

BRECHIN TINDAL OATTS

Solicitors

Response to the Scottish Civil Courts Review Consultation Paper

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Brechin Tindal Oatts is a commercial law firm with offices in Glasgow and Edinburgh. There are a total of 72 lawyers, 40 of whom specialise in litigation. As one of the largest insurance practices in Scotland we act for several major national and international insurers in respect of personal injury actions and other insurance related actions. We also have a specialist debt recovery unit which acts on behalf of two major clients in the recovery of credit card balances. In addition, we are regularly involved in a wide range of commercial litigation. We have expertise in relation to medical negligence, professional negligence and health and safety matters. Of our solicitors specialising in litigation, 14 are Partners and 11 are Associates. Of these 9 are civil Solicitor Advocates and 1 is a criminal Solicitor Advocate.

We have a wide experience of litigation in both the Sheriff Court and the Court of Session.

Against this background we make the following observations on the consultation paper.

Chapter 1

- 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?**

Our view is that our Civil Justice System should be designed to encourage early resolution of a dispute, if possible without resorting to the courts. Litigation has become expensive and time consuming and is not user friendly. It is really only affordable for large businesses or very wealthy individuals. Even very substantial businesses are questioning the costs of litigation, particularly for lower value claims. Other resources need to be used. Pre-action protocols accompanied by appropriate sanctions for non-compliance which are enforced would allow for the early resolution of some disputes without resorting to the courts. These would require however, to be more comprehensive than those currently in place. The further use of mediation and alternative dispute resolution could be encouraged. A concern, however, is that as things stand, these would have to be privately funded. If more use of these were to be made at the pre-litigation stage then consideration would require to be given to how this is funded. There may require be a requirement for some adjustment to the scales of judicial expenses or the provision of a fixed scale to allow the recovery of pre-litigation or alternative dispute resolution expenses by a successful party.

- 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, we agree the principles and assumptions are a sound basis and do not consider that these require to be supplemented by other factors.

- 3. Are there any matters given in the review's remit of which you have concerns but which are not dealt with in this paper.**

No.

Chapter 2

1. No answer.
2. No answer.
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?**

The perception of litigators within the firm who have had experience of dealing with party litigants is that the process of litigating individual cases is significantly protracted and the potential expense to one's own clients increased when a party litigant is involved. There are certain difficulties arising from the nature of legal disputes. Evidential and legal issues are complicated, and however desirable it may be for individual members of the public to be able to vindicate their rights/resolve disputes without access to legal advice and representation, as a practical matter it may not be particularly feasible to design court procedures which exclude the features of litigation which render it both complicated and difficult for those not dealing with it on a day to day basis. A major part of the problem can be the inability of some party litigants to objectively assess their own cases.

Last year, in one case we were instructed to defend a claim being pursued by a party litigant. He claimed damages in respect of several, mostly misconceived, allegations concerning procedural irregularities, unfair treatment, racial discrimination, defamation etc. The pleadings were long and unfocused and directed partly against a body which was not a party to the action. The action progressed slowly and called several times before different Sheriffs with none being in a position to take much control over the case. The case was eventually dismissed but our clients had no real prospect of recovering their expenses. An account totalling £4500 was prepared but it was irrecoverable in practice and the real costs to the defenders were around £24,000. In our opinion this is a prime example of a case which illustrates problems caused by some party litigants and which called for robust judicial intervention at the outset. Given the difficulties involved in obtaining an order for caution for expenses, caution was not obtained but, if this party had been required to place some of his own money at risk in order to pursue the claim, it may have deterred him from doing so. A case such as this is an example of one which a gatekeeper judge could perhaps sift out (at least in part) if there were a requirement, for instance, that any actions raised by a party litigant required to be approved as stateable by a Sheriff or Judge before warranting/passing the signet.

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?**

There is most certainly a place for any services to be made available to party litigants which might assist them in the conduct of litigation in such a way as to reduce the time and expense that can otherwise be introduced to what is already a time consuming and expensive process. One suggestion is that consideration could be given to the extent to which legal aid funding could be made available to something equivalent to the public defenders' office in criminal matters. It is certainly the case that if party litigants are going to continue to be regularly encountered then an overall saving in terms of time and expense might be achieved by putting additional resources into in court advice centres/mediation services, etc. Ultimately, however, if one of the difficulties of dealing with party litigants is that they may have unrealistic expectations of what can be achieved, and have been unwilling to accept advice simply because it differs from those expectations, then appropriate advice or assistance may not always assist in resolving litigation at the instance of a party litigant acting out of conviction or some alternative motivation in cases in which objectively their position has little or no merit in law or fact.

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

A particular issue raised in the context of dealing with party litigants is the amount of expense that can be incurred dealing with cases with limited or no merits. One suggested approach was that a greater

degree of judicial management could lead to earlier resolution of cases with limited merit thus limiting the amount of time, expense and inconvenience to all parties and the courts themselves. There should perhaps be some form of "sifting" carried out by an appropriately qualified person, probably a member of the judiciary, to limit the prospects of cases with little or no merit only being capable of resolution by judicial determination after debate or proof. Besides the sifting process, it may also be the case that some compulsory form of pre-action protocol, involving possibly a pre-action meeting between parties might provide an opportunity for resolution of cases earlier and at considerably reduced expense.

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?

This firm considers that until there has been a period of time within which to assess the impact of the new jurisdiction limits in small claims and summary cause matters that it may be premature to be making a case for dealing with low value cases by alternative methods. In certain cases some form of pre-action protocol/meeting might avoid the necessity of the litigation at all, but certainly in the field of undefended debt recovery, for instance, the view was that cases are dealt with comparatively quickly and there were no obvious changes within the existing structure which would be required. Undefended low value cases are turned around by the sheriff courts reasonably quickly.

One problem that has been experienced by a specific litigator concerns the unnecessary expense and delay involved in the same low value case calling repeatedly before different sheriffs. Had the case called before the same person then it would have been dealt with more effectively and quickly than by a variety of different people, none of whom were familiar with it or willing to rule specifically upon an essential issue in the face of repeated failures by an opponent to produce a specific document. It is considered generally, not just in low value cases, that there might be benefits to individual sheriffs or judges having their own caseloads so that the same person was approaching a case on each occasion that it called. There is also a concern that the opportunity does not often arise (largely due to the constraints of time and the quantity of cases calling) to make appropriate use of the first calling in low value cases to identify issues and confirm if there are genuine grounds for processing a case to proof or attempting to encourage parties to reach resolution by agreement/dispose of the case on its own merits without the necessity of further hearings.

There may be a case, for low value motor accident cases involving property damage only as an example, where it would be appropriate for a case to be referred for assessment by an arbiter in the first instance, and litigation would not be an option until that process had been completed. That could be a suitable method of dealing with particular cases where the material should routinely be available for the parties to resolve disputes without litigation, but there is no culture currently of parties disclosing in full their own positions at the outset. This might be improved by submitting the matter for resolution by a third party, not necessarily a member of the judiciary, but from a suitably specialist background to the type of case involved. Low value road accident cases involving property damage only can be disproportionately expensive and time consuming to resolve by the litigation process. It sometimes transpires at the hearing of evidence that the parties were by no means in disagreement as to the facts of a particular incident, rather they were unable to agree how liability should be apportioned principally due to other factors, such as the potential impact of a particular outcome upon the parties' insurance premiums. The input of an independent assessor of the descriptions of the incident submitted by the parties to their own insurers could save significant time and expense if such cases required to be referred to this process of potential resolution before litigation became a possibility.

Chapter 3

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?**

Data appended

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

This firm considers that the cost of litigating is of fundamental concern to all paying litigants and has a substantial impact upon the process of litigation even in cases where a party is not directly funding the litigation personally. Different factors operate depending upon the basis of funding, i.e. whether the individual is funding proceedings himself or herself, whether they are insured, legally aided, etc. Ultimately, the funding party may be the person who has the interest at stake in many cases, even if the litigation is not being conducted in the name of the funding party. In certain personal injury cases, it does appear to be increasingly the case that the actual party who is pursuing the claim does not run any particular financial risk, the risk having been assumed by a funding party and/or the representatives of the pursuer. In such cases, the deterrent of the perceived expense of litigating may have caused a pursuer to enter what might ultimately prove to have been a highly unfavourable arrangement with another body – such as agreeing to pay a set percentage of any damages recovered prior to any legal representatives being engaged. The ultimate cost to the successful pursuer might represent a substantially higher sum than the actual expenses that would otherwise be incurred, and could lead, for instance, to the assumptions upon which any award of damages was assessed by the court being undermined.

If a legal aid certificate has been granted to a party they may have unfair advantage over a non-legally aided opponent. An impecunious, legally aided party has little to lose in proceeding with the litigation even in a situation where they ultimately fail in their case, since the prospects are that the opponent will not be in a position to recover any expense due to the entitlement of the assisted person to move for modification of expenses, and the practical difficulty arising from the absence of resources on the part of the party receiving public assistance.

It is a problem for this firm's insurance clients that the disproportionately expensive cost of conducting a substantive defence to comparatively low value personal injuries cases may be leading to unmeritorious cases, or cases where the merits are not satisfactorily assessed due to the expenses implications, being settled in order to minimise the overall cost likely to be incurred.

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

This is not considered a particular problem by this firm in the business that it conducts.

4. **Are the current rules for recovery of judicial expenses satisfactory?**

No. Whilst it is dependent upon the type of case, there is a general sense that the system of recovery of judicial expenses is inadequate. In cases in which a party is successful in higher value commercial litigation, for instance, the expenses liable to be recovered by the successful party will be substantially less than the actual expenses incurred by that party. In many personal injury cases the level of expenses likely to be incurred by the unsuccessful party can be disproportionate to the potential value of the case, thus having a considerable impact upon the decisions to be made by parties dealing with the litigation. There might also be scope for improvement as to the consistency of the basis upon which expenses are to be recoverable. There may be some merit in a system of fixed recoverable expenses related to the value of a case on disposal as is understood to operate in certain other jurisdictions.

A problem which we have encountered in practice relates to the situation where sanction for counsel can be obtained in the Sheriff Court for members of the Faculty of Advocates only. A party instructing a solicitor with rights of audience in the higher courts who is not an advocate is not entitled to sanction, since all solicitors have rights of audience in that forum. It is submitted that it would be appropriate for practitioners, whether solicitors or advocates, to be on an equal footing with regards to the treatment of expenses by the Sheriff Court. The fact that the opponent was represented by a solicitor advocate has been founded upon as grounds for a successful litigant to be granted sanction for counsel by the Sheriff in a case involving this firm, and yet a solicitor advocate is not treated as counsel in this context, so had the outcome been reversed, the Sheriff would not have been in a position to grant sanction for employment of a solicitor with rights of audience in the higher courts. It is submitted that an option could be no "sanction for counsel" in the Sheriff Court. If there is justification for a particular case requiring a party to seek additional remuneration for representation by a particularly skilled or experienced practitioner it would more appropriately be dealt with as a question of whether the case merited an additional fee based on the principles for allowing an increase in the recoverable expenses from an opponent.

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

No. The procedures for taxation can be quite complicated. They differ depending upon the type of case. If a decision is made by an auditor of court that does not necessarily represent the concluded view of the court, and the auditor does not have sufficient scope for providing reasons for his decision or responding to criticisms if his decision is subsequently challenged. The auditor's opinion is only expressed after he has taxed the account and then been challenged rather than in support of his findings upon it. This firm does have experience in a number of recent cases before the Court of Session of the auditor's initial findings being challenged by note of objections, and it is a problem with that procedure that in the subsequent hearing before a Lord Ordinary the auditor's position may not be represented by any party. If the decision at first instance by the auditor is overturned, the party successful in its submissions before the auditor may be prevented from making arguments not raised in either the note of objections or auditor's report which was issued subsequently. The fact that the judiciary are only rarely called upon to make decisions relating to the actual amount of expenses being awarded, and have even less opportunity to be informed about the actual expenses incurred by the litigants may be a problem for the courts in exercising control over the true costs of litigation.

Recently this firm has encountered difficulties with the auditor of the Court of Session in dealing with fees charged by solicitor advocates. The problems identified included whether the expenses on the part of the solicitor advocate represented fees or outlays in the account; whether the cost should reflect solely the cost to the client or a notional outlay equivalent to a fee for instructing an advocate to carry out the same work; the extent to which the involvement of a solicitor advocate should preclude the expenses to be charged by an instructing solicitor; the degree of explanation provided in any vouching as to what work had been carried out by the solicitor advocate; and the extent of proof that requires to be provided of the instruction by an instructing solicitor to a solicitor advocate. These are areas in which guidelines would be of assistance.

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

The availability of legal advice and assistance and legal aid allows certain impoverished parties the freedom to conduct litigation with minimal personal risk. The majority of the population, who do not qualify on economic grounds for legal aid, are unlikely to have the means to litigate without concern to the potential expenses implications so are substantively deterred from seeking advice or representation before the courts. In certain cases the availability to some parties of civil legal aid has allowed cases which may transpire to have little merit to be pursued for a substantially greater time and at greater expense ultimately to an unassisted opponent than would be the case were the parties conducting the litigation on a more equal footing with regards to funding.

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

In relation to the business routinely dealt with by this firm it is considered that a gap in funding exists in relation to obtaining representation before a fatal accident inquiry. The family of the deceased frequently should be represented, but civil legal aid is not available routinely for that purpose because it is perceived that the procurator fiscal is already essentially representing their interests. It is submitted that there should be greater recognition that the deceased's family in this situation have a separate and distinct interest for which they should be entitled to assistance from public funds where appropriate.

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

This firm has limited experience of acting on a speculative basis, but considerable experience of acting in cases where it is assumed that opponents are using such arrangements, particularly in personal injuries cases. The arrangements may make it easier for certain claimants to pursue claims through litigation from which they would otherwise have been deterred, but may also have an adverse impact upon access to justice.

Essentially, by removing the element of risk from claimants, whilst certain funding parties and/or their representatives take a more commercial approach to recovering compensation for the victims of personal injury, litigation can be conducted without a particularly personal element of involvement for the party for whom the remedy in law was intended. This can lead to a shift in culture away from personal injuries cases being of immediate concern to the individual parties pursuing them in an effort to put themselves back in the position they would otherwise have been before any injury occurred and towards claims for compensation becoming commodities traded between otherwise uninvolved parties looking to profit by deriving referral fees and/or a proportion of any damages to be recovered by successful claimants in return for offering to assume some of the risk in the event that the claimant proves unsuccessful. From a commercial viewpoint, the essential feature of dealing with personal injury cases then becomes the quantity of claims that can be pursued as opposed to necessarily looking to the individual interests of the parties concerned. In addition, the claimant is not necessarily being advised solely in his own interests by the uninvolved funding party if not a legal representative. The responsible decision-making may also to an extent be partly removed from the party in whose interests the claim is being pursued and subjected to the interests of the party funding the litigation. Their interests may differ.

The fact that solicitors and counsel are also involved in the process by being encouraged to accept instructions on a speculative basis, and the potentially disproportionate costs involved in certainly lower value personal injuries cases, means that substantial litigation may be being pursued in which ultimately the legal representatives have as much or a greater financial interest in the outcome as the individual parties involved. This may also lead to a shift in culture. From the commercial perspective, representatives acting speculatively require to seek to maximise the expenses recoverable in successful cases to counteract losses that might be incurred in pursuing unsuccessful ones. It is third parties, not the legal representatives' own clients, which are being held accountable for the representatives' expenses. Traditionally the legal representatives having a financial interest in the outcome of a litigated case was considered a circumstance adverse to the interests of justice. Whilst there is no difficulty in principle in speculative fee arrangements, and in many cases they may offer benefits to the public generally and solutions to individual claimants particularly who might otherwise be deterred from pursuing meritorious cases, such shifts in culture can have negative implications for the civil justice system.

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?

The involvement of legal expenses insurance at least may remove certain difficulties associated with funding litigation by removing the deterrent of cost to individuals and increasing the prospect of recovering expenses where successful from opponents who might be of limited means. There is a concern that the introduction of "after the event" insurance would have an adverse effect on access to

justice, at least with respect to personal injuries cases, due to the increased likelihood of a shift in culture as mentioned in the context of speculative fee arrangements at question 8.

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

This firm considers that such an entitlement would have an adverse impact upon litigation for reasons similar to the above. Essentially it is important that individual parties have a personal stake in the outcome of litigation. Creating a system whereby the risk of all adverse implications to one party are removed even to the extent of the premium for insurance against such implications being recoverable from an opponent may lead to a greater surrendering of responsibility on the part of claimants/pursuers and subjection of their interests to those of funding parties as commented upon at questions 8 and 9. An unequal system could be created whereby essentially the funding party seeks to recover an inflated premium which is not otherwise recoverable from any party unless successful, a similar difficulty of unsuccessful litigants potentially bearing a proportion of the costs of the funding parties' losses elsewhere as identified in relation to the representatives' expenses recoverable under speculative fee arrangements.

Chapter 4

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

Yes. Time is wasted whilst Sheriffs and Judges deal with criminal business. Civil litigants/law firms require to pay for this wasted time. That said, we consider there has been a recent improvement in time wasted in the Court of Session. We consider that the position is significantly worse in the Sheriff Courts generally and we consider that the problem is worst in the smaller Sheriff Courts in particular. Proofs and Debates often require to be stopped in order that criminal business can be dealt with, besides interruptions from other cases considered to take precedence, which can be extremely inconvenient during the conduct of a substantive piece of civil business.

A further issue is that in the larger Sheriff Courts there are insufficient court rooms. The majority of the courts are used up for criminal business and this has an impact on how much civil business can be dealt with.

At Edinburgh Sheriff Court civil practitioners can require to wait for considerable periods before a Sheriff will come onto the bench to deal with their business.

We consider that the position in the Court of Session appears to have improved although there is still a lack of communication between civil and criminal clerks and the Keeper's office as to the availability of the Judges.

One issue which creates problems in some smaller courts is that they will only set down Proofs for one day at a time even although it is apparent that several days will be required. Presumably this is due to the pressure of other business. Clearly this leads to delays in the matter being resolved. This firm has an example of one case at Inverness Sheriff Court in which the Proof took place over no less than fourteen months.

2. Should (a) some Judges of the Supreme Courts and (b) some Sheriffs be designated to deal with civil business?

Yes. In our opinion this would be desirable. It appears to us to be in the interests of justice to have Judges and Sheriffs who have experience in specific practice areas dealing with disputes in these areas. An inexperienced, new Sheriff with a criminal practice background dealing with a civil matter in which he has no experience, clearly cannot be in the interests of any of the parties involved. We do not consider that there is a need for each and every Sheriff or Judge to specialise in one area or the other. It may be appropriate for some Sheriffs or Judges to deal in both civil and criminal business if they have the requisite experience. What we consider most important is that the Sheriff or Judge has the appropriate experience to deal with the case before him or her. In this firm we have solicitors who specialise in several different areas of civil litigation and many of us have experience of Sheriffs who did not seem to have the required experience for dealing with specialist cases.

3. Should the Sheriff Courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

In principle this would appear to be a good idea. The advantage would clearly be that Sheriffs with particular expertise in each area would be dealing with cases in that area. We consider the administration would also require to be split in order for there to be a real advantage.

There could be disadvantages in so far as economics are concerned in that if the designated civil Sheriff was free but there was a considerable amount of criminal business to be dealt with, he or she would not be able to deal with that and therefore judicial time would be wasted. Consideration would require to be given as to whether economics would justify such a split.

4. Should there be a greater degree of specialisation within the civil court in Scotland? If so, in what types of case and in which courts?

Yes. We consider that if it is economically viable then there should be a greater degree of specialisation within the civil courts. The types of case in which a Sheriff could specialise would be, in our opinion, commercial, family, personal injury, debt recovery and possibly housing. We consider that it is likely that specialisation may only work in the larger courts where there is sufficient civil business for Sheriffs to specialise in a particular area. We consider there would be problems in Sheriffs specialising in smaller Sheriff Courts.

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?

In our opinion there are many factors. These include the expenses of the litigation, the type and value of the action, the level of judicial opinion likely and convenience. In addition, some solicitors raise actions in the Court of Session in order that they can instruct counsel to appear and need not appear themselves. Some solicitors raise actions in the Sheriff Court in order that they can appear themselves. The speed at which the matter is likely to be dealt with is a further factor.

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

We consider that the Sheriff Court ought to have exclusive jurisdiction for most cases where the sum sued for is under £50,000. In our view, it is inappropriate for cases, in particular, personal injury cases, where the sum sued for is less than £50,000 to be raised in the Court of Session. We consider that there may require to be some exception mechanism to allow cases which turn on a particularly novel or important point of law to be referred to the Court of Session. If only claims where the sum sued for is £50,000 or more are allowed to be raised in the Court of Session then we consider there should be penalties in place for abuse of the sum sued for. If, for instance, cases in which the sum sued for is £50,000 settle well below that amount then there should at the very least be expenses penalties which could be used against the Pursuer's agents in these circumstances. We consider that the Court of Session ought to continue to deal with the majority of judicial review cases, more complex claims, and, unless specialist Sheriffs are appointed, cases such as intellectual property cases. We would also note that it is important that cases such as intellectual property cases actually call before one of the appointed intellectual property Judges in the same manner as commercial cases call before the appointed commercial court Judges.

Another possibility could be that there should be presumption again cases being raised in the Court of Session in the first instance unless there is cause shown. If a party seeks to show cause the case could put through a judicial sift before a gatekeeper judge.

Certainly if the Sheriff Court were to be required to deal with the vast majority of first instance business there would be concerns about how the Sheriff Courts could cope given the number of Sheriffs and the court room space which is currently available.

If the amount of work to be carried out in the Sheriff Court is to be expanded by it having greater exclusive jurisdiction or other means, we consider it is important that the issue of sanction for counsel identified at the fourth answer in chapter 3 be resolved.

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

No. We consider that there should still be a two tier system. A single such court would not be likely to be local therefore giving rise to issues concerning access to justice. There would also be issues as to who would have rights of audience. Is it desirable that everyone currently enjoying rights of audience before the small claims court should automatically continue to retain these rights before the equivalent

of the Inner House in a single civil court, or are rights of audience to be further restricted if there is only a single civil court?

8. Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?

We consider that the Court of Session should retain first instance jurisdiction. It is the court where law is made. It is appropriate that complex and higher value actions can be raised in the Court of Session in the first instance. We also consider it is important that actions that will turn on novel points of law or points of legal principle can be raised in the first instance in the Court of Session.

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

We consider that an appropriate level of privative jurisdiction of the Sheriff court could be set at £50,000 and the Sheriff should also have a dispensing power to remit a case to the Court of Session where appropriate.

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

It is our opinion that these powers are generally satisfactory but that the court could and should have more control over the remit of cases. At present motions for remit can be difficult to succeed and certain Sheriffs appear to take entirely different views with regard to them. Guidelines could perhaps be set regarding the transfer of cases between Sheriff Courts and between the Court of Session and the Sheriff Court. We consider it would be helpful if there were a consistency in the tests to be applied.

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

No. We consider that there should not be a third tier court. We consider that this would only result in more unsatisfied litigants and ultimately more court time being spent on appeals, and less resources available to the remaining parts of the existing system.

12. Alternatively should there be another level of judiciary within the Sheriff Court to deal with “third tier” business?

No, in our opinion it would not be appropriate to have a lower level of judiciary. In our experience in relation to cases such as, for instance, undefended debt recovery cases there are no difficulties with the current system. In any case, no matter how low the value, there can be difficult points of law to be considered. We do not consider it would be appropriate for these to be dealt with by a lower level of judiciary.

Further, the increased limits for summary cause and small claims cases have just recently come into effect and it is too early to consider what effect these new limits have had. If there were to be a third tier we would consider that expenses issues would arise. It would still cost litigants to pursue or defend litigation and appropriate expenses would require to be recoverable.

13. Does the current division of the Sheriff Court into distinct geographical jurisdictions present difficulties or does it have advantages?

We consider that the current division of Sheriff Courts sometimes presents difficulties and sometimes has advantages. We consider that there is a case for more centralised Sheriff Courts dealing with civil matters in certain areas. Some Sheriffdoms seem to have a considerable number of small Sheriff Courts where perhaps one or two Sheriffs sit. These courts can struggle to deal expeditiously with civil business. In our view, it may sometimes be more appropriate to remit civil cases to where the resources are within the Sheriffdom. For example in the Sheriffdom of Grampian, Highland and

Islands the Sheriff Courts in Aberdeen or Inverness may have considerably better resources to deal with civil matters than some of the outer lying Sheriff Courts. In terms of access to justice these small Sheriff Courts have the advantage of being accessible to those who require to litigate. However, it should perhaps be possible for parties to be given an option that their case be remitted to another Sheriff Court where a Proof, for instance, could be dealt with much more swiftly than at their local Sheriff Court. We consider that technology could be used to assist in dealing with distant Sheriff Courts by way of e-mail and telephone conference. For example this could assist in cutting down costs for litigants who are litigating in a remote Sheriff Court and who wish to obtain a solicitor of appropriate knowledge and experience who is based in one of the larger cities. The IT would need to be resourced properly if outlying Sheriff Courts are to continue to deal with significant civil business.

14. Are the current arrangements for dealing with undefended actions satisfactory?

Yes, we consider that they are. We deal with a large volume of undefended debt recovery actions and in our experience decrees are usually obtained reasonably swiftly.

15. No Answer.

16. Are there 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?

We consider that the current arrangements for the disposal of commissary business are on the whole satisfactory. We consider that there is a need for there to be the potential for shrieval involvement in such matters. We therefore do not consider that it would be appropriate that such matters be dealt with by an administrative rather than a judicial process.

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?

In our perception such a court would become a lower tier Court of Session and there may not be much benefit to litigants as another level of bureaucracy may be involved. The question of local access to justice would require to be resolved.

18. Is there a case for all Sheriffs to have an all Scotland jurisdiction?

We consider there would be both potential advantages and potential disadvantages of this. As far as advantages are concerned in principle this could appear to be a good idea in that if in any week there was, for example, a Glasgow based Sheriff with time available but that the Sheriff Court in Kirkcaldy required an extra Sheriff to deal with business the Glasgow Sheriff could sit in Kirkcaldy during that week.

However, a disadvantage could be that if Sheriffs were potentially required to sit anywhere in the country it may be put off appropriately experienced and qualified practitioners from applying for judicial office. Clearly the option of sitting in Lothian and Borders one week and Grampian, Highland and Islands the next would not be attractive. It may be that a system whereby Sheriffs are still allocated to a particular Sheriffdom but where they have all Scotland jurisdiction and can be asked to sit outwith their normal jurisdiction if an urgent need arises this could be considered. The amount of time that a Sheriff may be required to spend outwith his or her own Sheriffdom could be restricted on an annual basis.

19. If the Sheriff Court becomes a 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, we consider that there should be a power of transfer from the Court of Session to the Sheriff Court and a power for the Sheriff to seek leave of the Court of Session to transfer the case there. Factors which should be taken into account are the complexity of the case, the points of law concerned and the value of the case.

20. Are the existing appeal arrangements satisfactory?

Our perception is that on the whole, appeal arrangements are satisfactory. However, we consider that they could be simplified. We consider that the rules of appeal in both the Sheriff Court and the Court of Session are somewhat more complicated than necessary and that the procedure can be slow. We consider that the time delays which are common place in the appeals in both the Sheriff Court and Court of Session are unacceptable and require to be addressed.

In our opinion, one aspect of the current appeal process which is unsatisfactory is that a motion for leave to appeal requires to be heard before the Judge who dealt with the original motion. We consider that a motion for leave to appeal ought to be heard before a different Judge or Sheriff. It seems odd that the same Judge or Sheriff may make the decision regarding both the original motion and the leave to appeal.

We consider that there could be standard procedures and time periods for appeal in both the Court of Session and the Sheriff Court.

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?

In our view this depends on the court structure in place. We do consider that there is a case for appeals to the Sheriff Principal which have advantages in terms of time and expense. We consider that there requires to be a judicial role for the Sheriff Principal. We consider that it is probably questionable as to whether it is effective or desirable for the Sheriff Principal to have an entirely administrative role. We certainly consider that there is a need for some sort of supervisory administrative role if the current court structure is retained.

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

No, we consider that the Outer House could deal with some of these appeals. Sheriff Principals could deal with some appeals. We do not consider that the time of three appeal court Judges requires to be taken up automatically by statutory appeals.

- 23. Should there be a limit to the number of levels of appeal through which an action should 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?**

If it is considered that the number of appeals ought to be kept down then it could be the case that an appeal in the Sheriff Court to the Sheriff Principal could be missed out. We do not consider, however, that it is necessarily appropriate to restrict a party's right to seek redress through appeals where appropriate. We do, however, consider that where issues of leave to appeal are concerned, there is a case for a sifting Judge considering whether leave to appeal ought to be granted rather than these being dealt with by the original judge.

- 24. What are the advantages and disadvantages of reliance of temporary Judges and part time Sheriffs?**

Some advantages of reliance on such individuals are clearly flexibility and good use of resources. A further advantage could be said to be on the job training provided for those who may in time become permanent in these posts. A temporary Judge or part time Sheriff with a particular speciality in practice could be employed as necessary to determine cases in his field of expertise.

The disadvantages are lack of consistency and the tendency, perhaps, of temporary Judges and part time Sheriffs to be more cautious than their permanent or full time counterparts. Whilst the use of these individuals is not ideal it is difficult to see how this could be avoided.

Chapter 5

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?

If there is widespread agreement amongst those submitting responses to the consultation paper that there is a need for reform that implies that the current system is not considered to be operating satisfactorily. Whilst many users of the civil court system may feel that it is already operating under a general consensus about what are its fundamental principles, these are not currently defined anywhere. There could in the circumstances be considerable benefit to defining what the underlying principles are that are considered desirable in governing the conduct of litigation in this jurisdiction to ensure that they can be referred to clearly by all participants. If part of the perceived difficulty with the status quo is a failure on the part of certain participants to observe certain fundamental principles, the possibility of affecting a change in culture may be increased by seeking to define these and giving them some overriding authority so that the courts have the power of insisting upon certain fundamental principles being observed where that may not always be possible currently. This firm is satisfied that the principles and assumptions discussed in paragraphs 1.11 to 1.14 of the consultation paper are a sound basis for development of the review's recommendations, so these are the appropriate elements to take into account for drafting an overriding objective/statement of philosophy for the civil courts in this jurisdiction.

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?

We consider that the court should encourage the use of mediation or other methods of dispute resolution when appropriate.

We do not consider that the court should ever require mediation or other methods of dispute resolution.

In our opinion the court should facilitate mediation or other forms dispute resolution if appropriate.

If the court were to encourage or facilitate mediation we consider that there would require to be adequate funding in place. Currently mediation is generally funded privately. The main difference between mediation and litigation funding is that parties require to pay in full for the mediator rather than the small outlays which require to be paid in respect of court fees. We consider that there would require to be the provision of funding for mediation if it were to be encouraged or facilitated. We consider that the true costs of mediation would require to be taken into account.

We consider that in no circumstances it is appropriate for the court to force parties into mediation.

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

We consider that it may be appropriate for there to be a compulsory stage for the consideration of mediation or alternative dispute resolution in each case. If there was a pre-action protocol there could be a case for it being considered as part of the pre-action protocol. Further, if an action was raised, we consider that there also ought to be a stage where mediation requires to be considered by both parties.

We consider that this issue ties in with how the court procedure is reformed.

4. Are there particular kinds of disputes in which the use of mediation or dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

We consider that there are. It can be essential to have judicial determination where there is a point of law or a point of legal principle at issue. We consider that it is also usually necessary to have judicial determination in cases of medical negligence.

We consider that mediation is not usually likely to succeed in personal injuries actions or indeed in any cases where there is no ongoing relationship. Mediation is certainly not appropriate to be used in all cases.

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

We consider that this could take various forms. Currently the majority of mediation is funded privately. If mediation was to proceed on a larger scale then some funding requires to be made available, probably from the public purse if it were to be an alternative to litigation. There could remain the option of private mediation which would largely be at cost to the parties themselves or there could be the option of court appointed mediator for which the majority of the costs could be borne by the public purse.

6. In what respect could modern communications and information technology be harnessed to improve access to the civil courts?

We consider that there are several aspects in which these can be used to improve access to the civil courts.

Courts could use e-mail to accept pleadings and documents. They could also accept documents by fax. More use could be made of conference calls for dealing with procedural matters in court and video conferencing facilities could also be used.

Parties could be allowed to adjust and amend pleadings electronically. This currently happens in the commercial court in the Court of Session. Procedures could be streamlined in the Sheriff Court and the Court of Session. Courts could communicate with Solicitors by e-mail. This would considerably cut down the amount of paperwork involved.

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

We consider that the court should generally have more control over the conduct and pace of litigation. We consider that there needs to be judicial input in respect of most motions for continuations of hearings or motions for sists of a case. We consider that only one sist of a limited period should be allowed without proper judicial input.

We consider that case conferences could take place by telephone conference or video conference instead of, for instance, an Options Hearing. That would allow the principal solicitors to attend and provide the court with full and proper input which is not usually available when local agents are instructed to appear. We consider that in cases with case flow management there should be opportunities for judicial intervention when required. There ought to be a mechanism for a Sheriff or Judge to be able to deal with parties who will not co-operate or correspond with each other in the course of a case. Despite the case flow management procedures which are in place in personal injury actions in the Court of Session, we still find it common place that certain firms fail to answer correspondence from us on a regular basis. They do the bare minimum to comply with the court timetable and no more. They are not acting within the spirit of the rules and may just be obeying the letter of the rules.

We consider that continuity of the Sheriff or Judge's involvement is very helpful. If the same Judge or Sheriff deals with the same case each time there can be considerable savings in judicial time as well as considerable savings in costs to the parties concerned. The possibility of Judges and Sheriffs having their own caseload of allocated cases should be considered.

8. What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case flow management?

We consider that judicial case management benefits unusual or complex cases. We consider that cases with routine elements such as personal injury cases benefit from case flow management.

Chapter 6

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

The advantage of pre-litigation protocols would be to encourage early disclosure and lead to the possibility of resolution of cases without the necessity of litigation, or at least allowing such cases that do proceed to litigation thereafter to be resolved at an earlier stage due to the parties being in a stronger position to evaluate the strengths and weaknesses of an opponent's case. The disadvantages are generally perceived to be that unless appropriately supported and practical in application a pre-action protocol may add needless expense to the process without necessarily achieving the aims of earlier disclosure and a greater likelihood of early resolution. In this context, this firm considers it unlikely that pre-action protocols would be satisfactory if not compulsory. In addition, a difficulty with the current voluntary protocol for personal injuries cases is identified to be the need to obtain an admission of liability before consideration is given to investigating the case's value. It is submitted that considerations of liability and quantum at a pre-litigation stage by an agreed process would be appropriate without necessarily prior insistence upon a concession of liability.

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

It would be useful for greater use of pre-action protocols in personal injuries actions, regardless of value – the voluntary pre-action protocol applies to low value cases only. The extent to which there should be greater use of pre-action protocols in other areas of litigation to an extent depends upon the views of individual practitioners in those areas, and would require their co-operation if to be beneficial, although the culture in which pre-litigation discussion and negotiation can take place could also be changed if currently considered inadequate by an insistence on certain compulsory stages of disclosure.

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

This firm considers that if pre-action protocols are not compulsory then essentially they may not work. Also it is perceived that a protocol which is not accompanied by sanctions to encourage compliance with the protocols would be unhelpful.

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

There is a general sense of unease about restricting parties' entitlement to bring proceedings but at the same stage there might be some benefit to some kind of sifting process being in place to prevent cases of little or no merit proceeding unnecessarily, or extensive resources being devoted disproportionately to certain lines of inquiry, given the potential expense and time involved for an opponent in such circumstances. The basic requirement that would need to be fulfilled would be that a case was reasonably stateable and the step in process justifiable. In addition, if parties are not legally represented, there might be a greater use of criteria to establish whether further steps in procedure should be sanctioned by the court. Generally, there could be a benefit to there being a "gatekeeper" judge or sheriff with respect to various aspects of civil procedure, although it would be important for access to justice that parties would not be over-restricted in how they could conduct proceedings.

5. No answer.

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

It would be helpful to have greater rationalisation of the procedures in the Court of Session and the Sheriff Court so that certain features would be the same in both. It is equally perceived that a single set of rules of civil procedure covering all types of case may be unrealistic. The procedures for lower value

and less complex cases will not necessarily suit the fair resolution of more complex or higher value disputes and it is perceived in the circumstances that a single set of procedures for all civil procedure before the Scottish courts is unlikely to be possible. Different types of action and values of case will continue to be dealt with by different procedures if resources are to be apportioned to them appropriately.

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

Under reference to the above answer it is unlikely that a single initiating document would be possible or appropriate.

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

It is an anomaly of the civil court system now that whilst in commercial actions before both the sheriff court and Court of Session and personal injuries actions before the Court of Session it is possible to proceed with abbreviated pleadings such a system of pleadings is not employed in the ordinary cause procedure in the sheriff court in which actions which may be of significantly less complexity and difficulty require in theory a more detailed set of pleadings. That said, this firm recognises that a system of abbreviated pleadings may work where there is a shared degree of expertise being applied by those drafting the pleadings but difficulties arise where there is less expertise or experience in identifying substantive issues early and what may be required for providing fair notice to an opponent. Unless there is to be a radical shift in culture in the approach to the system of fair disclosure in this country, there is still a place for a degree of specification being required in pleadings, although the extent to which a more abbreviated approach may be applied more widely could be increased.

9. Are the current arrangements for summary disposals satisfactory?

No, the current arrangements are not satisfactory. Particular problems can arise in cases where a party is not legally represented. The fact that a motion for summary decree can only be entertained by a pursuer in absence of what are essentially "striking out" procedures is unfair to defenders. If, in particular, there is a move away from more detailed pleadings and an encouragement on the part of the courts to avoid debates and what may now be considered outdated or over-technical arguments concerned with form rather than substance in pleadings, a type of summary disposal procedure open to either party in the appropriate circumstances of cases where the merits appear lacking would be appropriate in order to avoid substantial expense and time being incurred unnecessarily.

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

There might be some benefits to such an approach, such as greater consistency in approach to procedural matters, whilst freeing up other judges for substantive business. The fact that this is a fairly limited jurisdiction in size and resources does lead to concerns whether there is scope for introducing judges to deal purely with procedural matters. In any event, we consider there is a benefit to having judiciary accustomed to dealing with actions at all stages rather than tiers of judiciary, some dealing purely on a procedural level without seeing business through to its ultimate judicial determination, and the remainder being removed from the procedural stages. We would favour the same Judge or Sheriff dealing with a case throughout the litigation process.

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

It is felt that routine procedural business is dealt with in certain cases satisfactorily but could be improved elsewhere. Hence, the undefended motion procedure in the Court of Session is considered to work reasonably well in terms of timing, whereas the fact that motions take substantially longer to be resolved within the sheriff court is a problem. Recent developments in Glasgow Sheriff Court are welcomed – the fact that parties do not necessarily have to appear in court to deal with routine procedural matters and can inform the court of agreements about further procedure by use of

telephone, e-mail communication, etc., are positive developments. The case management conference calls in commercial actions and the personal injuries pilot project at Glasgow Sheriff Court are considered a useful procedure that may eliminate certain expense and inconvenience. A problem in terms of timing is experienced with motions that require to call in certain sheriff courts and the Court of Session leading to solicitors or counsel being detained by a procedural matter for lengthy parts of the day at considerable expense and inconvenience awaiting a hearing which may in itself be short. It is possible that the introduction of specific time slots for dealing with particular hearings would be of assistance in this connection.

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 a reference to a timetable determined by the court?

There could be some benefit to the court allocating specific times for hearings, but at the same time, it would be considered an inappropriate restriction if parties were compelled to compromise their submissions purely for time considerations if procedures otherwise remained largely as they are at present. Should there be additional changes such as greater use of written submissions, greater disclosure of evidence between the parties, more specific identification of individual issues to be resolved at hearings, etc., a more restrictive approach to time limits for oral submissions might be appropriate. Agents and counsel are frequently criticised by the courts for their individual estimates of the time required to deal with specific cases, so some more specific guidance from the courts as to how long a particular hearing is to take in advance might be appreciated for the purpose of preparing submissions accordingly.

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

In certain cases it might be appropriate for greater use of written rather than oral arguments. That in itself might create its own problems in that certain issues can be dealt with more speedily and without substantial consideration time if parties restrict themselves to oral arguments only. It is possible that the situation which currently applies whereby on occasion parties are invited to submit written submissions could be used more frequently in cases identified as appropriate for that purpose by the individual judge or sheriff hearing the case, and otherwise the appropriateness for written rather than oral arguments may be a matter for consideration by the parties rather than the court.

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

This firm considers that fair notice is an essential element in ensuring a just outcome of civil proceedings and if earlier and wider disclosure of evidence is made possible by changes in procedure that can only be an improvement. This may be of particular importance in the event that the intention of any reform is to move away from traditional methods of pleading, which, historically, were supposed to guarantee the same outcome of providing fair notice to an opponent of a relevant case meriting an evidential hearing and the likely lines of evidence to be led at proof. The use of compulsory pre-action protocols and timetabled dates whereby certain pieces of evidence if intended to be founded upon are disclosed would only be beneficial to the expeditious progress of litigation.

15. To what extent should the court have control over the use of expert and other evidence?

It is for the parties to have control over the use of expert evidence, but essentially at their own risk. Certain improvements could be made in procedures to facilitate agreement of expert evidence. The most recent amendment of the rule in respect of the expense recoverable for the use of expert opinions in the Court of Session may have added to the burden of unnecessary expense. It is submitted that the expense for the opinion of an expert should be recoverable from an opponent only to the extent that the expert opinion facilitated resolution of the proceedings/supported particular aspects of the case in which the party relying upon it can be shown to have succeeded in the proceedings. In appropriate cases experts might be encouraged to enter discussion as to whether their opinions were capable of agreement or the basis of their disagreement if they were not.

Our experience of court-appointed experts in other jurisdictions is that they neither accelerate disposal of the case nor engender satisfaction on the part of litigants. Similarly the English system of seeking agreement on opinions, or parts of opinions, from opposing experts does not appear to significantly avoid evidential conflict.

16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?

In the current state of procedures, it would not be fair for a system of pursuers' offers to be re-introduced, since there are difficulties arising from the inequality of the positions of the parties to civil proceedings. In particular, the extent of any sanction for failure to accept a pursuer's offer if there was one would be more prejudicial to defenders than the alternative situation when a defender makes an offer to a pursuer. Whilst defenders can make an offer at any stage and the potential sanction in expenses to a pursuer applies only to the expenses incurred thereafter, if defenders were to be penalised for failing to accept the pursuer's offer by a particular stage then the sanction would need to be greater expenses than would otherwise be recoverable should the defender be entirely unsuccessful in the court action anyway. That cannot be fair since one party suffers a potentially greater penalty than the other with respect to the expenses of the case. In any event, on the whole a pursuer will have had a greater opportunity to investigate and formulate his position with respect to the value of his case, so a system of pursuers' offers could also operate unfairly if not accompanied by a necessary requirement for disclosure of evidence so that both parties were equally capable of ascertaining whether the proposal suggested was reasonable. That is not to say that some system of pursuers' offers would not be welcomed if it encouraged earlier resolution of proceedings and was accompanied by procedures designed to avoid an inequality in the potential consequences for a defender that failed to accept the proposal as opposed to the equivalent situation where a defender had made a proposal not accepted by a pursuer. One suggestion is possibly that as an aspect of procedure there could be a recognised "tendering process" during which the opportunity to resolve the case without further expense for either party pending resolution of that process could be invoked by either party making a proposal to which the other party formally required to respond within a specific time period if in an appropriate position to do so.

17. Should civil jury trials be retained?

There is general perception in this firm that civil jury trials are problematic because of the significant degree of uncertainty about the outcome of cases where so little guidance can be provided as to value and the jury's reasoning is not available for subsequent consideration. As a firm regularly instructed by insurers in civil cases before the Court of Session, considerable difficulties are created in adequately advising these clients about the potential value of cases and what reserves are appropriate if cases are ultimately going to be appointed to jury trial. That said, criminal cases of the utmost severity are considered appropriate for jury trial, so is it acceptable to suggest that members of the public are less capable of coming to a fair verdict in the civil cases in which jury trials continue to be permitted? Certain of the criticisms levelled at civil jury trials could be addressed by certain procedural reforms. If certainty and consistency of legal interpretation and levels of damages are more likely to be guaranteed by a single judge than a jury, then the jury could be charged with determining issues of fact only to which a judge would then apply the appropriate legal rulings, just as a jury does not determine the penalty for a convicted person in a criminal trial. Alternatively, if the benefit of some public input into the levels of awards for solatium is appropriate, some uncertainty and inconsistency could be removed if certain guidance might still be issued, such as the parties submitting awards ought to be made within specific parameters. There may even be alternative methods of obtaining public, as opposed to judicial, guidance about appropriate levels of solatium which do not involve juries at all, such as by making ranges of awards for solatium the subject of regularly reviewed legislation. Some form of agreed system of questions could be employed so that a civil jury provided its reasoning on specific points to answer the criticism of the absence of a written judgment. Part of the problem of

dealing with the place of civil juries in this system is largely about perception given that so few cases proceed to civil jury trial on an annual basis. Many observations made by representatives in relation to civil jury trials are speculative in the circumstances. Whilst our clients in the circumstances might value the removal of this option from pursuers in personal injuries cases if the system does not otherwise alter, the concerns raised about civil jury trials might be met by reform without necessarily total abandonment if there was a strong support for their retention.

18. Should written judgements be required in all cases?

No. In appropriate cases there is no necessity for issuing written judgments, and the delay involved in waiting for a written judgment can be counter-productive, particularly in cases of low value. The current system whereby there is discretion as to whether written judgments are issued is not considered particularly problematic in practice. If written judgments were required in all cases that might cause significant administrative problems and introduce additional delays into the resolution of civil proceedings.

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?

Yes. One of the problems about the current system is that there may not be sufficient insistence upon adherence to particular practices which would be more likely to be observed if sanctions were more consistently imposed for failure on the part of parties and practitioners to comply with certain court rules and procedures. In addition, instead of what tends to be expenses implications only, it is suggested that possibly wider sanctions, impacting upon the disposal of the case, might be appropriate for more extreme examples of non-compliance to particular provisions or unreasonable behaviour on the part of parties or their representatives.

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

Refer back to question 4. It is perceived that some form of “gatekeeper” judge or sheriff might enable unmeritorious causes to be identified at a stage appropriate to disposal to avoid substantial expense and time and inconvenience to an opponent.

21. No answer.

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

If the court was satisfied that (a) the particular individual was an appropriate person to assist the party litigant and (b) it would be advantageous to the conduct of proceedings to allow them to do so then there could be a benefit to allowing a non-legally qualified party to address the court on behalf of a party litigant in certain cases. This situation sometimes arises in practice of necessity. The matter should be at the sole discretion of the sheriff or judge dealing with the case and ruled upon as a preliminary issue. An essential feature of such a process would be that no remuneration would be permitted to the nominated representative to avoid the possibility of a category of unregulated parties without rights of audience seeking to acquire a means of remuneration by that method.

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

It would be appropriate, such as where a single case could be identified as determinative of a number of similar cases in order to restrict the time and expense that might otherwise be incurred.

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

In our view, this rule is not wholly satisfactory. The intention behind the rule appears to be that a first hearing may take place fairly quickly but in practice that does not now occur. In a straightforward petition for judicial review presented by this firm in early March, the one day first hearing was fixed for June. Despite the three month wait, potential respondents only require to advise if they will be represented 48 hours prior to the hearing which is far from ideal. Further it is not always clear what form a First Hearing should take (whether debate or hearing of evidence) and it could be helpful if there was a provision for determining this issue prior to the hearing itself.