

Response by Ampersand

to

The Scottish Civil Courts Review  
Consultation Paper

We wish to make the following responses in answer to the questions contained in the Consultation Paper:-

### **Chapter 3**

**Question 8:** what impact have speculative fees had on access to justice?

Speculative cases have a role to play in assisting access to justice but there are important drawbacks.

Lawyers acting speculatively are entitled to agree with their client an uplift on the fees ordinarily chargeable to reflect, among other things, the risk of a case being lost. This uplift is not recoverable from the defender. In effect, successful litigants subsidise the unsuccessful. It is also of concern that the compensation recovered in successful cases which may be required as a replacement for future loss of earnings, maintenance or care may be seriously undermined by the amount required to finance a contingency fee arrangement.

Further (i) there are cases which should be brought but which are too uncertain to bring on a speculative basis; and (ii) entrepreneurial business men may well cherry-pick the cases in which the risk of the case being lost is small, so restricting the possibilities for others to act speculatively.

**Question 9:**

We believe that the use of “before the event” legal expenses insurance is to be encouraged. It is important that such schemes are of adequate quality to ensure that prospective litigants are adequately represented.

We think that “after the event” legal expenses insurance is proving problematic. We understand that the insurer will look very hard, arguably too hard, at the circumstances which have led to a claim on such insurance, and that claims are repudiated where there is dispute as to the reasonableness of continuing to prosecute an action, and as to whether the insurer was kept properly informed of the changing circumstances which commonly arise in litigation. We also understand that some solicitors find it difficult and sometimes impossible to obtain “after the event” legal expenses insurance for their clients.

## **Chapter 4**

### **Question 5:**

We believe that the key factors influencing the decision to raise an action in the Court of Session rather than the Sheriff Court are the importance, value or complexity of the cause and the greater experience and superior quality of the bench. In our experience solicitors are very discriminating in decision making as to which forum to choose and we are unaware of a problem in relation to cases being brought in the Court of Session that should not be there.

### **Question 8:**

The Court of Session should be retained as a court of first instance and not merely as an appellate court. As a court of first instance, the Court of Session provides litigants with the benefit of centralisation in the form of the existence of a specialist bar and specialised firms of solicitors. These can exist only where there is a centralised court with a sufficient volume of specialist work. The benefits of centralisation are evident in the business world generally as a means to cut costs and increase efficiency. Centralisation is also a recognised government policy relating to the National Health Service to ensure the provision of high standards of specialised medical care. The same is also true of centralisation of the Scottish court system. The benefits to the consumer of value for money and proportionality are seen in personal injury actions raised under Chapter 43 in the Court of Session. The presence of a specialist personal injury bar has been a contributing factor in the success of Chapter 43. The presence of a specialist bar and specialist firms of solicitors, with judges recruited from these provides access to justice for the Scottish public which would not be possible should the Court of Session cease to be a court of first instance. Should the sheriff court be a national court of first instance the benefits of centralisation would be lost.

### **Question 10:**

We are not aware of any deficiency in the powers to transfer cases between the Court of Session and the sheriff court. So far as we are aware, the rules in this regard work well. If, despite this, it is discovered that the judicial discretion to transfer cases between the Court of Session and the sheriff court is unduly circumscribed then the discretion should be expanded.

## **Chapter 5**

### **Question 2:**

Yes, but we do not think parties should be forced to mediate in non-family disputes.

## **Chapter 6**

### **Question 1:**

In our experience pre-action protocols are useful to (1) to prevent a defender being disadvantaged by being propelled with little or no warning into litigation with a thoroughly prepared pursuer and (2) identify and focus the issue(s) between the parties.

### **Question 2:**

Yes. Commercial, personal injury and debt recovery are all areas where pre-action protocols may be useful.

### **Question 8:**

There has often been a tension between the requirement to give fair notice of a case and the desire to avoid excessive pleadings. Sometimes the pleadings do not make it possible to identify the true issue between the parties and there remains a problem of fair notice for both sides.

Abbreviated pleadings should be the norm with the possibility of greater specification upon cause shown. Parties should be assisted to identify the true issue between them.

### **Question 13:**

Greater use should be made of written argument than at present, but we do not think that this should become the predominant method of submission. Oral discussion results in arguments being thoroughly tested, developed and modified in a true debate, encouraged and facilitated by the court, between the parties.

**Question 15:** to what extent should the court have control of the use of expert and other evidence?

In our experience legal advisers do not consciously lead unnecessary evidence; often the problem is too little evidence, rather than too much.

The expense of expert witness may be a concern, but we believe that the best control of this is by taxation of expert's fees, both between solicitor and client and party and party. We do not believe that it is desirable, at least in most cases, to have a single expert witness instructed on behalf of both parties. Two reputable experts may reasonably differ, and often do. That is often because the expert issues are subtle and complex. The experts may not appreciate the significance of nuances in the evidence for the legal outcome. These things are thoroughly tested at proof. It is difficult to subject the expert evidence to this degree of scrutiny in other circumstances. Having a single expert witness instructed on behalf of both parties is liable to lessen the scrutiny under which expert evidence is currently put, with unjust results.

If a sanction is needed for lodging excessive documentary evidence we believe that the best control would be in expenses.

In the circumstances, and with the exception noted above regarding productions, we believe that the existing controls of the use of expert and other evidence, fundamentally in the expenses, do not require to be changed.

**Question 17:**

Civil jury trials should be retained as they provide access to justice for the people of Scotland by allowing ordinary men and women to be involved in the protection of individual rights. This is also reflected in the jury system being seen as an indispensable part of the administration of justice in criminal trials. Civil awards by modern juries represent the views and values of the ordinary man and woman, ensuring that damages meet reasonable public expectations. Juries are seen by the public as neutral and passive decision-makers and are able to provide realistic awards of damages where judges sometimes cannot. As juries deliver verdicts contemporaneously and these verdicts are relatively final on questions of fact, civil jury trials encourage earlier resolution of disputes. This compares with delays in delivering civil opinions by judges which are

becoming more frequent due to the demands placed on judicial time. Under the Court of Session Act 1988 the Court does not have an unlimited discretion to proceed by way of proof or jury trial in any particular case and it is appropriate that juries should only be involved in straightforward cases. Juries provide a useful means of protecting citizens' civil rights and responsibilities in such cases and improve access to justice for the public.