

Response by Anderson Strathern LLP

to the Scottish Civil Courts Review Consultation Paper

Chapter 1

Question 1:

Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

Yes. The key elements should be:

- Procedural clarity and certainty.
- Predictability of court outcome.
- Expenses proportionate to the value or subject of the dispute.
- Speed of court procedure.
- Scrutiny of pre-litigation conduct, with appropriate sanctions.
- Access to legal advice.

Question 2:

Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

Yes.

Question 3:

Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?

No.

Chapter 2

Question 1:

What contribution can public legal education make to improving access to justice?

Legal education, both in terms of general public awareness, and specific education in schools, has an important contribution to make to improving access to justice. For example, the existence or importance of "before the event" insurance is poorly understood. Many members of the public receive information about civil justice from television programmes or other media, with little basis in fact. This provides an unsound basis for decision making when faced with a legal problem or attempting to overcome hurdles preventing access to justice.

Question 2:

Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?

It is understood that there are severe difficulties in obtaining certain types of legal aid services in Edinburgh city centre, in particular matrimonial or housing advice on legal aid.

Question 3:

To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

Designing court procedures with a view to enabling litigants to represent themselves is both desirable and feasible where the subject-matter of the dispute permits it. For legally straightforward cases of low monetary value it is right that parties should be able to represent

themselves, and it would be sensible for court procedures to be designed to take account of that possibility at that level.

Question 4:

What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access to justice?

Our experience of court-based advice services is positive, in the sense that they can help unrepresented litigants understand the nature of their dispute and decide from among the options that may be available to them, in circumstances where the party litigant may otherwise be reluctant to have a dialogue with the solicitor acting for the other party. Court-based advice services should not however replace or obscure an individual’s right to qualified and impartial legal advice from a solicitor. If a litigant elects to represent himself, advice services can assist by allowing the case to progress more efficiently.

Question 5:

Are there any other issues which impact on access to justice in Scotland which the Review should consider?

No.

Question 6:

Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?

Yes, there is a case for a new method of dealing with low value cases. Many such cases are raised in bulk and few reach enquiry into the merits or evidence. In particular, cases of consumer debt or local authority/housing association rent arrears are often raised in bulk. It would be sensible for such actions to be commenced electronically by means of emailing the court with the writ. An electronic approved form of warrant could then be attached and the warranted writ returned to the agent by email. A scanned signature by PDF file should be acceptable. It ought to be possible to lodge defences by fax or email. A secure online tracker site could make available to agents information about whether, for example, a NID has been lodged or a citation returned if service was unsuccessful. There may be a case for a specific all-Scotland court or clerk to deal with actions of a certain type or value. The increase in specialisation would result in a more experienced clerking service, better knowledge of the issues which can arise, and a response time which would be the same across the country. Economies of scale would also permit investment in specific forms of IT or training, for example, which might otherwise not be worthwhile if the work is not concentrated in one court.

Chapter 3

Question 1:

What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?

Our general experience is that the levels of legal expenses recovered tend to remain about two-thirds of the agent and client expense. In complex actions the proportion reduces to nearer to 50%. We have responded separately as members of FOIL in relation to settlement figures. Generally the settlement figure has to exceed at least £5,000 before it will exceed the expenses in the cause.

Question 2:

To what extent does the cost of litigating deter people from pursuing or defending cases in court?

The cost of litigating acts as a deterrent. This is entirely appropriate. It can however act against the interests of justice in relation to proceedings which require a great deal of investigation before the merits can be identified. Claims which may have some merit are often not pursued because of the costs involved in investigating the prospects of success. The dilemma is most acute for the majority of the population who are not wealthy, but do not qualify for legal aid (see answer to question 7, below). Before the event insurance with appropriate cover for investigation of a case is the best solution for a private individual or a small business.

Question 3:

Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

In our experience, no. The exemption for legally-assisted persons is sensible. It might be that a means assessment test ought to be carried out to identify whether a party litigant also ought to be exempt. The current level of court fees is modest.

Question 4:

Are the current rules for recovery of judicial expenses satisfactory?

Yes. A system of block fees is predictable and certain. The level of unrecoverable extra-judicial expense deters unnecessary litigation and encourages compromise.

At present, there are no rules which permit a party to "tender" on expenses. It is suggested that such a rule would force parties to consider the time and expense of a taxation at an earlier stage and would prevent unnecessary diets of taxation occurring.

Question 5:

Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

In a general sense, yes. The Office of the Auditor of the Court of Session is open from 9.30am until 4pm. It is submitted that it would be sensible for the opening hours of the office to reflect modern legal practice. Accounts and objections to accounts ought to be capable of submission electronically. To the extent that the Auditor has a position in respect of certain matters, it would be helpful if there were a facility for that position to be published in the form of practice notes or guidance. As well as making his position explicit, this would hopefully also achieve some degree of uniformity across Sheriff Court auditors in different Sheriffdoms.

Question 6:

To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

The award of legal aid distorts the economic mechanisms which otherwise compel parties to consider settlement. There is no equality of arms where one party can effectively litigate without personal penalty in terms of an award of expenses against him. In areas where solicitors are prepared to offer legal services on a no-win, no-fee basis (e.g. road traffic accidents) it is inappropriate for public funding to be made available unless the litigant can demonstrate to SLAB that no solicitors are prepared to act on a speculative basis. At present SLAB will not consider objections on this point, with the result that public funds are put at risk unnecessarily.

If the general practice of modifying awards of expenses to nil for legally aided persons were abolished, with either SLAB or the assisted person responsible for meeting the judicial expense, the effect would be hugely positive in terms of encouraging (a) a prudent approach to the management of litigation, and (b) settlement.

In other respects, the fact that legal aid is only available to the poorest in society creates a huge “middle ground” of those unable to pay for legal advice but at the same time ineligible for legal aid. The hourly rates paid by the Scottish Legal Aid Board are such that a solicitor practising in the centre of Edinburgh acting in legal aid matters will not only make no profit, but will make a loss, on average, in the region of £60 per hour.

Question 7:

Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

Please see the answer to chapter 2, question 2.

Question 8:

What impact have speculative fee arrangements had on access to justice?

They have improved access to justice, but their availability ought to be considered by SLAB when determining whether to grant legal aid (see answer to question 6, above).

Question 9:

Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?

Yes. The products offered by insurers vary in level and type of cover. The vast majority of claims handlers within insurers offering these products have little or no experience of Scottish litigation. Many members of the public have BTE insurance without knowing it exists, normally as an add-on to some other policy. Legal education is important, as is the interaction with SLAB.

Question 10:

What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?

We do not consider that “after the event” insurance premiums should be recoverable. The effect would be to create a new species of litigation in relation to the appropriate level of recoverable premium. A repetition of the English experience is, it is suggested, undesirable. It is understood that in many English cases the premium only requires to be paid if the litigation is unsuccessful. With the exception of legal aid, how a party chooses to fund a litigation is a matter for him. If an “after the event” premium is recoverable, why should a “before the event” premium be irrecoverable? The level of risk is obviously different, and the premium generally lower. Why should the prudent man be penalised by being unable to recover his “before the event” insurance premium?

Chapter 4

Question 1:

Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?

Yes. For example, Edinburgh Sheriff Court agents often attend for the Ordinary Court at 10am. Frequently, the court does not start until approximately 11am, as the Sheriff has had to deal with a criminal matter beforehand. With greater use of IT this problem could be alleviated. If the court were aware that the Sheriff had criminal matters to deal with first, it could be intimated on the roll that the ordinary court would start at 11am that day. A further problem is caused in Sheriff Courts when parties attend for a proof diet but there is insufficient court time for the proof because other proof diets have also been allocated for that day. The expectation is clearly that most actions will settle. However, this means that practitioners often have to increase the estimate of the days required, as agents expect to lose the first half-day to delay and procedural matters. There is an increase in the use of pre-proof hearings in Sheriff Court matters. This is welcome and, it is

suggested, makes it less likely that the same number of proofs will go off on the morning of the hearing.

Question 2:

Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?

Yes. See answer 1. This would avoid delay and would make timetabling for civil proofs easier.

Question 3:

Should the sheriff courts be separated into civil and criminal divisions? What would the advantages and disadvantages of such a separation?

Yes. This would create a more efficient use of time. Further separation would lead to specialisation – see answer 4.

Question 4:

Should there be a greater degree of specialisation within the civil courts in Scotland? If so in what types of cases and in which courts?

Yes. A greater degree of specialisation is likely to lead to decision-making of a higher quality. This would in turn be expected to lead to fewer appeals and greater use of the sheriff court. Cases will be run and managed more efficiently if the judge were familiar with the area of law, and parties can therefore simply make brief reference to the legislation/authorities/institutional writers on the particular area. This would speed up the court process. It would avoid any opportunity for parties to delay arising from a sheriff's unfamiliarity with a particular area of practice. This would be beneficial in many actions but specifically commercial actions, personal injury actions and family actions. For example, in family cases it would be useful if Convention actions were dealt with by judges with specialist knowledge in order that the procedure and legislation need not be reviewed on each occasion. Often these actions require to be heard as a matter of urgency. More efficient use would be made of the court time if the facts of the individual case could be turned to as quickly as possible.

Question 5:

What are the key factors which influence the decision to raise an action in either the Court of Session or the Sheriff Court where jurisdiction is concurrent?

We will normally consider issues such as complexity, and the monetary value of the claim. Particularly in complex contractual cases, it makes sense to raise proceedings in the Court of Session where a specialist commercial judge can deal with the case. If the action is raised in the Sheriff Court then the proof may take place before a sheriff who has a background in, for example, criminal work, and so even if the value is not particularly high, it may be that the hearing requires to be longer in order fully to review the background to the law rather than focus on the facts of the particular case. Another factor is the availability of jury trials in the Court of Session. A litigant properly advised will wish to consider his right to a jury trial prior to commencing proceedings. It is not surprising that so many low and medium value personal injury actions are litigated in the Court of Session.

Question 6:

In what, if any, types of cases should (a) the Court of Session and (b) the Sheriff Court have exclusive jurisdiction?

None.

Question 7:

Should the jurisdiction of the Court of Session and the Sheriff Court be unified to create a single civil court?

No. The present structure provides balance and flexibility.

Question 8:

Should the Court of Session become a Court of Appeal only or should it retain a first instant jurisdiction? If so, for what types of actions and why?

The Court of Session should retain a first instance jurisdiction in order that complex cases and those with wider public interest can be dealt with at that level. There may however be an argument to require leave to raise an action at the Court of Session.

Question 9:

If the current structure of the court is retained, at what level should the privative jurisdiction of the Sheriff Court be set?

The level should be increased, especially if greater specialisation is to take place. Staged increases should be considered to allow any new specialised system to bed in. An initial increase to £50,000 should be considered, with the provision to remit cases of a lower value to the Court of Session on cause shown (such as complexity, novelty, etc.).

Question 10:

Are the current powers to transfer cases between the Sheriff Courts and between the Court of Session and the Sheriff Courts satisfactory?

The arrangements for transfer between the Court of Session and the Sheriff Court are satisfactory. If Sheriffs had an all-Scotland jurisdiction then transfer between different Sheriff Courts would be easier, as currently such powers are inadequate. A Sheriff Court with an all-Scotland jurisdiction would be of particular benefit to bulk users of the Sheriff Court, and would be unlikely to disadvantage other users. Ideally such a Court would deal with undefended cases to a conclusion. Defended cases would, on the lodging of the NID, be remitted to the Sheriff Court local to the defender, or as agreed between the parties and subject to the availability of court time.

Question 11:

Giving the range in value and complexity of civil business in the Sheriff Court, should there be a tier of civil court below the level of the Sheriff Court?

Yes. A third tier would be useful for issues such as housing and consumer issues. This would relieve pressure on civil business in the Sheriff Court. It could also be more inquisitorial and be geared towards parties representing themselves. It ought to provide a quicker resolution of disputes where, for example, there is no stateable defence. An in-court adviser or court based mediator should be available.

Question 12:

Alternatively, should there be another level of judiciary within the Sheriff Court to deal with "third tier" business?

See above.

Question 13:

Does the current division of the Sheriff Court and to distinct geographical jurisdictions present difficulties or does it have advantages?

There can be disadvantages to parties who require access to the process quickly. We have had problems lodging documents with outlying rural courts, especially if they are not on the DX or LP systems. With an increase in the use of IT this is likely to be alleviated. In the meantime however there are advantages to parties, especially in family actions where many hearings may be assigned, that they are able to attend their local courts. This is also the case in small claims actions where it would become uneconomic if parties had to travel any material distance to court.

Question 14:**Are the current arrangements for dealing with undefended actions satisfactory?**

The current arrangements for dealing with undefended actions are considered to be satisfactory, in terms of both procedure and timescales. Improvements could be made by an increase in the use of information technology (see the answer to question 1, above).

Question 15:**Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?**

The flexibility of the judicial review procedure is satisfactory. However, given that judicial review petitions can only be raised in the Court of Session at present, many "low level" disputes are litigated in the Court of Session when they may be better suited to the Sheriff Court, such as disputes over golf club decisions and those of local associations etc.

Question 16:**Are the types of business in the Sheriff Court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example are the current arrangements for the disposal of commissary business satisfactory?**

The current arrangements are satisfactory.

Question 17:**Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?**

There would be advantages to a national sheriff court, in terms of the opportunity for specialising, streamlining of process, economies of scale, etc. However, when assigning hearings, consideration would need to be given to the location(s) of the parties, in particular the location of the defender. If the Sheriff Courts became or came to have all Scotland jurisdictions, then Sheriffs Principal could specialise in certain areas of law for appeal purposes and sit in different courts as required.

Question 18:**Is there a case for all sheriffs to have an all Scotland jurisdiction?**

Yes; see above.

Question 19:**If the Sheriff Court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the Sheriff Court and a power for the sheriff to seek the leave of the Court of Session to transfer a case there? If so what factors should be taken into account?**

Yes, powers to transfer should be granted. Each case would require to be considered on its own facts but factors such as complexity, novelty, value and the public interest would be the principal issues to consider.

Question 20:**Are the existing appeal arrangements satisfactory?**

Generally, yes, but the number of appeals available should be restricted so that a party who has two consecutive decisions against him must seek leave from the court in order to appeal again.

Question 21:

Should the office of Sheriff Principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

Yes, and both judicial and administrative.

Question 22:

Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session?

No. Many appeals could be dealt with at Sheriff Principal level, especially those concerning a particular local issue, for example licensing.

Question 23:

Should there be a limit to the number of levels of appeals through which an action can progress? If so how many levels would be appropriate? What provision if any should be made for exceptional cases and how should these be defined?

A party should be permitted to appeal twice and thereafter leave would need to be sought before a further appeal could be taken. Please see answer 20.

Question 24:

What are the advantages and disadvantages of reliance on temporary judges and part time sheriffs?

The advantages are that there is more chance of business being dealt with as scheduled if additional judicial cover has been brought in. The disadvantages are that if cases are part heard, or require to be continued, there may be problems allocating the future diet. Similarly if greater emphasis is placed on shrieval continuity, allocation of diets with temporary judges and part time sheriffs will become complex and cases may take longer to conclude.

Chapter 5**Question 1:**

Should the rules of civil procedure have an overriding objective or statement of philosophy and if so what should the main elements of that overriding objective or statement of philosophy be?

To expedite resolution and to ensure the smooth and efficient progress of all civil actions through a transparent and cost-efficient process.

Question 2:

Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

Parties should not be required to attend mediation, as often it is inappropriate for the dispute. In commercial disputes the parties will normally have sought to negotiate before coming to court. Similarly, in personal injury cases, both parties are usually represented, and agents will have sought to resolve matters if possible. In family matters mediation may be useful in many cases but again should not be compulsory given issues arising from imbalance of power in relationships. In most personal injury cases the cost of appointing a mediator will vastly outweigh the value of the claim.

If agents are acting for parties, alternative dispute methods will normally have been discussed. If parties are unrepresented it may be appropriate for the court to raise such issues at the Options Hearing.

It is suggested that it would be preferable for the court to encourage rather than require the use of mediation, given the range of cases which come before the courts. One form of words would be "to require the parties to consider mediation".

Question 3:

If so, how should this be done and at what point or points in the progress of a dispute?

See answer 2.

Question 4:

Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential?

See answer 2.

Question 5:

What form should mediation or other methods of dispute resolution take and how should this be funded?

If it is accepted that courts should actively encourage mediation and other forms of dispute resolution, then such methods should be covered by a legal aid certificate. A court-appointed mediator for cases of lower value might assist in removing time-consuming and unmeritorious cases from the court, provided deadlines are given and adhered to.

Question 6:

In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

An increase in the use of IT is likely to lead to greater efficiency, especially when dealing with outlying courts which are not in the LP or DX mail system. If email can be used to communicate with the judge or sheriff to dispense with procedural hearings, if parties are in agreement, then this would also lead to cost and time savings, and relieve pressure on the court. We have set out some ways other ways in which we believe IT can be made use of (see answer to chapter 2, question 6, above).

Question 7:

To what extent should the court control the conduct and pace of litigation?

If the court has too much discretion as to control of the conduct of litigation, it will become difficult to advise clients of the likely procedure an action will follow. If greater shrieval continuity could be achieved then the control and pace of litigation is likely to be improved, as the background will not need to be rehearsed at each hearing and the sheriff or judge will be able to warn parties how delays will be dealt with in advance.

Question 8:

What types of cases would benefit from (a) judicial case management and what types of case would benefit from (s) case-flow management.

Commercial and family actions would benefit from judicial case management. The same applies to judicial review petitions. Personal injury actions would benefit from case-flow management.

Chapter 6

Question 1:

What are the advantages and disadvantages of pre-action protocols?

Advantages – cases are more likely to settle pre-litigation. This could lead to cost savings for litigants. This will also lead to less pressure on the court system and will force parties to focus the

issues earlier in the day. The disadvantage is that there are smaller judicial recoveries in terms of expenses for clients. Front-loading costs can be expensive, especially if the action is then undefended. If pre-action protocols are to be used, the courts should take a strong stance on expenses if one party has failed to comply. The courts have so far been reluctant to entertain applications for sanctions in expenses based on failure to comply with the voluntary pre-action protocol for personal injury actions, for example.

Question 2:

Should there be a greater use of pre-action protocols? If so in what courts and for what types of action?

Commercial and personal injury actions, in both the Sheriff Court and the Court of Session.

Question 3:

Should compliance with pre-action protocols be voluntary or compulsory.

Voluntary, but when entered into, significant weight should be given to whether or not they have been followed. It ill behoves a party who has entered into a protocol arrangement, and gained the benefits of that, then to avoid any sanction for not doing what is required of him under the protocol. The appropriate sanction is a penalty in expenses.

Question 4:

Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points and proceedings and what criteria should the court apply in deciding whether leave should be granted?

No.

Question 5:

Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.

Increased dialogue between the decision makers in terms of the Court of Session and Sheriff Court rules would produce greater consistency, though it is likely different rules are required for each court to take account of the fact that the Court of Session are more likely to be dealing with more complex cases. Ultimately it would make sense for there to be one Rules Council.

Question 6:

Should there be a single set of rules of civil procedure in both the Court of Session and the Sheriff Court?

No. Actions brought in the Court of Session are more likely to be complex, and the timescale imposed by the Sheriff Court procedure would be unsuitable. Similarly parties wish to bring matters to a swift conclusion especially if raised in the Sheriff Court and therefore it makes sense for their timescales to be shorter. It would also assist if there was greater consistency in respect of expenses.

Question 7:

Should there be a single initiating document for (a) all types of actions and/or (b) at all levels of the court structure? If so what format should that document take?

No. It is difficult to conceive of a form that would take account of the variety and complexity of matters raised as civil proceedings.

Question 8:

To what extent should a system of abbreviated pleadings be introduced?

The concern is that if abbreviated pleadings are used it would take too long to focus issues in dispute and could lead to more significant investigative work which turns out to be unnecessary. It

may be difficult to reconcile the right to fair notice with abbreviated pleadings. At matters stand, the abbreviated pleadings used in personal injury actions are sufficient for, for example, the majority of road traffic accident cases, but in multi-party employers' liability actions they can leave the defenders in the dark as to the true nature of the pursuer's case until the pre-trial meeting. The only alternative is to remit the action to the ordinary procedure, losing the benefits of a requirement for a valuation and a pre-trial meeting in the process.

Question 9:

Are the current arrangements for summary disposal satisfactory?

There should be the opportunity for a defender to seek summary dismissal at an earlier stage than debate (perhaps by way of a motion for summary dismissal) if an action is clearly spurious or without merit.

Question 10:

Should routine procedural matters in both the Court of Session and the Sheriff Court be dealt with by judges (perhaps a more junior level) designated for that purpose?

This would conflict with the desire to see greater shrieval continuity. It may be that increased use of IT could assist in respect of procedural matters. If parties are in agreement then greater use of email or telephone conferencing could alleviate pressure on the court. If the court decided that a hearing was needed, specific times could be allocated (rather than 10am) and therefore reduce the amount of wasted waiting time.

Question 11:

Are the current arrangements for dealing with routine procedural business satisfactory?

See above.

Question 12:

Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?

It would be difficult to limit the length of a hearing unless greater use were made of written submissions. Otherwise there is the danger that parties will not have access to justice if they are cut off before all points are made to the court. If this was used in conjunction with outline arguments and written submissions, however, then arguably it would not require as long for the hearing to take place. It may be that the written documents should only require to be lodged shortly before the hearing in order to avoid unnecessary expense and front-loading. The system would need to be flexible. This could be discussed when the debate was being fixed, or at a pre-proof hearing. Perhaps some expansion of the Note of Basis of Preliminary Pleas, or the Note of Arguments, with a requirement for other parties to lodge responses, could achieve this object.

Question 13:

In the conduct of substantive hearing should there be a greater use of written rather than oral arguments?

Yes. Written arguments could be ordered in the Sheriff Court at the pre-proof hearing stage. See question 12, above.

Question 14:

To what extent should there be an earlier and or wider disclosure of evidence?

Too many difficulties enforcing early disclosure of evidence are encountered, especially in complex cases where investigation is ongoing. There should be a greater presumption towards approving Specifications of Documents. Parties should be permitted to seek approval of a Specification at any stage in the proceedings. Parties who seek approval of a Specification prematurely without first having sought the documents informally should be penalised in expenses.

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

The danger of the court appointing an expert is that this will simply increase costs. Both parties will want their own expert, especially if they require their assistance in terms of understanding evidence and input, and to allow the parties' agents to cross-examine the court's expert. The court has the discretion whether or not to certify witnesses and this power should be retained.

Question 16:**Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what feature should such a system have?**

Yes. This should be lodged in the same way as a tender. The expenses penalty would be for the auditor to determine, possibly as a percentage uplift on fees. The auditor would need to consider whether the defender had access to all necessary documentation and information from the pursuer to substantiate the pursuer's offer when deciding whether and what level of uplift was appropriate. The pursuer's advisers ought to appreciate that the offer cannot properly be considered without access to that information. The pursuer is in an unusual position as he has full knowledge of his own circumstances, which invariably a defender will lack.

Question 17:**Should civil jury trials be retained?**

Yes. Greater predictability of the level of awards would assist settlement negotiations. The unpredictability of juries is the greatest practical problem with jury trials, and is incompatible with one of the key elements of a system of civil justice (see our answer to chapter 1, question 1). Very often cases which have been allocated to jury trial will settle, but settlement negotiations are longer, more complex, and more expensive. It may be that parties should be able to make submissions on quantum to the jury, and refer to authorities.

Question 18:**Should written judgements be required in all cases?**

Yes, unless heard by a jury. Clearly if the case has been fairly straightforward only a brief decision will be required.

Question 19:**Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?**

The current sanctions are appropriate. We do not think further sanctions are required.

Question 20:**What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?**

Leave should be required in order for the action to be raised. This is already the case in the Court of Session, and should be extended to ordinary cause actions in the Sheriff Court. There should be a brief initial hearing to decide on whether to grant such leave. The court should be entitled to require caution to be lodged as a condition for granting leave. Such cases could be identified, if not by the general department on the basis of the pursuer's identity, by the parties themselves. The defender ought to be able to apply by motion to have an action deemed to be unmeritorious, even if he cannot succeed in a motion for summary dismissal.

Question 21:

Is the current legislation on vexatious litigants in need of reform and, if so, how should that be done?

The defender should be permitted to seek summary disposal (i.e. dismissal) by way of motion. The system of requiring caution for expenses should be reviewed. A bond ought to be lodged by an party who has previously (and persistently) commenced proceedings lacking in merit, or failed to comply with an order of the court, or on application by the defender.

Question 22:

Should a person without a right of audience be entitled to address the court on behalf of the party litigant and, if so, in what circumstances?

Yes, but in limited circumstances. It would be useful if a written request were submitted before the hearing. Each case would have to turn on its own facts. There should be a presumption against allowing the individual to address the court. There should be no remuneration or financial interest involved.

Question 23:

Would it be desirable to introduce separate procedures for multi-party litigation?

This would improve consistency for such cases and improve access to justice for pursuers. It may also be an efficient use of court time, rather than many similar cases being dealt with by the courts simultaneously. An example is the child abuse cases arising from alleged ill-treatment in orphanages in the 1960s and 1970s. Numerous actions against a multiplicity of defenders were raised, and then sisted. It ought to be possible for a pursuer to register an interest sufficient to stop the calculation of time for the purposes of the limitation period. Flexibility would be required, as each situation is likely to differ.

Question 24:

Is the rule governing the procedure to be followed for judicial review satisfactory?

It is useful for the court to retain discretion in terms of how the action should be conducted, but it would be sensible at the first hearing for a timetable should be put in place for the remainder of the action. There may also be an argument that parties should suggest a timetable to the court when lodging the petition for judicial review.