

Scottish Civil Courts Review – A Consultation Paper

Response on behalf of C.A.L.M. – Comprehensive Accredited Lawyer Mediators

CALM is an organisation of 50 specialist family lawyers who are accredited by the Law Society of Scotland to provide mediation in family cases dealing with issues both concerning children and financial provision on separation/divorce. Some of our members are also accredited by the Law Society of Scotland as specialists in family law. Many also practice as collaborative lawyers. Our membership is Scotland wide and across our membership we have significant experience of litigating family cases in both the Sheriff Courts and Court of Session.

Chapter 1 – Introduction

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 members approach family law cases from the perspective of attempting to reach an early and amicable resolution of disputes both concerning children and financial issues. Only a small proportion of our cases currently result in mediation referrals to Family Mediation and as an organisation, we have given consideration to development of Family Mediation. Certain issues falling within the umbrella of family law are not suitable for mediation (e.g. adoption, interdict and exclusion orders, public law cases, domestic abuse issues or applications to relocate a child abroad) of those remaining where there are private law issues concerning children and issues concerning financial provision on separation/divorce, we are of the view that mediation should be considered in every case. We are in favour of greater public funding being invested in the provision of neutral information to families on relationship breakdown as to the services offered to them. This should cover not just mediation but counselling, Collaborative Law and an outline of the relevant legal provisions. We are in favour of provision of this information from a wide variety of sources and for solicitors to have a requirement to advise clients about mediation, where appropriate, and to consider whether a referral should be made in each case. It may also be appropriate that consideration is given to mediation prior to the granting of Legal Aid for family law cases. However, we must stress that there are a significant proportion of cases which are not suitable for mediation due to the level of distress on break-down of the relationship, power imbalances between the parties or the level of acrimony involved. Mediation will only be successful in cases where there is a genuine willingness to co-operate in resolving issues in the best interests of the children or to achieve an amicable and cost effective resolution on the part of the couple involved.

Mediation has a greater prospect of success if the intervention is early. Once actions have been raised in the Sheriff Court, the likelihood of successful mediation lessens nonetheless it can succeed and we consider that it would be appropriate for the rules in both the Sheriff Court and Court of Session to be amended in order to provide for appropriate consideration of a referral to Family Mediation at relevant stages in the case. In the Sheriff Court rules this would particularly apply to Child Welfare Hearings and Options Hearings.

We wholeheartedly agree with the review proceeding upon the assumption that the aim should be to improve the system for the benefit of those whom it is intended to serve rather than those who work within it. We have given careful consideration to how the system could be improved upon and how an early resolution of disputes could be achieved in family cases. There are a number of aspects to our recommendations in this regard.

Firstly, consideration should be given to the environment provided for litigants in family law cases. Our members consider that there is merit in providing a separate building or family law suite from where family law cases would be dealt with separately from other civil and particularly criminal business. Litigants attending court in family cases are often subject to high levels of distress, anxiety and tension and consequently providing facilities for appropriate discussion of cases, separation of the parties, the staggering of cases etc would greatly assist.

Secondly we consider that there should be more joined up provision of services. Consideration should be given to the reports provided to family courts in respect of residence and contact cases. Part of this process would be to review who provides the reports, the approach, content and format of such reports and the funding of them. There may be a case for a specialist body of reporters (who may not necessarily be legally trained) to provide such reports for the court. The consequent saving in cost could be utilised to resource other services. We are also supportive of in court family mediation and information services on issues concerning child law, child support agency, resources available to parents and children on family breakdown, contact centres, counselling for both adults and children etc. These services should be linked to the family courts.

Thirdly, there is a great deal of room for improvement in the case management of family law actions. While a degree of written pleading is inevitable, the use of pro-forma craves and pleas in law could be considered. Equally, in England family law cases use pro forma forms for financial disclosure which require to be filed with the court on a particular timetable. Early disclosure in family cases allows an early focus on identifying the extent of matrimonial property and the parties resources. This reduces a significant element of procedure by way of Specifications of Documents, corresponding with third parties to obtain valuations, delay in adjustments, amendments etc. We would be supportive of the rules of court for family cases providing a more timetabled approach with emphasis on early disclosure and the use of Joint Minutes of Admission to focus the issues between the parties at an earlier stage. Coupled with this, continuity of sheriffs dealing with cases in order to implement this system would assist. family lawyers would certainly welcome introduction of specialist family law sheriffs whether these be permanent appointments or those with a "ticket" to hear family cases for a period of time. The existing rules of court allow a more pro active case management approach by the sheriffs at Options Hearings and where the parties must attend court in family cases. Our experience is that this opportunity is rarely taken and we would welcome a far more pro-active approach by the courts in narrowing the issues, testing the areas where agreement can be reached and focusing on the early exchange of evidence. Likewise more consideration should be given to the amount of court time saved by Pre-Proof Hearings in family cases. The appropriate sanction for failure to comply with these procedures should be by way of awards of expenses which are currently rarely awarded in family cases.

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 reviews recommendations? Should they be supplemented by other factors?**

We are in agreement with the principles and assumptions underlying the consultation paper but observe that there are certain features which are specific to family law cases which may not readily fit with answers to each of the questions posed.

- 1.3 **Are there any matters within the Review's Remit about which you have concerns but which are not dealt with within this paper?**

We accept the general application of the proportionality principle to civil cases and also accept that this may apply in determining certain financial issues in straightforward cases. However, such a principle does not readily sit with cases where decisions are made regarding children where the over arching principle must be the best interests of the children involved with a focus on designing, resourcing and delivering a system of justice which provides a speedy child centred and carefully considered decision from an appropriately experienced sheriff or judge taking on board the crucial importance of the subject matter to the family concerned.

Chapter 2 - Access to Justice

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

We consider that there is a role for public education regarding a number of issues arising in family disputes. Firstly information on parenting agreements, parental rights and responsibilities with frequently asked questions in this area would be of benefit. Information on the Child Support Agency and claims which may be made by both co-habitants and spouses on the breakdown of a relationship in broad terms would also be of assistance. Limits for availability of Legal Aid, cost and availability of legal services together with sign posting as to provision of family support services on relationship breakdowns such as Relate, Step Families Scotland, counselling services for children provided by both Relate and Family Mediation, family therapy, mediation, contact centres etc. The public should also be better educated as to forms of dispute resolution on family breakdown in particular the differences between mediation, whether with or without a legally qualified mediator, collaborative law, negotiation by solicitors outwith a court context and litigation.

We do consider that there is a line to be drawn between the provision of information/sign posting of services and the giving of advice. In our experience the first interaction of a family lawyer with our clients is the most crucial in setting the scene as to the best way of approaching the difficulties which that particular family encounters and sign posting the family in the direction of the appropriate means of resolving that dispute armed with information as to their legal rights and obligations. We do consider that it is appropriate that where required, all those requiring legal advice are able to access it readily at an early stage in proceedings. In our experience many clients seek advice from solicitors before embarking upon

mediation or in indeed discussions directly with their ex spouse/partner and the early provision of appropriate legal advice can assist in setting realistic expectations as to outcome and focusing parties on the issues they require to address.

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

There are a number of areas within Scotland in which CALM do not have legally qualified mediators as the number of cases referred to us did not justify those solicitors who trained as CALM mediators within those areas and keeping up their training and accreditation requirements. There are equally areas where Family Mediation Scotland do not provide mediation particularly in relation to financial issues. In our experience, provision can be patchy and increased public funding for mediation together with a greater level of referrals by the courts would result in a greater provision of successful family mediation throughout Scotland. Cut backs in civil Legal Aid have also meant that there are a number of areas in Scotland where there are no specialist family lawyers prepared to provide legal advice and assistance or civil Legal Aid to those requiring family law advice.

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?

Few family lawyers would welcome litigating cases against party litigants. The level of distress, acrimony, power imbalance and emotional baggage regularly ventilated in the context of a family dispute is unlikely to be suppressed without the input of legal advisers. The provision of appropriate and focused legal advice, representation from a specialist family lawyer will narrow the issues, focus on early disclosure and agreement and significantly reduce the amount of court time. It is rarely the case that party litigants in family cases are equipped to represent themselves.

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

The assistance of an in court advisory service in focusing party litigants as to what is required by way of financial disclosure, presentation of pleadings and productions etc. would be of some assistance but we remain of the view (as above) that party litigants are ill equipped to represent themselves in family cases regardless of what assistance they receive to do so.

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

The priorities given to criminal business in the Sheriff Court often mean a lack of time for the hearing of family cases. The pressure of business often results in interim decisions in family cases concerning residence, contact and maintenance being made in a very pressured environment with very limited court time by a sheriff with little experience or interest in family law matters. The environment within which such cases are heard is also far from ideal and is not conducive to the early focusing of issues and the hearing of cases from a child centred perspective or indeed, sufficient time and resources for appropriate case management to secure an early resolution of the issues. The lack of continuity in sheriffs dealing with the case, the difference

of approach between individual sheriffs and between different sheriff courts also contribute to these difficulties. Consideration should be given to the appropriate resourcing of family law cases to enable them to be dealt with in the interests of families within the court system with the appropriate weight being given to the importance of the subject matter to those involved.

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?

We have confined our answer to cases involving family law issues. We consider there may be some merit in cases for financial provision for capital claims of less than £5,000 being dealt with effectively within expedited small claims type procedure providing there are resources within the court system for such actions to be dealt with.

Chapter 3 - The Cost and Funding of Litigation

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

Awards of expenses in family cases are very rare. The majority of cases either settle prior to proof or because of an element of divided success in the outcome of a Proof are dealt with on a no expenses to or by basis. It is consequently very difficult to comment on this issue. A great deal of expense is incurred in family cases either due to the level of hostility between the parties or due to a lack of early disclosure and focusing of the issues between the parties. More pro-active case management by the courts with a front end loading of the rules would be the most important factor in resolving cases at an earlier stage, reducing the number of actions proceeding to proof and decreasing the costs involved.

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

Significantly. Many family law actions settle simply because of the cost of proceeding to a multi day proof in either the Sheriff Court or Court of Session with the consequent risks involved.

3.3 Does the current system of levying court fees effect access to justice?

In our view this does not have an impact on access to justice in family cases.

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

Expenses are rarely awarded or recovered in judicial actions.

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

Yes but rarely used (see above).

3.6 To what extent and in what respect does the availability of Legal Advice and Assistance and Legal Aid affect access to justice?

Increasingly fewer family law clients are eligible for Legal Aid and there are a significant number of areas across Scotland where family lawyers will not provide their services at Legal Aid rates. This has a real impact on access to justice for some litigants.

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

As already indicated there are a number of areas where the provision of Legal Aid for family cases is limited or non-existent. The Family Law Association report that this is particularly common in urban areas, Glasgow, Edinburgh, Aberdeen and also in the north west of Scotland.

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

Not applicable in Family cases.

3.9 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?

We have yet to find an insurer who will cover separation from partners/divorce and therefore thus far this has not been applicable to family cases!

3.10 What impact would the ability to recover “After the Event” Insurance Premiums from unsuccessful parties have on litigation?

Not Applicable.

Chapter 4 - 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. The progression of civil cases is regularly impacted upon as a result of sheriffs requiring to give priority to criminal business, deal with deferred sentences, prior to the start of civil courts, interrupt civil courts in order to deal with custodies etc. Proofs are regularly discharged due to lack of court time, there are difficulties in certain courts in obtaining dates for Proof. There is often a disinclination on the part of sheriffs to hear contested family cases either in respect of opposed motions, child welfare hearings or proofs.

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

In our view there would be considerable benefits in having dedicated civil sheriffs and judges and in particular in having dedicated judges and sheriffs to deal with family business. The benefit of expertise, continuity of dealing with cases and the allocation

of appropriate court time for family actions would be of significant benefit for the expeditious resolution of cases and ultimately to both the court and the parties.

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

We are supportive of civil business being separated from criminal business and in particular in a separate family division for cases. (The advantages have been outlined above). The only disadvantage would be in terms of the resource required.

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 is a strong case for the specialisation of both sheriffs and judges in family cases given the uniqueness of the subject matter involved, the different approach and increasing complexity of the legal provisions involved and the necessity for a different approach to other civil cases. Within the Sheriff Court structure this could be achieved either by setting up a number of regional centres for the hearing of family law cases where appropriate facilities, infrastructure, associated support services etc could be put in place or alternatively if resources were not available for this in the first instance, to have peripatetic sheriffs in each regional centre who would cover a number of sheriff courts and travel between them as business determined.

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 the jurisdiction is concurrent?

The complexity of the legal provisions and consequent desire to instruct counsel, complexity in factual matters and number of documents, specialist reports etc required, also the amount of court time required for hearing the case or cases with international elements either in relation to child law or family issues are all factors leading to actions being raised in the Court of Session.

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

The current rules providing for privative jurisdiction of the Court of Session in certain family cases are appropriate and we have no recommendations to make regarding their amendment.

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

We see no merit in this. There are a relatively small number of family actions raised in the Court of Session these are self selected from the perspective of cost or complexity of the issues involved meriting instruction of junior and sometimes senior Counsel. We do not see any benefit to litigants in preventing them from litigating such cases in the Court of Session.

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 have confined our response to family law actions and as indicated, remain of the view that litigants should be able to raise certain actions in the Court of Session where appropriate and see no merit in amendment to the current jurisdiction on provisions to preclude this.

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

(Not applicable - see above).

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

The Rules of Court are adequate in this regard though could be simplified and made better use of.

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?

Other than the referral of family law cases with purely financial issues in claims of under £5,000 being remitted to some form of small claims procedure, we cannot make any further recommendation in respect of this question. The level of family business which would be separated out under such a provision would not merit another "tier" of Sheriff Court.

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

This may be the more pragmatic solution of more resource perspective in respect of dealing with small claims cases but the applicability to family law is limited.

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

A greater flexibility in the ability to raise actions throughout Scotland would be appreciated providing there is a restriction on the ability of parties to raise actions outwith the forum convenience for parties, witnesses etc. If specialist regional centres for family law were to be set up or to be a body of specialist family law sheriffs who were peripatetic between courts, it would be clearly of advantage to litigants to be able to raise actions in the locations where such services are avoided.

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

There is regional disparity in some areas of Scotland there could be scope for speeding up the disposal of such cases. The electronic filing of documents would also be a welcome step.

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

(Not applicable to our area of expertise).

- 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?**

(Not applicable to our area of expertise).

- 4.17 **Is there a case for a national sheriff court which would allow cases to be raised in the sheriff court level anywhere in Scotland? If so what appeal arrangements should there be.**

This may lead to cherry picking of certain jurisdictions where there are sheriffs specialising in family law or to the raising of actions by parties in a location deliberately inconvenient to their spouse/ex partner or witnesses in order to gain tactical advantage from a cost perspective. We would have no difficulty with considering the boundaries of sheriffdoms and sheriff court districts with the provision of regional centres for family cases providing the whole of Scotland is appropriately served and there is access to justice for litigants in their local area.

- 4.18 **Is there a case for sheriffs to have an all of Scotland jurisdiction?**

Yes, this would allow floating sheriffs specialising in family law to work throughout Scotland.

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

We would be in favour of such a provision to enable the transfer of cases between courts on the basis of the level of complexity involved both in terms of law and fact.

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

No. There is a significant delay in family cases being dealt with. Routinely family cases will take between twelve and eighteen months to proceed to appeal before the Inner House. This is entirely inappropriate in cases involving issues relating to children. It is also an inadequate time scale in cases involving the division of matrimonial property where the issue of the decree of divorce and the parties' ability to move on with their lives and achieve a distribution of their assets awaits the decision of the Appeal Court. There should be a provision for fast tracking family cases on appeal.

- 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?**

The opinion of our members was divided as to whether we should retain the appellate function of sheriff principals. We are in favour of a Court of Session Outer House judge being able to hear appeals from the Sheriff Court in family cases to allow these to be processed more expeditiously and for there to be a sifting process for appeals to the Court of Session to weed out unmeritorious cases.

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

Not relevant to our area of expertise.

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

A variety of views were expressed by our members and in particular there was divided opinion as to whether the option of appeal to sheriff principals should be retained. It may be more appropriate for such appeals to be dealt with by a single judge in the Outer House. We would be supportive of cases being appealed to the Inner House only with leave where there are legal issues also that the decision of the Inner House represents a final determination of the case with no option to appeal to the House of Lords available in family actions.

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

The employment of temporary judges and part time sheriffs allows clearing of bottlenecks within the system and provides additional resources for cases to be dealt with. In some cases this allows those with specialist knowledge of a given area of law to be allocated to hear proofs. In our experience the expertise of part time sheriffs is rarely matched to the business which is set down before them and there is significant room for improvement here. The hearing of proofs by part time sheriffs can add an additional layer of difficulty in fixing continued dates. There is also a significant benefit to litigants from continuity of the same sheriff dealing with their case in family actions. We would consequently be more supportive of the appointment of all of Scotland floating sheriffs specialising in family law who would work within specific regional areas and could provide both continuity and expertise in the hearing of family law cases.

Chapter 5 - Principles for the 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?

We do not believe that this would be of benefit given the variety of different types of civil cases litigated in the Sheriff Court and the fact that the overarching principles of the Children (Scotland) Act 1995 with a strong focus on determining actions in the best interests of the child are key in family actions. The philosophy and principles applicable to the determination of family disputes often do not chime with the prevailing issues in other types of civil litigation.

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

We would obviously be supportive of the court encouraging and facilitating parties to use mediation. We consider there should be an amendment to the rules of court to encourage more proactive consideration of mediation in family cases at an early stage and in particular in Sheriff Court actions that it should be mandatory that the issue of mediation is raised and considered at the Child Welfare Hearing and Options Hearing stages of the action. However, it is not appropriate in our view that parties are required to attend mediation. It may be appropriate that they are required to be given information about the option of mediation both before and during court proceedings in family actions.

If so, how should this be done at what point or point in the progress of a dispute? (see above)

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

A number of family law cases require judicial determination e.g. adoption, child abduction, applications for a child to relocate abroad, public law matters etc. In addition, there are some cases where private law issues in respect of residence and contact, financial disputes are not suitable for mediation due to either the level of distress, acrimony and power imbalance in the relationship between the parties involved or quite simply that the parties require a solution to be imposed upon them rather than being capable of agreeing matters through the services of a neutral mediator.

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

Much literature on support service for families on relationship breakdown confuses the roles of counsellor, mediator, collaborative lawyer and arbiter. We consider that there is a significant role for public education in the different options open to families. Mediation can only be provided by a neutral mediator who does not have the power to impose a solution on the parties but simply facilitates them in reaching an agreement between themselves providing appropriate information as to their rights and obligations, if required, throughout the process. Collaborative lawyers represent parties throughout discussions and attempt to facilitate parties in reaching agreement on issues concerning both child and financial matters. They provide an advisory role and are not required to remain neutral throughout the process. They do however focus solutions with respect to the medium and long term interests of the family unit as a whole, while also representing their clients throughout the process. A limited number of family cases are suitable for arbitration and a pilot project has been devised by a number of our members in conjunction with certain members of the Faculty of Advocates. Arbitration provides a fast track procedure for the determination of issues in certain family cases, where the parties seek the imposition of a solution from a third party with specialist legal knowledge. We consider that public funding should be provided for the provision of information on options for dispute resolution to parties and appropriate Legal Aid funding for access to the different options where appropriate.

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

Electronic filing of documents and the use of video conferencing (particularly in rural areas) would assist in family cases.

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

We would be supportive of a far more pro active case management approach in family actions to the imposition of timetables specific to a given case with pro forma forms for the disclosure of financial information, reliance on joint expert reports and the early agreement of areas of evidence and a focusing of the issues.

5.7 What type of case would benefit from (a) judicial case management (b) case flow management? Family law actions would be suitable for case management as indicated above.

Family law actions would be suitable for case management as indicated above.

Chapter 6 – Working Methods of the Civil Courts

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

We do not consider these to be applicable to actions which affect the status of the parties, urgent issues concerning their children or financial matters. Proceedings often require to be raised at an early stage in order to obtain protective remedies from the court or an early intervention. Consequently while pro-active case management after actions are raised is appropriate, the use of pre-action protocols should not apply to family actions.

6.2 Should there be a greater use of Pre Action Protocols? If so in what Courts and for what types of action?

Not applicable to family actions.

6.3 Should compliance with Pre Action Protocols be voluntary or compulsory?

Not applicable to family actions.

6.4 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 issues the court apply in deciding whether leave should be granted?

There may be a case for leave to appeal being required in certain aspects of family actions.

6.5 Are the current arrangements for making the rules of civil procedure satisfactory?

We consider there should be a greater level of communication between the Sheriff Court and Court of Session Rules Council and a greater focus on devising a set of procedural rules directly applicable to family actions rather than “tweaking” the Civil Court rules for family cases.

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

We do not consider this to be necessary though a greater level of communication and consistency on certain issues pertaining to family cases e.g. standard forms of disclosure etc. between both courts would be appropriate.

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

There is some scope for making the pleadings in family cases more formulaic e.g. specimen craves, pleas in law, standard forms for disclosure of information etc. The use of a formatted document could assist with the layout of pleadings to focus better the issues between the parties. However, an element of information provided in respect of the grounds of divorce, the arrangements for the children, reasons for departure from equal sharing of matrimonial property/an award of financial provision on the breakdown of cohabitation or death of a partner and the need for spousal maintenance/resources of the parties will always be required. We do not consider that pre-printed documents would be sufficient for this purpose.

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

There is a greater scope for non contentious routine procedural matters to be dealt with by sheriff clerks and for the better timetabling of hearing of contentious motions within the court system.

6.9 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 consider that more pro-active case management will result in an early focusing of the issues and the greater use of Joint Minutes of Admission. We consider that sheriffs dealing with Options Hearings should more pro-actively identify the areas of evidence that can be agreed, limit of the scope of the issues between the parties, identify the number of witnesses involved, the potential for agreeing expert reports, and the use of affidavit evidence. Having identified the amount of court time required agreed between the parties a hearing for the appropriate number of days required should then be fixed (as opposed to one day of court time being fixed with subsequent days at a later stage as is often the case in many regional Sheriff Courts). If parties and agents are then unable to stick to the timetable fixed by the court, we do not consider that they should be precluded from leading further evidence as this may be essential to determine the issues between the parties.

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

The use of written submissions allows an earlier focusing of the issues saves court time and is to be welcomed in cases involving financial provision on divorce.

The option for oral submissions in cases involving children or where the sheriff or judge requires to test the strength of the arguments being put forward by solicitors or counsel or requires clarification from them should not be denied but the time involved could be greatly reduced with the use of focus on written submissions.

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

We are supportive of the use of pro forma forms for the disclosure of financial information in family cases and pro active case management to ensure the use of joint expert reports, the agreeing of valuation evidence, the use of affidavits etc in order to greater focus the issue between the parties and reduce the scope of proofs and encourage early settlement.

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

We consider it appropriate that the court explores in family cases whether a single expert should be used e.g. a surveyor to value heritable property or an actuary to provide a pension valuation. A decision requires to be taken as to the extent of questions posed to the expert to cover the perspective of both parties. In some actions e.g. those concerning business valuations, the input of more than one expert accountant may be required but there is scope for more pro-active case management in narrowing the issues and remit. Consideration in some actions whether a remit to a specialist for determination of a particular issue may be appropriate.

6.12 Should a system of pursuer's offers be introduced into the Civil Court procedure? If so what features should such a system have?

In family cases involving financial provision "founding offers" are regularly made to protect parties in respect of awards of expenses. We consider that the greater use of the sanction of awards of expenses where parties fail to beat such offers should be imposed to encourage more serious consideration of pre-litigation offers made and the early settlement of cases.

6.13 Should Civil Jury Trials be retained?

Not applicable to family cases.

6.14 Should Written Judgments be required in all cases?

Where evidential Child Welfare Hearings take place or where determination of issues at an interim stage by hearing of motions in family cases, written judgments are not required. In some actions a more expedited form of written judgment could be provided. In family cases where there is a prospect of an appeal on certain issues a written judgment would still be required.

6.15 Should the courts have greater powers to impose sanctions for non compliance of the court rules or where a party or his representative has behaved unreasonably? If so, what should these rules be?

We consider that there should be greater use of the imposition of awards of expenses for parties failing to make early disclosure of information and co-operate in agreeing of evidence and focusing of the issues.

6.16 What measures should be available to the court to identify and manage un meritorious causes or appeals brought by party litigants?

The importance of the subject matter to the parties makes identification of such actions difficult in family cases. There are certainly a number of actions in respect of parental rights and responsibilities or the opposition of orders for freeing of adoption where a careful balancing act is required between litigant's article 6 rights to a fair trial and the fact that they are clearly pursuing cases which are unmeritorious. From an objective stand point their reasons in pursuing matters relating to the breakdown of their relationship with an ex-partner rather than the issues in dispute in the litigation. Pro-active case management should allow earlier determination of some of these cases and a sifting process for unmeritorious appeals/leave to appeal being required would reduce the number of appeals in such actions by party litigants.

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

We would question whether or not a family law litigant could be regarded as "vexatious" – see answer to question 6.16.

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

Presentation of family law cases by either party litigants or non legally represented advisers results in a greater amount of court time being taken up, a failure to address the relevant legal provisions and issues required to determine the case, a lack of appropriate focusing of the issues at an early stage and an ineffective use of court time. We can see arguments in favour of parties not entitled to legal aid who cannot afford legal representation requiring to present their best possible case by seeking advocacy skills from an adviser/friend or family member. This may also be the case in a number of actions where for parties for whom English is not their first language. Nevertheless, for the larger part, we consider this to be discouraged in family cases as it does not facilitate an early, cost effective resolution of matters or who have health difficulties. Nevertheless for the larger part, we consider that this is to be discouraged in family actions as it does not facilitate an early, cost effective resolution of matters.

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

Not applicable to family actions. Cases where curators, grandparents etc enter process are adequately catered for in terms of the existing rules.

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

Not applicable to family actions.