

**Brodies LLP has a long-standing pre-eminent reputation in litigation. We undertake a range and volume of complex instructions from the Scottish marketplace, representing the interests of many of Scotland's largest companies, its public bodies and private individuals. Our litigators are also regularly instructed on challenging referral work by London firms, international practices and corporate counsel worldwide. Our litigation practice includes solicitor advocates and a large number of other expert practitioners working across a range of specialist areas in the litigation field. These include; corporate, banking, employment and other commercial disputes; family law; personal injury; shipping, professional negligence and insurance and public law.**

**As such we have chosen to set out our response by focusing on the key issues within the context of those specialist areas. We also approach the review from the perspective that confidence in our system to deliver proportionate, timeous and robust remedies is critical to the economic as well as social well-being of Scotland.**

## **PERSONAL INJURY**

### **CHAPTER 1 – INTRODUCTION**

#### **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?**

We agree that in personal injury there should be scope for the settlement of disputes without having to resort to the courts. This should involve a robust and compulsory pre-action protocol to encourage both sides to disclose relevant information as early as possible and to conclude the early settlement of disputes for sums which are commensurate with courts awards. At the moment the pre-action protocol is not compulsory and does not involve all insurers. How it operates is unclear in certain instances. For example, it is not always clear when the investigation fee ought to be paid. The operation of the protocol varies between insurers. This is unsatisfactory. We would wish the Review to consider making the protocol compulsory. It would also be important to look at the rules for the protocol and to add/amend them for clarity. Given the protocol has been in operation now for over two years, it would be possible to modify the protocol rules to bring them into line with how they are working in practice.

The key features of any system designed to encourage early resolution would be the following:-

Access to independent legal advice for all parties;

The early exchange of relevant information between the parties;

An agreement by both parties that the basis for valuing claims is by reference to court awards. The insurers currently use software they have developed such as Colossus which values claims on what has been paid in previous cases by insurers as opposed to the courts.

A compulsory pre-action protocol.

A fair cost structure both in respect of pre-action settlements and after the action has been raised which takes account of the work required to effect settlement.

**1.2 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?**

We agree that the principles of proportionality and value for money are factors to be taken into account when considering a review of this nature. The default position should be that those cases with a low value or with no particular difficult legal issue do not require the same amount of time or money spent on them as those with a higher value or complex ground breaking legal issues. That said, there should be sufficient flexibility to enable cases of a low value to be allocated additional time should that be required. The difficulty in certain cases is that one or other of the sides can increase the amount of time spent on litigation by their behaviour during the litigation. If that party is not successful in either pursuing or defending the action they are, to an extent, penalised by having a finding of costs against them. Currently, personal injury actions have been taken out of the Small Claims procedure. This is to be welcomed. This allows for reasonable costs to be recovered in the event of one side dragging their heels in the litigation. That said, the costs awarded rarely cover the work done. We would like the Review to consider the question of introducing a client/agent account for all court cases. This would allow for a reasonable recovery of costs, such costs being paid by the unsuccessful party. Framing the account in this way would result in the recovery of costs at a level which reflects the work done by the solicitor and would avoid the pursuer's damages being subject to a reduction to cover the shortfall in the costs.

**CHAPTER 2 – ACCESS TO JUSTICE**

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

In any system of justice, it is vital that those using it know their rights and know where to obtain advice in relation to enforcing those rights. They should know where to obtain specialist advice and the system should regulate the practices of certain parties which may be contrary to their interests. For example, the Review will be aware of the fact that there has been a practice of third party capture by insurance companies i.e. when the insurers of the party at fault deal directly with the victim of the accident. This may prove to be contrary to the interests of the person making the claim.

**2.3 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 difficulty with any court procedure, even one which is relatively straightforward, is that there is a degree of form and process which is necessary to ensure that both parties are dealt with fairly and justly. Party litigants can find it difficult to understand the practices and procedures although clearly they are entitled to enforce their legal rights insofar as any dispute is concerned. Whilst

there may be certain types of cases, for example, a standard debt recovery case which may be suitable for a party litigant, our view insofar as personal injury cases are concerned is that it would not be possible for party litigants to run their own claims on the basis that personal injury cases involve an element of interpreting complex regulations and medical issues. This may involve both the court and the party which is represented in having to spend considerable time attempting to teach the party litigant the intricacies of the court process. Accordingly, we believe it to be in the best interests of both parties in personal injury cases, that both be represented.

In relation to personal injury cases, the problem should not arise too often. Most defenders will be backed by an insurance company for the claim, including legal expenses and those that are not will, on the whole, at least have the benefit of legal expenses cover. For pursuers, if the case is a good one then it is likely that they will have access to independent legal advice given that the majority of personal injury pursuer cases these days are ones which are taken on a speculative basis.

**2.6 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?**

There has already been a recent change to the limits for personal injury cases such that all ones below £5,000 are summary cause and those above are ordinary cause. It is difficult, at this stage, to assess how successful this change will be. Clearly, there will be an increase in the number of summary cause actions raised on the basis that the majority of personal injury actions are ones with a value of less than £5,000.

We believe that there may be room for a different process for dealing with low value personal injury cases. The current system of the summary cause procedure involves too much judicial time. The presiding Sheriff at the first calling requires to be aware of the issues in the case such that he needs to decide whether the case should be set down for a proof. It is often too early to decide on such matters. The case management flow, as introduced by the Coulsfield Rules, works very well within the Court of Session. There is no reason why these rules cannot be amended and used as required to good effect in the Sheriff Court. The advantage of doing so will be that we would have one system applied to all personal injury cases. If there is any difficulty in the interpretation of any particular rule then any ruling of the Court of Session will determine how it ought to be applied. This will give some clarity to the Sheriff Court about how these cases and processes should operate in practice.

As the majority of all personal injury actions are ones which are settled prior to proof and therefore are mostly settled with the involvement and the agreement of both sets of solicitors, there is no reason for there to be judicial case management in such injury cases as is presently practiced by the Glasgow Pilot Project for personal injury cases. We understand from the current statistics that an average of 1¾ hours of time is being spent on each of the cases in the Glasgow Pilot Project. That seems excessive given the type of cases included in the Project. The outcome of the Review will probably result in the Sheriff Court dealing with a greater volume of personal injury cases.

Whatever system is put in place is one which ought to ensure that the case will be dealt with as quickly as possible and for neither party to be in a position to use tactics to stall the resolution of the case. There should be sufficient flexibility to allow for judicial intervention to resolve any issues between the parties, but that should be the exception.

We do not agree that personal injury claims in Scotland should be dealt with in a similar way to the system adopted in Ireland. The Personal Injuries Assessment Board (“PIAB”) appears to have been set up to ensure that there is little involvement of lawyers. Given the principles that all pursuers are entitled to independent legal advice and that conflict of interest must be avoided, it seems to us that the operation of PIAB is entirely contrary to those principles. Further, we are aware of the research which has suggested that up to 90% of those pursuers who have been referred to PIAB have, in fact, resorted to seeking independent legal advice notwithstanding that they have required to pay for that advice. PIAB seems a very backwards step and one which is simply not practical and fair.

## **CHAPTER 3 – COSTS OF LITIGATION**

### **3.4 Are the current rules for recovery of judicial expenses satisfactory?**

We believe that consideration should be given to a change in the rules for recovery of judicial expenses. The principle that the losing party should pay for the reasonable expenses actually incurred ought to apply. We would suggest that the Court should be entitled to award expenses on a client agent basis, as happens in England. An appropriate charge rate would require to be determined, depending upon the complexity of the work and the solicitor doing the work.

We do not believe that it is appropriate to cap the expenses available to the winning party or for expenses to be calculated with reference to the value of the claim, as currently happens in non personal injury small claims. Whilst we fully appreciate that the question of value for money and proportionality should be kept in mind, it seems to us that if a party is not prepared to come to the table to discuss matters and reach a settlement at an early stage then that party should pay for extending the life of a case, whatever its value. The purpose of any litigation should be for an appropriate award of damages to be awarded to a pursuer and for damages to be awarded only where the case has merit. By capping expenses, access to justice may be affected, since a pursuer may feel pressurised to accept an offer which is substantially less than the case is worth, simply because of concerns that expenses being incurred will not be able to be recovered. On the other hand, defenders may feel pressurised into offering settlement terms in cases which are without merit, simply to avoid incurring irrecoverable expenses. Experienced and well resourced litigants may seek to abuse the system where there is no effective deterrent.

There should be procedures in place which will allow a reasonable party to use the court process to limit the expenses incurred. For example, the use of Tenders and indeed Pursuer Offers are tactics which ought to be available to either party to force the pace of the litigation and focus both

parties' minds on the value and merits of the case. At the moment, there is little provision for a pursuer to advise the defender of what he believes to be the value of the case. Whilst that clearly can happen in correspondence both before and after the action has been raised, it would be better to have a formal process in place similar to Pursuer Offers so that the value of the claim can be formalised with the court at the earliest possible time. There is already the option for a defender to lodge a Tender but it does surprise us how little Tenders appear to be used. This may be because agents are aware that Tenders are usually based upon the valuation of the case as indicated by the internal software which the insurers use, such as Colossus. Our experience suggests that this software generally results in an undervaluing of the claim and accordingly, any Tender which is lodged by an insured defender may justifiably be ignored by the Pursuer.

We would also urge the Review to take account of the unfairness of the system in relation to recoverability of expenses in the Sheriff Court. Block scale fees are out of line with solicitors' charges. There is a considerable amount of work involved in the solicitor firstly meeting the clients, drafting detailed documentation and thereafter serving that documentation, which is not covered by the block scale.

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

We understand that the majority of all personal injury claims which make it to the courts are run on a speculative basis. Where a client has signed a no win no fee arrangement, if there is no legal expenses insurance in place (which is often the case), the law firm is effectively insuring the client against the risk of the claim not being successful. If unsuccessful, not only will the law firm not be entitled to any costs at the end of the case but could also be liable to pay the other side's costs. There is no provision in the current rules relating to judicial expenses to reflect the fact that the law firm has taken on the risks (sometimes considerable) of running the case.

To reflect this new position of law firms in the context of personal injury litigation we suggest that there should be an entitlement to an uplift in expenses awarded if they are successful in achieving a settlement for the client. In England, conditional fee agreements allow for such an uplift, payable to a pursuer in the event of a successful claim. This is in the form of a success fee which is paid by the insurance company. The level of success fee is based upon the level of risk taken by that law firm both at the start of the case and as the case progresses. In cases where there is little risk, perhaps a standard road traffic case, then the success fee should be minimal but where the risk is greater, such as in a medical negligence case, then the level of the success fee reflects the level of risk. The system encourages solicitors to take on cases where liability is an issue and has the advantage of increasing access to justice. We would urge the Review to introduce a similar system in Scotland.

We are aware that, in England, conditional fee agreements have been the subject of extensive litigation. We would hope that in Scotland we could learn from the experiences in England, such that we could introduce the concept of conditional fee agreements without it leading to involved and lengthy litigation, since many of the issues likely to arise have already been determined in England.

So far as legal expenses insurance is concerned, we have noted that in England, the ATE insurance premiums can be significant. We heard of one recently where the original action was valued at £500,000 and the ATE premium was £320,000. That premium together with the solicitor's costs and a success fee will be paid back at the end of the case if the pursuer is successful. Clearly, the issue of insurance premiums, particularly ATE, is one which would have to be carefully considered. If ATE premiums were deemed to be a recoverable expense then the insurers would wish and indeed require to become involved in the litigation. We do not consider that to be appropriate and would therefore argue against insurance premiums being recoverable in Scotland.

## **CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURT**

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

We agree that the civil business of the courts is adversely affected by the pressure of criminal business. Whilst, in theory, a number of the Sheriff Courts currently designate Sheriffs to deal with civil business, that does not always prove possible as the designated Sheriff will be called to assist on criminal business. Often, they may have to undertake criminal business at the start of the morning which may last well into mid morning. Given the restricted hours of the Sheriff Court this will have a significant impact on the speed with which civil business can be dealt with. This is particularly acute in some of the smaller Sheriff Courts.

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

We believe that there is need for specialisation within the Sheriff Court. For example, in personal injury, we see no reason why certain designated Sheriffs cannot be identified to undertake this work. In the Court of Session, a number of the Judges have experience of dealing with personal injury cases. That, however, is not the case with a number of Sheriffs in the Sheriff Court. A number, whether they be temporary or permanent, have largely had a background of criminal work. This is clearly unsatisfactory. We appreciate that the Review have been considering the question of Sheriff Court Centres of Excellence and we approve of this. We see that if there was, perhaps, five courts dedicated to personal injury in Scotland covering the major cities then it would be possible for civil business (most of which is personal injury) in those courts to be dealt with much more effectively and efficiently. We believe that Sheriffs who have particular expertise in specialised areas will be much more able to deal with cases quickly, and indeed justly. At the moment, there may be a hesitation in raising actions in certain Sheriff Courts in Scotland as we are aware that the Sheriff has little experience in dealing with such cases. It is not always the law which dictates his/her thinking on how the case is to be decided. Scotland is a small enough place to limit the dedicated courts to the major cities. In any event, most litigation can be dealt with at arms length and does not necessarily require attendance at the court until such times as the case calls as a Proof.

**4.5 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 believe that straightforward low value cases are ones which should properly be raised and dealt with in the Sheriff Court. There are too many cases in the Court of Session of a low value which deal with straightforward legal issues which could be in the sheriff court. We appreciate, however, the reasons why they may be there in that the advising agents of the pursuer may consider that their local Sheriff Court is not one which can deal with these matters. The present system of the Sheriff Courts being non specialised and the difficulties we have raised above with regards to the impact of criminal business is one which, if changed, would allow for there to be a greater number of lower value cases dealt with within the Sheriff Court.

We appreciate that a limit has to be set relating to the value of the case. We are aware of the research which is available to the Review concerning the type and value of cases previously being raised in the Court of Session. Taking this into account, we would consider the sum of £10,000 to be the minimum value for cases in the Court of Session.

It is not always easy to accurately assess the value of the case at the outset. Accordingly, the practice over the years has been that any writ is one which is substantially greater than one would expect to be the value of the case. No doubt, this practice will continue. It therefore will be the case, no doubt, that court actions which continue to be raised in the Court of Session will settle for a sum which is less than the minimum Court of Session level whether that is £10,000 or any other figure. Whilst we appreciate that there must be some rules in place which will deter parties from raising actions for sums which are vastly in excess of what they are worth, we would wish there to be a degree of flexibility in relation to how expenses are calculated. Presently, it is mostly determined by the value of the settlement. For example if a claim settles for £8,000 at a time when the writ raised was for £20,000 then the costs will generally be granted in accordance with the Sheriff Court scale. Accordingly the pursuer's agents may find that they are penalised so far as costs are concerned as a result of the claim settling for £8,000 as opposed to above the £10,000 threshold. In the circumstances, we would wish there to be flexibility in the rules with regards to the question of which expenses would apply in that instance. There may be provision for coming before the court to explain why the case had originally been raised for £20,000 as opposed to something closer to the level it actually settled for.

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

We do not believe that the jurisdiction of the Court of Session and Sheriff Court should be unified to create a single Civil Court. Equally, we do not believe that the Court of Session should just be a Court of Appeal. There may be various cases which require to be dealt with in the Court of Session either in terms of value or in terms of the complicated nature of the legal aspects involved even if the value is less than £10,000. There ought to be a flexible system which will allow for the transfer of cases both to and from the Court of Session on cause shown. We would not wish there

to be a denial of access to the specialisation which is available in the Court of Session for any case with merit.

**4.16 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?**

In our view the key to ensuring that the Sheriff Court operates effectively is to make sure that firstly there are a sufficient number of Sheriffs to deal with the business depending upon the volume of business passing through that court and secondly to have an effective administrative function in place to ensure that the cases are dealt with as quickly as possible. There is no doubt that a number of interlocutory matters could be dealt with by the equivalent of a Master in England. It does not necessarily always have to be a Sheriff. Some of the Sheriff Clerks in our current Sheriff Courts who are very experienced could easily deal with a number of straightforward interlocutory matters. If the final decision is left to the Sheriff in conjunction with the Sheriff Clerk who has heard both parties, if necessary, then such a system ought to work.

**4.21 Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?**

On the question of appeals to the Sheriff Principal it appears to us that in many cases, this is delaying the inevitable ie an appeal to the Court of Session. If the Sheriff Principal is not the last resort for Sheriff Court cases then this two tier process ought to be abolished. In essence, we believe that appeals should go directly from the Sheriff to the Inner House of the Court of Session.

## **CHAPTER 5 – REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES**

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

Whilst mediation could have a role in personal injury cases, it is clearly not going to be appropriate in all cases. One of the main difficulties is that those involved in the mediation process would essentially be the same parties who have attempted to settle the case prior to any action being raised ie the pursuer's agents and the insurers' agents. As we have indicated previously in this paper, one of the main reasons why court actions require to be raised in personal injury cases is that the insurers do not offer sums which are comparable with the sums awarded in the courts but rather offer those sums which are calculated by their own software, by reference to settlements previously achieved out of court. If, in any mediation, the issue is one to do with the value of the case then we do not see that mediation is going to assist in the settlement of cases if the insurers continue to solely rely upon their internal software as opposed to consideration of the court awards. Equally, in any issue involving liability, there is no doubt that a robust pre-action protocol process should allow both parties to adequately explore all aspects of the claim. If they have done so and thereafter proceed to mediation then presumably the same arguments will be canvassed and that presumably will lead to the same result.

In these circumstances, if there was a move towards compulsory mediation then, it seems to us, in quite a number of cases this would simply lead to adding an additional layer of process which, for the reasons we have stated above, would ultimately not be appropriate for the majority of claims. Compulsory mediation, in the circumstances, will simply add an extra layer of expense to both parties.

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

We are in no doubt that IT ought to play a very central role in the running of cases going forward. There is no reason why most cases cannot be dealt with at some distance from the court which has issued it and the use of such facilities as video conferencing, electronic filing of documents, emailing and I-meetings can be used to good effect. There is no reason whatsoever why most cases, indeed even opposed interlocutory matters, cannot be dealt at a distance given the range of suitable technology now available in several courts.

**5.8 What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?**

We believe that case-flow management as opposed to Judicial Case Management is the way forward for personal injury cases. The manner in which Chapter 43 of the rules of Court of Session operates seem to us to be ones which could be duplicated very well in the Sheriff Court. .

**CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS**

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

As indicated above, in our view the only possible way that the current pre-action protocol can work is for there to be certainty in its application and making it compulsory for all insurers. There has to be co-operation between the parties as to how it operates. There would also need to be some movement on the part of the insurers with regards to the valuation of claims.

Whilst the current level of recovery of fees under the pre-action protocol, to an extent, encourages the early settlement of claims, we still see some difficulty in being able to settle the majority of claims under the pre-action protocol if the insurers are not willing to change their position on the valuation of claims. Clearly, the pre-action protocol fees are pitched at a level which is less than the insurers would have to pay if the case was to go to court. However, if the court action is settled after it is raised but before it is defended, then the recoverable costs are considerably less. Accordingly, it has been the practice of the insurers to allow the pursuers to raise actions and thereafter to immediately settle the action after the matter has been raised, thereby saving costs. We see no reason why, in the event a claim is successful, the Defenders should not pay for the expenses incurred prior to the action being raised as well as the costs incurred in raising the action.

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

The pre-action protocol only applies to cases with a value of less than £10,000. We believe it should be extended to cases with a value up to £50,000.

**6.12 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?**

We believe that the time available to hear a proof during any court day is restrictive. We see no reason why, if a proof has been allocated and is due to run that it cannot begin at 9am and finish at 5pm, with one hour off for lunch. Whilst clearly there may be an issue about the availability of witnesses early in the morning, one would expect that at least the pursuer would be there and would be available to give evidence if the case could indeed start at 9am. If a Sheriff could be designated to the case in advance we see no reason why there could not be a call over of all cases at 8.30am which would allow for the case to start at 9am. That would effectively allow for the equivalent of at least two days worth of evidence in the current one day structure. We believe that there is greater scope for written submissions and the agreeing of evidence which could reduce the amount of time required in court yet further.

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

The English structure of the discovery of evidence is one which, appears to us, to be much more fair and just in all the circumstances. The current arrangements in Scotland of one or other party having to make an application to the court for the disclosure of evidence with the need to be specific about what is required and having averments on the record to back up the calls is one which is open to abuse by the party holding on to the documents. The current system enables the party which has documents which are relevant to the case to withhold the disclosure of those documents if the other party is not able to provide the court with a valid reason as to why these documents are required. The system in England of obliging both parties to disclose all documents which they consider to be relevant to the case is much more fair and just. It seems to us that if such a process can be made at as early stage as possible then it may involve a considerable reduction in the costs required to run the case. It happens all too often that certain documents which are clearly relevant to the case only come to light at a very late stage. This simply prolongs the life of a court case at a time when it could have settled at a much earlier stage.

## **FAMILY LAW**

### **CHAPTER 3 – COSTS OF LITIGATION**

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

The limited availability of solicitors carrying out legal advice and assistance and legal aid work has a significant effect on access to justice. Anecdotal evidence suggests that there are currently only four practices in Edinburgh which will take on family law clients on a legally aided basis. Again, anecdotally, we understand that of these four firms, two are about to give up legal aid work, leaving only two firms carrying out family law work under either the legal advice and assistance or the legal aid scheme.

### **CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURT**

#### **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. The pressure on Sheriffs and Judges having criminal business adversely affects the civil courts in various different ways. Civil business is delayed because the Sheriff or Judge has a criminal walk-on for a deferred sentence or the like. Sometimes there is a lack of Sheriffs or Judges for civil business because of the volume of crime. There is also a difficulty in fixing fresh dates for part heard proofs because of the particular Judge's or Sheriff's commitment to criminal business in the immediate future.

#### **4.2 Should (a) some judges of the supreme courts and (b) some sheriffs be designated to deal with civil business?**

Yes, and preferably they should have specialist areas of expertise, eg, family law.

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

Yes.

The advantages of separation of the Sheriff Courts into civil and criminal divisions would include allowing Sheriffs to specialise in the procedure/law in their specific area, encouraging specialist candidates to apply for posts and allowing specialist Sheriffs to focus on relevant matters before them, thereby providing a faster and more efficient service.

#### **4.4 Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?**

With regard to the possibility of a specialist family division in the Sheriff Court or Court of Session, there are a number of issues which occur to us: The two main areas of dispute in a family action

are financial and child related. A large part of the time taken up by, for example, the Glasgow Family Court, is child related work. Disputes arise over contact or residence. An alternative approach to having a specialised family court would be to try and take childcare disputes out of the court system as much as possible. The dynamics of many of these disputes are complicated and can be highly emotive. The court system, even with special rules for family matters, (eg, Child Welfare Hearings) finds it very hard to deal with difficult childcare cases in a practical way. Rather than have childcare cases adjudicated by the Sheriff, they could be diverted to another system. We could learn from England who have Cafcass reporters. These are properly trained reporters who deal with childcare disputes. It may be more cost effective to pass childcare disputes to trained reporters. There is still a place for the courts in childcare disputes, as some parties need the compulsion of a Sheriff's order and in some cases evidence may need to be heard to resolve disputes of fact. If the bulk of childcare disputes were taken out of the mainstream court system, we would be left with financial disputes in family actions, and there would be a less compelling argument for specialist sheriffs to deal with family actions.

**4.5 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?**

The key factor in influencing the decision on where to raise a family action is what court is the best for a client. The complexity and value of the case would have a large bearing on where it is raised, as would the question of convenience – where is the local court? Other, more minor factors would include raising proceedings in the court which would be considered to be likely to provide the best result for your client, a lack of confidence in the ability of the other party's local agent to deal with the case appropriately, and the desire to put the matter in the hands of Edinburgh agents and Counsel.

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

The Court of Session currently has an exclusive jurisdiction for child abduction actions. This should remain. For many years, the German courts had a very bad reputation for failing to implement the Hague Convention on international abduction. We understand that the problem was caused by applications being made to the lower civil courts which did not fully appreciate the Treaty obligations. Child abduction actions have very tight timescales. The Court of Session is geared up to processing international child abduction actions within the correct timeframe. Scotland has a very good reputation amongst the international community for implementing its obligations in respect of the various child abduction treaties, and we believe that this is because this work has always been dealt with in the Court of Session.

**4.11 Given 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, in divorce actions where children/finance are not in dispute.

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

Yes, as above.

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

It can be helpful if the Sheriff has local knowledge, eg, when considering values of matrimonial property, in making practical suggestions in contract cases, in identifying crimes prevalent in a particular area etc.

**4.14 Are the current arrangements for dealing with undefended actions satisfactory?**

Yes. Many undefended actions are carried out by party litigants who require assistance, which is provided by the Sheriff Clerk. They can visit the local court, and speak with the Sheriff Clerk who can help them complete the appropriate forms. It is important that undefended actions continue to be dealt with at a local level, rather than centralised in order that the litigants have ready access to justice through their local court.

**4.16 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?**

Undefended divorces where there are no children under the age of 16 or money disputes.

**4.20 Are the existing appeal arrangements satisfactory?**

No. There should be greater facility for early disposal of appeals in childcare cases. Early disposal should mean just that. On occasion we have been advised, “We will try and fit you in if we get a gap next term”.

**CHAPTER 5 – REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES**

**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?**

The efficient but fair administration of justice.

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

In family actions, where there is a dispute over residence or contact, we would like the court to encourage or in some other way facilitate the very early use of mediation in order to try to resolve the dispute. Mediation should take place at as early a date as possible, to allow the court to

intervene, if mediation has not been successful, at the child welfare hearing stage in terms of the current timetables set down by the Sheriff Court Rules. The parties and the children deserve the safety net of knowing that there will be a judicial decision at an early stage, where no agreement has been reached.

An alternative to mediation would be to take childcare disputes out of the court system altogether and put them into the hands of trained reporters such as those provided in England through Cafcass.

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

See above.

We would welcome a solicitor or advocate mediator being appointed early in the proceedings to assist parties to resolve financial disputes arising on divorce, with the matter reverting to the Sheriff if agreement is not reached.

**5.4 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? Please specify.**

Yes.

- (1) Many of the most difficult childcare cases involve a power imbalance between the parents. The mediation process can at times reinforce this power imbalance. Often the dominant personality in the relationship will be the one who has in the first place pressed for the mediation process taking place – the perceived wisdom being that the party offering mediation is seen as the reasonable one, and the party refusing mediation as the unreasonable one. In such circumstances, the parties should not be forced to mediate.
- (2) Where there are allegations of child abuse in a family action mediation would be inappropriate.

## **PUBLIC LAW**

### **CHAPTER 3 – COSTS OF LITIGATION**

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

We note the reference at paragraph 3.32 of the Consultation Paper to the ‘inequality of arms’ which can arise in litigation where one party is legally aided and the other is an individual of modest means. We have sympathy with the concerns expressed about this inequality.

A similar but distinct inequality of arms can arise in public law litigation where an individual of modest means may have a well-founded and legitimate claim against a public authority but is dissuaded from pursuing that claim – even where their own agents may be willing to act on a fixed fee or pro bono basis – for fear of an adverse award of expenses being made against them.

We would suggest that the Review give consideration to the need for clarity as to (1) the competence of seeking an order equivalent to what is described in England, Wales and Northern Ireland as a ‘protective costs order’ and (2) the circumstances in which such an order may be granted. The possibility of the making of such an order was discussed in McArthur & Ors, Petitioners [2005] CSOH 165 but the Review may consider that more formal guidance may be appropriate.

### **CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURT**

#### **4.4 Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?**

We consider that there are also grounds for considering greater specialisation within the Court of Session in relation to the hearing of petitions for judicial review and, where heard in the Outer House, statutory appeals. We appreciate that there are at present ‘designated’ judicial review judges but in our experience judicial review petitions are often heard by judges who are not so designated. We understand that a strict policy of designation may be untenable but we believe that the rapidity with which public law jurisprudence is now developing would justify more formal steps being taken to utilise specialists in public law in judicial reviews and statutory appeals wherever possible.

#### **4.6 In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?**

We consider that the exclusive jurisdiction of the Court of Session to hear petitions for judicial review. We explain our reasons for this view in our answer to question 4.15 below.

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

As mentioned above, we consider that the exclusive jurisdiction of the Court of Session should be retained. Contrary to the view expressed in the Consultation Paper, our own experience is that very few judicial reviews can be characterised as “essentially private law disputes” of the sort aired in *Smith, Petitioner*. Certainly almost every petition for judicial review will have at its heart the rights and interests of an individual - the absence of which would raise immediate problems with respect to title and interest to sue – but equally such petitions will frequently raise important points of public or administrative law. The broader significance of issues in a petition for judicial review may not become apparent until the first hearing of the petition. We would have concerns about the allocation of judicial review cases as between the Court of Session and Sheriff Court on the basis of an administrative judgement as to the relative public importance of the issues raised.

Given the relatively low volume of judicial review business in Scotland we would also have concerns that attempts to further develop public law specialist judges within the Court of Session (as to which see our answer to question 4.4 above) would be frustrated by the allocation of petitions for judicial review amongst the Sheriff Courts.

We note the reference in paragraph 4.53 of the Consultation Paper to the creation of specialist centres which could deal with public/administrative law. It is difficult to comment on this suggestion without greater detail as to how such centres would operate and we would hope that if such a proposal were to be made there would be further consultation on the detail of that proposal. We would simply re-iterate our view that specialisation within the Court of Session for the purposes of both judicial review and statutory appeals would be an appropriate means of ensuring the efficient and effective conduct of public law business. We make specific comments in relation to statutory appeals in our answer to question 4.22 and in relation to judicial review on our answer to question 6.24.

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

We are of the view that it is appropriate that a large number of statutory appeals be dealt with by the Court of Session and we can see good reason, in terms of achieving greater judicial specialisation, for having designated judges to deal with such appeals. To enable that to be effective, we would support greater flexibility to allow such appeals to be dealt with by a single judge in the Outer House. While the current rules provide a mechanism by which such appeals may be remitted to the Outer House from the Inner House it is our experience that this option is not often sought and where it is sought may be refused. Given the current ‘presumption’ in favour of such appeals being dealt with in the Inner House that is perhaps unsurprising. Transfer of many of these appeals to the Outer House could expedite their disposal and could also allow more satisfactory arrangements in relation to appeals: it seems anomalous that an appeal under statute in relation to a planning matter which is dealt with at first instance in the Inner House can be

appealed only to the House of Lords whereas a judicial review by an objector to the same planning decision may be the subject of appeals both to the Inner House and the Lords.

## **CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS**

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

We agree with many of the comments made at paragraph 6.103 of the Consultation Paper and believe that judicial review procedure could be improved by more pro-active case management. We consider it an unhelpful anomaly that a respondent to a petition for judicial review may wait until as little as 48 hours before the date of the first hearing before intimating an intention to answer a petition. This is at odds with the much more formalised procedures for dealing with statutory appeals which may raise very similar issues and it also sits ill with commonly understood notices of fair notice.

We do not consider that there is any pressing need for a formal time limit for the bringing of judicial review proceedings such as that which exists in England. Nor do we believe that a formal requirement for leave is required.

We do, however, consider that it would be useful to have in place a mechanism for dealing expeditiously with preliminary issues such as competence, delay and title and interest rather than leaving those matters to be dealt with alongside the ‘merits’ at the first hearing.

## **COMMERCIAL LAW**

### **CHAPTER 1 – INTRODUCTION**

- 1.2 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?**

We do agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for development of the Review’s recommendations. We would emphasise our concern that questions of proportionality and value for money should be addressed from a broad rather than narrow perspective and having regard to the factors – such as the need for judicial precedent and societal values such as protection of children and vulnerable persons – referred to in paragraph 1.13.

### **CHAPTER 3 – COSTS OF LITIGATION**

- 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?**

We consider that the costs derived from Scottish Legal Aid Board statistics to which reference is made at paragraph 3.3 of the Consultation Paper significantly understate the true cost of litigation. SLAB accounts are artificially low both because the rates applicable to work carried out on a legal aid basis are substantially lower than the rates charged by the majority of law firms on a privately paying basis and because a considerable amount of work which professional advisers would consider to be essential to the proper conduct of a litigation may not be recoverable in terms of the legal aid regulations.

- 3.4 Are the current rules for recovery of judicial expenses satisfactory?**

With respect to the Court of Session, we consider that the general discretion afforded to the judge in any particular cause to make or refuse awards of expenses is appropriate. Similarly, we are satisfied with the rules of court regarding the circumstances in which an additional fee may be awarded.

Our concerns with respect to the recovery of judicial expenses concern the amounts which may be recovered by a party in whose favour an award of expenses has been made. We explain those concerns in our answer to question 3.5.

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

We are conscious that the level of recovery which a successful party can hope to achieve following litigation in the Court of Session will often compare unfavourably with the level of recovery which could be expected from similar proceedings in the English courts. This discrepancy appears to

derive at least in part from the extent to which the Auditor of Court of Session is prepared to allow recovery of particular items included within accounts of expenses and his view of the necessity or otherwise of agents having undertaken certain work in connection with litigation.

By way of illustration, the Auditor will normally only allow recovery of time spent by a single solicitor on behalf of a party to the litigation. This principle does not reflect the realities of, in particular, complex commercial actions in which it is now commonplace for a team of solicitors – of varying levels of experience and expertise – to act on behalf of one or both parties. We consider that team working of this sort may be both legitimate and in the client's interests and that there ought not to be any objection in principle to it.

We are concerned that the current rules and practice with respect to the recovery of judicial expenses in the Court of Session has the potential to put Scotland at a disadvantage so far as it may be viewed as being in competition with other jurisdictions as a forum for the resolution of commercial disputes.

More generally, we believe that all users of the Court of Session would benefit from greater transparency as to the principles which will be applied by the Auditor in the taxation of judicial accounts.

#### **CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURT**

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

We do consider that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business. Particularly with respect to civil litigation in the Court of Session our own experience is that the allocation of business and the commencement of hearings are frequently delayed to allow criminal business to be concluded.

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

We do not advocate a completely rigid division between civil and criminal judges and sheriffs. We do, however, think that there is merit in a more formalised system within which individual judges or sheriffs are allocated predominantly criminal or civil business. This ought to enable not only greater certainty with respect to allocation of business but also the development of greater specialisation and expertise.

##### **4.4 Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?**

In the Sheriff Courts we consider that there is much to be said for the creation of Commercial Courts within each Sheriff Court (or at least within each Sheriffdom) following the examples set by those Sheriff Courts referred to in the Consultation Paper.

**4.8 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 believe that the Court of Session should not be transformed to become a court of appeal only.

The Court of Session is an extremely valuable forum for the conduct of first instance business. This may be for reasons related to the complexity or novelty of the subject matter in issue, e.g. in relation to petitions for variation of trusts which may be dealt with by the Inner House at first instance, or related to the value (in monetary or non-monetary terms) of the claim.

As we have alluded to in relation to public and administrative law business, the Court of Session is also valuable as a first instance court to allow the concentration in one forum of cases which on a Scotland-wide basis may not represent a large volume of business but in relation to which it is desirable to create a centre of judicial expertise. This latter point is particularly well illustrated by the work which has already been done in creating the Commercial Court of the Court of Session and in the creation of specific procedures for a variety of specialist subject areas including causes relating to intellectual property matters.

**CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS**

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

So far as commercial litigation is concerned, a requirement to comply with a pre-action protocol has obvious advantages for a potential defender in bringing to that party's attention the imminence of litigation and, in most cases, allowing that party to take steps to prepare for the defence of proceedings. Less obviously, a pre-action protocol also has advantages for a potential pursuer – and that party's legal advisers – in ensuring that the merits of litigation are explored as fully as possible before proceedings are raised.

Those advantages do depend to a great degree, however, on the extent to which compliance with a protocol is enforced by the court and the willingness of the court to impose sanctions for failure to comply with such a protocol. Enforcement can be difficult: parties may have legitimate reasons for bringing proceedings before every detail of their case has been (or could be) fully worked through. An obvious example is where proceedings must be raised before recovery of vital documentation can be achieved, the absence of which documentation at the outset may make it impossible for a pursuer to present a fully developed case within the ambit of a pre-action protocol.

Potential disadvantages of pre-action protocols include that compliance adds further to the costs of litigation and may not ultimately bring about a more expeditious settlement of a dispute.

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

We consider that the use of pre-action protocols in the Commercial Court of the Court of Session is appropriate and we do not feel strongly that the use of a pre-action protocol should be extended to Ordinary actions in either the Sheriff Court or the Court of Session.

**6.3 Should compliance with pre-action protocols be voluntary or compulsory?**

If pre-action protocols are thought to be a worthwhile part of commercial litigation procedure then we consider that compliance with those protocols should be compulsory.

## **INSURANCE AND SHIPPING**

### **CHAPTER 1 – INTRODUCTION**

**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?**

Within the confines of our adversarial system, some steps are already taken to encourage early resolution of disputes. The culture which the adversarial system breeds, and the fact that, in some cases at least, the issue of the legal expenses incurred are as significant as the claim itself, can mean that information required for early resolution is not forthcoming as early in the process as it might be. The system should encourage early resolution of disputes, but it is hard to see that, across the board, that could be without resort to the Courts. The Courts are required to resolve disputed issues of fact between the parties and to rule on competing interpretations of the law applicable to facts.

The key feature of a system designed to encourage early resolution would be early disclosure of information and a requirement to meet with the opponent. That would, however, bring with it significantly increased cost at an early stage, which may well run counter to some of the principles underpinning the Review.

Since 2006 a voluntary pre-action protocol has operated in relation to the resolution of lower value, excluding medical negligence and disease claims. Since July 2007 a similar protocol has applied to Professional Indemnity claims though it is neither commonly known about nor used.

There are at least two ways in which the existing protocols could be improved. First, by making compliance compulsory, the protocols would be used in every case. Second, by ensuring that there was a coordinated approach throughout the claim resolution process, non compliance with the protocol could be the subject of expenses sanctions in the event that court proceedings are raised.

We would welcome the extension of the use of protocols to deal with other types of reparation claims and higher value claims.

### **CHAPTER 2 – ACCESS TO JUSTICE**

**2.6 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?**

Whilst there is an attraction to trying to find a new method of dealing with low value cases, the recent history of both small claims and summary cause cases suggests that some form of judicial intervention will always be required, and in many cases lawyers will continue to be involved. The general public are now very aware of their rights, and many will still want to involve a lawyer to

vindicate those rights. Commercial organisations will generally wish to engage lawyers to deal with litigation. Cases such as those involving consumer and housing issues can require resolution of complicated questions of law and the outcome of these cases can have a very significant impact on the parties. As the Review has noted, there are cost implications and, in respect of choice of forum, issues of ensuring justice for both parties. We do not think that the introduction of a Personal Injuries Assessment Board or similar body would be appropriate. Parties should have the right to have a claim decided and quantified by a suitably qualified and experienced judge exercising judicial discretion. There would also be a risk that those who applied to the Board would not be satisfied with the Board's assessment of damages and then opt to litigate.

### **CHAPTER 3 – COSTS OF LITIGATION**

#### **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?**

As a general observation, the cost of proceeding now figures heavily in the risk analysis exercise carried out with clients in considering whether and if so at what level to settle a case.

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

For the commercial clients for whom we act in insurance and shipping work, it is generally not an issue. There is however sometimes a frustration that fees are paid but the Court system is unable to provide the judicial resource when required, meaning that clients pay for having a legal team wait around at Court rather than for legal work actually carried out on their behalf.

#### **3.4 Are the current rules for recovery of judicial expenses satisfactory?**

Although the rules for recovery of judicial expenses do not allow for the full recovery of expenses incurred, the current levels of expenses potentially to be awarded are still significant enough to represent a factor to be taken into account when considering either bringing or defending cases in Court. We would be concerned that a system whereby full recovery of expenses was possible or alternatively a system whereby each side met their own costs but there was a substantial success fee taken from recovered damages (eg the United States model) may encourage spurious claims. We consider that the Scottish system whereby a reasonably substantial contribution to expenses can be expected by the successful party encourages a prudent approach to litigation.

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

The expenses recoverable judicially do not reflect the work required to be carried out in relation to the taxation of judicial accounts. The system of taxation is expensive, laborious and not productive of certainty for clients. There is currently no opportunity to “tender” on the question of expenses and there may be merit in introducing such a procedure.

## CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

### 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. Many hours can be wasted by civil practitioners waiting for a judge to complete criminal business, with in many cases, substantial parts of a Court day being lost, resulting in continued diets which add both to expense and delay. With the Court requiring estimates of time for diets, it is unfortunate that the pressure of criminal business often means that the time estimated is not made available for civil business. In our experience there are frequently lengthy delays and disruption in civil business caused by the need to deal with criminal business. We accept that the public interest requires for criminal work to be given priority but delays are extremely expensive once the time of lawyers, parties and expert witnesses is taken into account.

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

We see merit in a system whereby, for a period, a judge could be allocated exclusively to civil business so that civil business was allowed to proceed at the allotted time, without interruption. This would take a significant effort in liaison between the civil and criminal administrations within the Court system.

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

Judges with particular expertise should be allocated cases within that area of expertise if possible. It does not seem to us, however, that the size of the jurisdiction justifies specialisation on the same scale as, for example, in England. If however a judge comes more predominately from either a civil or a criminal background, then it would seem reasonable to take account of that in the allocation of that judge's work. As to more specialist areas, it would help if judges who had particular areas of expertise and interest dealt with those areas. This would give a greater confidence in the judicial system and might assist in attracting the resolution of disputes to Scotland in specialist areas. If there is to be a more formal specialisation then we consider that personal injury, commercial, and family law are the obvious candidates.

### 4.5 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?

Generally, value is an important consideration. Location is another. Flexibility of procedure is another. For an action which is complex on its facts and requires significant development of pleadings, the Sheriff Court system is often inflexible because of the nature of the timetable automatically generated there.

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

No. The loss of a Supreme Court of first instance would be a significant loss for not only the judicial system but also for the country.

**4.8 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 believe the Court of Session should retain a first instance jurisdiction. The lower courts are undoubtedly assisted by the kind of detailed scrutiny which the Court of Session provides in cases involving complex or novel points of law and statutory interpretation. It must also remain possible for a lower court to be asked to remit such cases to a higher court where appropriate.

**4.9 If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?**

The figure of £10,000 would seem appropriate.

**4.11 Given 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?**

Again, given the size of our jurisdiction, although there are high value cases it might prove difficult to adequately resource, in judicial terms, a lower Court.

**4.12 Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?**

See comment above.

**4.13 Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?**

Geography can present difficulty. Cases sometimes require to be raised in a particular Sheriff Court to comply with the rules on jurisdiction, but in a Court which is not convenient to any of the parties. In such circumstances the cost of actually attending Court for any substantive hearing can of itself be a factor in the economics of proceeding.

**4.16 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?**

The system and procedure for dealing with undefended applications in the Sheriff Court is unduly cumbersome.

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

If the Court system was adequately resourced temporary judges and part time Sheriffs would only be used in exceptional circumstances, rather than as part of the normal compliment of the judicial system. We see there being a danger of reliance on temporary/part-time posts where permanent appointments would be more appropriate. The system perhaps operates best in the Court of Session where there is a ready supply of well qualified and experienced members of the bar to fill positions. It is understandable that a part-time or temporary sheriff may often have difficulty getting to grips with cases which fall outside their previous area of expertise. We accept however that the use of part-time/temporary posts can be helpful in providing individuals with experience before taking up a permanent post.

**CHAPTER 5 – REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES**

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

The Court should encourage parties to consider all methods of dispute resolution, but should recognise that in many cases, if a dispute cannot be resolved, and unless there is a contractual dispute resolution mechanism providing for a forum other than the Court, parties are confident in the Court system.

We do not consider that ADR should be required, but we do consider that consideration could be given, at an appropriate time in proceedings, to requiring the parties to attend a pre trial meeting which operates successfully in the Personal Injury Procedure in the Court of Session. Ultimately parties should still have the choice as to how to resolve their dispute, subject to the over riding control of the Court.

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

There is great scope for the use of IT in the management of cases. Electronic filing of documents, intimation of Motions, delivery of Interlocutors and perhaps even dealing with minor applications – for example for continuation of a hearing - can all be dealt with electronically. The use of conference call facilities in Aberdeen and Glasgow Sheriff Courts at the moment is very helpful in fact from our experience tends to result in greater judicial time being given to cases.

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

The present system of there being a basic timetable which can be extended on application to the Court works reasonably well. It may be beneficial, however, to have some form of judicial intervention available in all cases if the party wishes to significantly alter the timetable. That may be possible by way of Motion, but consideration could be given to some other mechanism of bringing the matter before Court. The conduct and pace of litigation involves a number of parties –

counsel, solicitors, clients and experts, and sometimes, it might be thought, there is a lack of understanding on the part of the Court of the time, effort and expense which requires to be made in order to progress the development of pleadings in an action, and the focussing of issues.

**5.8 What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?**

Personal Injury cases would benefit from a form of case flow management. The Court of Session Personal Injury Case Flow Management System works reasonably well although there are occasions when production of information is made, it appears, only for the timetable, rather than for the purpose of trying to resolve the action at an earlier stage.

**CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS**

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

Pre-action protocols do allow parties the opportunity to ventilate the issues and, in certain types of action at least, could require the articulation of the claim in clear terms and the production of relevant supporting information. They would therefore give a defender an opportunity, if the requirements were properly complied with, to consider the case being made against it, and to respond appropriately.

In the context of commercial actions the disadvantages have been noted in the Review, and are principally in relation to cost and the fact that in some disputes no amount of correspondence will in fact resolve it.

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

There could be greater use of pre-action protocols in most actions. The fundamental requirement should be disclosure of the factual and legal basis for the case and a valuation of the claim, rather than simply the existence of an unspecified and unquantified claim.

**6.3 Should compliance with pre-action protocols be voluntary or compulsory?**

If the pre-action protocols are voluntary then there should be an opportunity for the opposing party to apply for a sist of proceedings whilst information is disclosed. If they are compulsory there ought to be some opportunity for extending the timetable in recognition that the complexity of actions varies significantly as, accordingly, does the time taken to investigate them.

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

Abbreviated pleadings have not been helpful in the Court of Session personal injury actions. Fair notice of fact and law should still be required. These actions can often be for substantial sums of money and the standard of pleading often discloses much less than in actions in the Sheriff Court for significantly less value.

**6.9 Are the current arrangements for summary disposal satisfactory?**

There should be an opportunity for a Defender to seek to have a claim struck out without having to wait for a hearing on the Procedure Roll.

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

More routine procedural business could be dealt with by using technology and by reducing the requirement for appearance.

**6.12 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?**

Allocating the length of time is a very difficult art form. To allocate accurately the case needs to be very well prepared at what is often an early stage, with a resultant cost implication.

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

Whilst this may have some attraction it seems to us to potentially add significantly to cost.

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

There should be greater disclosure of the basis on which the Pursuer brings a case at an earlier stage so as to allow a Defender to make an informed decision at an earlier stage.

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

The Court should take a more robust view of “experts” who in some cases do not add anything other than their own synopsis of information they have gathered and a view that they wish to put forward on behalf of the party by whom they are instructed.

**6.16 Should a system of pursuers’ offers be introduced into the civil courts procedure? If so, what features should such a system have?**

If Pursuers offers are introduced then they should require to have full breakdown of the calculation which results in the figure offered as acceptable, together with production of all vouching to back it up.

**6.17 Should civil jury trials be retained?**

No. The lack of written reasoning and the inconsistency of awards make it difficult if not impossible for parties to predict the outcome of civil jury trials. That hinders the early settlement of cases. It also raises human rights issues which have yet to be addressed. In any event we do not consider that the use of juries in civil cases can be justified purely on the basis that they provide a means of

cross checking the appropriate level for judicial awards. If juries are to be retained then it should be open to parties to refer them to previous awards or, at the very least, a suggested range of awards which they might consider appropriate.