do with justice and instead use our courts system as an international commercial commodity.

Significantly, however, there has been nothing said about workers in Scotland, many of whom are represented by trades



**MAIN:** Judges have backgrounds in law, not business, and may not be ideal for a review into how our civil court system works **LEFT:** Lord Gill



unions and other organisations. Given that these organisations consider the primary objective of our civil courts to be the protection of the health and safety of workers by ensuring that they receive 100 per cent of damages (as opposed to reductions of up to 30 per cent by claims companies), it is surprising that they only merit a passing mention in the review. Trades unions have, for decades, been major stakeholders in our civil justice system.

Then there are the guiding principles set out in the review. These principles will be used to allocate resources to a case in accordance with its value, importance and complexity set against the total cost. The decision, of course, as to how we juggle these



principles in any future system will be left to judges. But any civil court review should rest first and foremost on the rights that we accept underpin our democratic system, in particular the rights contained in the European Convention of Human Rights and Fundamental Freedoms.

The Human Rights Act of 1998 enabled these rights to be pursued before our own courts. This means that our civil courts system should reflect these rights and our judges should be there to address them, irrespective of what they consider to be the value, importance or complexity of a particular case set against cost. The right to life is a fundamental provision of the human right legislation and so, therefore, is the protection of life. The right to property and possessions, while important, is not so regarded. Curiously, there is no mention of this on the consultation paper, in fact there seems to be no reference to the word "right" at all.

But even when the civil courts review has

come up with its conclusions, the prescription for our civil court patient will not end there. As stated in its recent consultation paper, the Scottish Courts Service intends to ensure that whoever uses the new court system will be required to pay 100 per cent for running it. Costs will include, for example, employing a judge that will cost as much as £2,500 per day. This is, of course, the logical conclusion of the consumer model for our justice system.

We are also told that the rights that we have exercised (in many cases for centuries), have been reliant upon a subsidy from the government and we now must be weaned off this subsidy. This is, of course, the antithesis of a rights-based system. It is the duty of our society and of our government to provide courts and judges so that we can pursue our rights. That should not, and should never, depend on who can pay and who cannot pay. Universal access to our courts has been a constitutional right at common law and, in case

we need reminding, it is also upheld by Article 6 of the European Convention of Human Rights. If we no longer have this right, not only will the State not be acting in accordance with the values that we expect, it will be transgressing one of the very rights it pretends to otherwise uphold.

So what is the prognosis? By handing over review of our civil courts system to judges, and by treating our legal needs as consumable goods and our system as a commodity all set against our most fundamental rights, we are in danger of delivering a radical surgery which may cripple one of the proud characteristics of our Scottish society – our legal system. It will be in danger of being seen as essentially administrative, money-driven and a haven for those who have nothing to do with it. The ultimate irony is that it will also itself have become unlawful.

● Frank Maguire is Senior Partner at Thompsons solicitors