# RESPONSE BY

# DRUMMOND MILLER LLP SOLICITORS

# TO

# SCOTTISH CIVIL COURTS REVIEW: A CONSULTATION PAPER

# 28 MARCH 2008

## FOREWORD

**Drummond Miller LLP welcomes the opportunity to respond to the Consultation Paper on the Scottish Civil Courts Review. We consider that the civil justice system in Scotland is in need of reform. The present system and structure is becoming badly over-worked and over-stretched. Solicitors are becoming increasingly specialised and selective over cases in which they are prepared to represent clients, often as the result of the unavailability of adequate funding. Access to justice is being denied to various sectors within society and should not continue.**

**We share Lord Gill's opinion that reform of the civil courts cannot be looked at in isolation from the criminal justice system which is in critical need of reform. Considerable resources will require to be committed by the Scottish Government if the aims of this review are to be achieved.**

## 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?**

Yes, undoubtedly. The key features should include properly funded advice and assistance that allows disputes to be investigated and negotiated without excessive bureaucracy; mandatory mediation for lower-value consumer disputes; encouragement and facilitation to use alternative dispute resolution measures in appropriate circumstances in other cases; and where litigation is unavoidable, the use of compulsory early disclosure and constructive case-management.

In clinical negligence actions, an apology rather recompense is often all that a victim wants. Some consideration should be given to how this type of "remedy" could be accommodated in Scotland's civil justice system.

From a family law perspective, the system ought to be designed to encourage resolution of disputes at the earliest possible stage. Reference is made later in the response to the optimum use of child welfare hearings, options hearings and pre-proof hearings in family actions.

Specifically on the issue of whether there should be resort to the courts, there would seem to be merit in the courts having a gatekeeper role in the first instance, which would enable the court at the earliest stage to determine further procedure and the appropriate forum. Consideration could be given at that stage to whether earliest resolution may be achieved through mediation. It is submitted that it would not be appropriate for matters automatically to be referred to mediation, as that would erode the courts' emergency or protective jurisdiction. The court ought to retain that jurisdiction, as there requires to be a mechanism for immediate access to the courts where interim protective orders or interim financial orders are required. Early orders, e.g. financial disclosure in a divorce action may be required before there can be any

meaningful extra-judicial negotiation. If a period of mediation were a pre-requisite of access to the courts, then it may be in the interests of one party to stall and thereby frustrate necessary regulation by the court of interim matters.

It ought also to be borne in mind that certain cases will not be suitable for mediation. Reference has been made above to cases where there is a failure to co-operate in disclosure, e.g. in divorce actions with financial ancillary craves, but also where one party may be vulnerable or where there is a substantial imbalance in bargaining power.

It is submitted that any such gatekeeper role should be a judicial rather than an administrative role.

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

   Yes, on the whole. Caution has to be given to the application of the principle of proportionality. The public must have access to justice. They must see their rights being enforced and justice being applied to have confidence in their legal system. Often complex cases, e.g. medical negligence actions, which are expensive to litigate, may be of comparatively low value. However, the subject matter of the dispute (often connected with the life and death of the litigant or his or her loved ones) may be of the utmost importance to the litigant. Regard, also, has to be had to proportionality of expectations. Lawyers cannot be expected to provide a Rolls Royce service (and face disciplinary proceedings if they fail to do so) if funding is limited and they cannot conduct business profitably.

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

The review of Scotland's civil justice system must be undertaken hand-in-hand with a wholesale review of the availability of and resources allocated to civil legal aid in Scotland.

## CHAPTER 2: ACCESS TO JUSTICE

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

   The general consensus of opinion is that there is little public legal education at present but that it would be unlikely to have much impact on access to justice. Such education could raise awareness, to some extent, of the remedies and forms of dispute resolution available to the public. This could result in more litigation. There is a need to raise public awareness of funding options and, in particular, legal expenses insurance. Such insurance often allows access to justice but not a lot of people are aware that they even have such cover or that they are entitled to use it.

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

   There are both geographical and subject areas where there are gaps in the provision of civil legal advice and representation. Geographically, it is increasingly difficult for clients to find a solicitor prepared to take on legally-aided work in rural areas and inner cities. This is almost entirely as a result of reforms to Civil Legal Aid, the extent of the bureaucracy and to the level of fees which can be earned doing legal aid work. Fewer and fewer law firms can financially afford to undertake such work, as it is not profitable. In terms of subject area, there is thought to be a general shortage of legal assistance available to those requiring legal aid, whether this be in human rights law, medical negligence or family law.

   Those requiring a solicitor for family law matters, in particular, have difficulty in finding somebody to represent them and access to justice is, therefore, greatly affected. All large Edinburgh practices with specialist, family law teams solely undertake privately-funded, family law actions dealing with financial provision on divorce or following upon separation. A limited

number may undertake legally aided work in respect of child law matters. This firm has experience in the provision of family law in Edinburgh. We do, however, receive a number of referrals from Orkney, on the basis that solicitors there are not prepared to provide specialist family law advice. There are considerable difficulties in undertaking such referrals and referrals will certainly not be undertaken when they are legally aided.

It is also thought that, due to the limited fees available to those taking on legal aid work, practitioners in rural areas, in particular, require to generalise in respect of the work they undertake. This means that solicitors may be handling cases where they have little experience of the subject area and the quality of the client's representation could be called into question. This is where the Court of Session is of benefit, as rural firms will instruct Counsel who are specialised in the relevant subject area and Edinburgh agents who are more experienced in the procedures of the Court of Session.

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?**

It is generally thought to be desirable for party litigants to take part in the process without legal representation at small claims level only. In our opinion, party litigants appearing in court themselves often do not understand the rules and procedures that they require to comply with and end up wasting a lot of court time. It is desirable in small claims actions as it improves the perception of access to justice but, perhaps, more importantly, due to the levels of expenses available, solicitors are not going to be prepared to act in small claims cases. It is, therefore, important that people can still raise actions themselves. It is feasible to design court procedures so as to enable party litigants to appear themselves but the rules have to be very straightforward. Even with in-court advisers to assist people, there are still party litigants appearing every week who do not understand what is required of them.

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?**

   'Self-help' and in-court advice services can and do improve access to justice. The in-court adviser assists many party litigants every week in the small claims and summary cause courts and this should remain. They are not able to assist everybody but they do a good job of informing party litigants of the procedures and rules.

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

   The small claims and summary cause limits and expenses should be reviewed again. Fewer solicitors are accepting instructions in small claims and summary cause cases due to the level of expenses available being so low. This significantly reduces access to justice as a lot of individuals and small businesses simply cannot afford the time, or feel confident enough, to appear in court themselves. This is particularly important to consider now that the limits have increased to £3000 for small claims and £5000 for summary cause actions. This means that there are cases which are of considerable importance/value to people but they cannot find legal representation. Indeed, legal aid is not even available for small claims actions and this is reducing access to justice. A claim for £2800, for example, is of significant importance to many people. Yet, they will not be able to get legal aid, even if financially eligible. The limit for small claims should be reduced to £1500. Other issues, which should be considered in the Review, are access to Legal Aid and reform of the legal aid system in Scotland. Regard should be had not only to the structure for remuneration of solicitors undertaking legally-aided work, but the overly bureaucratic administrative system operated by the Scottish Legal Aid Board. A further issue which it is felt should be considered is the non-recoverability of insurance premiums in personal injury cases.

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?**

   The small claims court is sufficient for dealing with low value cases. It is thought, however, that the limit for claims in the small claims court should be reduced to £1,500. The present limit of £3,000 means that cases of reasonable value and complexity have to be dealt with by party litigants alone. Solicitors are not prepared to take on small claims cases due to the level of expenses that are recoverable.

## CHAPTER 3: THE COST AND FUNDING OF LITIGATION

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?**

   Drummond Miller keeps no statistical evidence on expenses recovered in respect of litigation claims. The firm has an extensive pursuer personal injury practice and cannot provide such information. APIL will have made detailed representations in their response, of which this firm is a member.

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

   There is no doubt that the cost of litigation does deter both pursuers and defenders from proceeding with court actions. This is particularly true where legal aid is unavailable, for whatever reason, especially for defenders. There is no satisfactory insurance scheme in place in the country at the present time. Given the relatively low-income levels that require to be eligible for legal aid, a large section of the population are undoubtedly deterred from proceeding with court actions except in the most certain of cases. Where there is inequality of arms due to ability to fund an action or where there may be vulnerability of one party, the fact that one party may be deterred, is a cause for concern.

   It is submitted that the courts could take a more robust approach to expenses in family actions. A more robust approach was perhaps considered in the Inner-House decision of *Sweeney v Sweeney*. It is submitted that the courts could have a greater regard to conduct of the litigation and, in particular, attempts to settle at earlier stages and when disclosure is made. As stated, such an approach was alluded to in *Sweeney*.

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

The firm does not believe that the present system of payment of court fees does affect a litigant's access to justice. The firm considers that the present level of court fees and payment of them is satisfactory and has no real impact on a decision to proceed with a court action or not.

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

Concern has been expressed within the firm that the present rules for the recovery of judicial expenses is not entirely satisfactory. The firm takes a pragmatic approach to the recovery of such expenses. For matters of expediency, it is simply not possible to argue over expenses for any period. Very often, the firm takes the view to accept a lower level of expenses to avoid taxation and to bring a case to a conclusion as quickly as possible. This is not entirely satisfactory but, like many others, the firm is under pressure to conclude matters, ensure payments are made to successful pursuers and accounts paid and fees taken as quickly as possible, for obvious business reasons. If we do not do this, additional delays are encountered, often running into months, in having detailed legal aid accounts prepared and then negotiated with SLAB and in having a final reconciliation provided to our client.

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

Concern is expressed that taxation dues in the Court of Session are too high, and cancellation fees excessive. The four-month rule, applicable in the Court of Session, is far too tight which can often create problems through no fault of the firm.

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

It is very often in a litigant's interest to obtain legal aid for obvious reasons. The downside is the bureaucratic system that is legal aid at the present time

and the diminishing numbers of legal firms who are prepared to do such work at legal aid rates. The availability of legal aid does allow access to justice but a large proportion of the population is not eligible for legal aid. Indeed, very real problems can arise when a party faces a litigant who has the advantage of legal aid. The legal aid system generally is in need of overhaul as it is becoming increasingly difficult to deal with the Legal Aid Board in a satisfactory manner given the number of queries raised by them and their unwillingness to make payment from the legal aid fund without minute scrutiny of each and every account.

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

Very real problems now exist because of the diminishing number of solicitors willing to work at legal aid rates. Access to justice is therefore being denied to litigants who have increasing difficulty in finding a solicitor willing to take cases on where legal aid might otherwise be available. This is very true in the rural population and inner cities. Family Law in particular has been badly affected by the present legal aid system that is in place and this badly requires to be addressed.

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

There is no doubt that large numbers of personal injury actions are litigated on speculative fee agreements with solicitors. Whilst this provides good access to justice, there is a feeling that this impacts on settlement which may often be encouraged at an early stage of the case to avoid prolonged court actions which may be to the detriment of a pursuer's claim. Overall, however, the firm believes that speculative fee agreements are beneficial to the litigant and the firm.

9. **Should legal expenses insurance, including "before the event" and "after the event" insurance, have a greater role to play in the funding of litigation in Scotland?**

The firm is of the belief that there should be a greater choice of legal expenses insurance available in Scotland. Various schemes have been tried in the past, none of which have been successful. Premiums require to be recoverable where an action is successful. Premiums also require to be set at realistic levels to encourage members of the public to take up such insurance in the event of litigation. More input is required from the legal profession and the insurance industry in developing this.

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

The firm believes that this is a more attractive option for pursuers and again requires further thought and development in conjunction with the insurance services industry. The negative experience in England of satellite litigation concerning recovery of insurance premiums and success fees requires to be considered carefully.

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

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

   Yes. As a result, sufficient numbers of judges are not available to start proofs on Tuesday mornings and debates throughout the week, creating a lot of wasted time and expense. The cost of diets being put off is ultimately borne by the civil litigant.

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

   Yes. Specialisation must be the way forward (although this may be resisted by the majority of the shrieval bench). Sheriffs/judges should be specialists in the areas of law that they have had most experience of throughout their professional careers. This, of course, may be much more difficult for rural sheriff courts who, perhaps, only have one full time sheriff. Specialist sheriffs could be mobile to make up for local deficiencies.

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 would be consistency, speed, more reliable timetabling and the increased experience and quality of decisions from specialised sheriffs.

4. **Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what type of cases and in which courts?**

   Yes. There should be more specialisation in matters of family, personal injury, executries/tax/trusts, public and commercial law. The commercial courts in the Court of Session and Glasgow and Aberdeen sheriff courts have proved successful, as are the specialist drug courts in Glasgow and Fife for criminal business. The firm's experience of the personal injury pilot scheme in

Glasgow Sheriff Court has been good. Judicial business can be dealt with more efficiently and with a greater degree of expertise if the right judge/sheriff is in place.

From a family law perspective, it would seem to be unarguable that, in family and child cases, there would be benefit from a greater degree of specialisation within the Civil Courts. Reference is made to the Glasgow Family Court. It is accepted that the model of the Family Court can only have application in the larger Sheriff Court. The benefits are evident in terms of specialist training and knowledge acquired by the presiding Sheriff. Further benefit is seen in a consistency of approach and predictability of outcome. It is accepted that there can be limits outwith the Family Court model, to one Sheriff retaining a case for most or all of its progress through the court. This is stated under reference to the demands of the wider court programme.

**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 value of the claim, its complexity (taking into account factual, legal and medical issues), expertise of agents and counsel, the value of claim weighed against cost of litigation, the need for Counsel, more experienced judges, intellect of bench, authority of decision, time for preparation for proof, risk-management, and the speed of the process are all factors which have influence the decision on which forum court proceedings should be raised.

From a family law perspective, it is submitted that the key factors in financial provision cases are:

(a) complexity and value;

(b) time-scale - if the issue of value or complexity were marginal, in general terms, it is submitted that a Sheriff Court action would be determined more quickly. However, the firm's recent experience of Court of Session

divorce actions is that proof dates have been available considerably earlier than was previous the case; and

(c) cost - in the firm's experience, cases will require to be substantially more complex or of considerably higher value before being raised in the Court of Session.

In child law cases – other than child abduction – it is submitted that actions should only be raised in the Court of Session where there are jurisdictional issues, which necessitate Court of Session jurisdiction being invoked.

It is often said that in family actions, decisions of the Court of Session will be more consistent than decisions in the Sheriff Court. That view is not necessarily supported.

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

Cases worth under £10,000 should be raised exclusively in the Sheriff Court (subject to there being scope, in complex professional/clinical negligence and industrial disease cases, for a remit to the Court of Session). It is unacceptable that some firms raise straightforward actions for a few thousand pounds within the Court of Session.

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

No.

**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?**

No – Court of Session should remain as court of first instance for cases worth at least £10,000 and complex cases. If it were to become solely a court of

appeal, vast resources would be needed to improve and expand the Sheriff Court network and employ hundreds of clerical and administrative staff across the country. The sheriff courts could not cope with being the only courts of first instance with the resources they currently have. The Court of Session offers parties superior judicial expertise (essential in complex, high-value or novel cases), opinions which carry more authority, and easier access to the skills and expertise of the Bar. It is able to accommodate longer proofs for complex and/or novel cases. The Outer House has been responsible for the development of Scots law and has a valid and continuing role to play in the future of civil justice in Scotland

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

   £10,000 (subject to there being scope, in complex professional/clinical negligence and industrial disease cases, for a remit to the Court of Session).

10. **Are the current powers to transfer cases between sheriff courts and between sheriff court and Court of Session satisfactory?**

    Yes

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 for low-level consumer disputes. Small claims courts should not have sheriffs sitting in them – disputes could be heard by a sheriff clerk, legal practitioner or experienced members of consumer industry. How would such a tier be administrated and what about expenses and right of appeal?

12. **Alternatively should there be another level of judiciary within the sheriff court to deal with "third tier business"?**

No – a more radical approach is needed.

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

    Local knowledge by sheriffs and solicitors is important and how else would judicial business be spilt up (if specialist courts were not available)?

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

    Yes. However, in some smaller courts it is more difficult for time to be allocated to a sheriff to deal with undefended actions. It may be that such undefended business could be dealt with centrally, thereby freeing up more time within a local court for contentious business.

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

    Yes

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 disposal of commissary business satisfactory?**

    Administrative business could be dealt with centrally, thereby freeing up time for sheriffs in smaller courts to deal with contentious business. Also, for example, options hearings in the sheriff court could be dealt with more easily and simply with a telephone conference call (as used in the Glasgow pilot scheme).

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

    The firm is unsure of the benefits this might have and concern is felt that such a reform could overload the major centres. Sheriffs should be expected to be much more mobile than they currently are in order to enable business throughout the country to be dealt with more efficiently. It could allow parties more convenient access to court and appeals could be to the Sheriff Principal.

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

    There is certainly no reason why they should not have such a jurisdiction. It would be required if there was a nationwide sheriff court. It is doubted whether such an arrangement would be attractive to the majority of sheriffs.

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

    There should be a power of transfer if sheriff court was primary court of first instance. The current rules allow for a remit. There should be a sifting of cases by a judge in the Court of Session and he/she should take into account the complexity of the case, its value, the length of preparation time needed by agents, speed etc.

    From a family law perspective, it is considered essential that there should be a power of transfer. Specifically, what is envisaged is from the Sheriff Court to the Court of Session on the grounds of complexity and value.

20. **Are the existing appeal arrangements satisfactory?**

Yes, although concern has been expressed in the delay incurred in obtaining a hearing in the Court of Session.

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

The Sheriff Principal's office should be retained and he should continue to be responsible for judicial appeal business and administration of the local jurisdiction. Sheriff Principals deal with business in an efficient and evenhanded fashion.

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

Yes. The problems that exist are delays in getting a hearing and the length of the hearings themselves (particularly where party litigants are involved). There may be scope for limiting the length of time that a party should have to present his appeal or response thereto (as is the case in the Supreme US Courts).

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

There needs to be rights of appeal through the courts to ensure access to justice and compliance with human rights law. The present arrangements are considered to be satisfactory.

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

The use of temporary judges/sheriffs is disadvantageous because they have a lack of experience and public perception is not good if case is dealt with non-permanent member of the judiciary. More judges/sheriffs should be appointed if court business demands it. There is a potential for real conflict when someone sits as a temporary judge/sheriff. A number of these positions are applied for and taken by advocates and practitioners simply seeking to enhance their income. There should be a more structured approach to the appointment, training and monitoring of such positions than is the case.

## CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

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

   The objective should be: (1) for procedures to be user-friendly i.e. not overly complex, clear but flexible, with ability to exercise discretion, and to have realistic time constraints; (2) justice for all; and (3) fairness to parties.

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?**

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

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.**

   NB: Questions 2-4 have been taken together.

   From a general Court of Session perspective:
   Mediation should be encouraged and facilitated but is considered to be less appropriate in public/administrative actions, or where liability not admitted, more so in cases where relationships to be preserved e.g. family / commercial. Mediation is not felt suited to personal injury, insurer-backed, cases where the aim of insurers to settle for lowest possible sum.

   Mediation should be encouraged either before proceedings commence or at an early procedural stage e.g., when pleadings finalised.

From a family law perspective:

Undoubtedly the Civil Justice System ought to be designed to encourage resolution of disputes at the earliest stage. Reference is made later in the response to optimum use of child welfare hearings, options hearings and pre-proof hearings in family actions. Specifically, on the issue of whether there should be resort to the courts, there would seem to be merit in the courts having a gatekeeper role in the first instance, which would enable the court at the earliest stage to determine further procedure and the appropriate forum. Consideration could be given at that stage as to whether earliest resolution may be achieved through mediation. It is submitted that it would not be appropriate for matters automatically to be referred to mediation, as that would erode the courts' emergency or protective jurisdiction. The court ought to retain that jurisdiction, as there requires to be a mechanism for immediate access to the courts where interim protective orders or interim financial orders are required. Early orders, e.g. financial disclosure in a divorce action may be required before there can be any meaningful extra-judicial negotiation. If a period of mediation were to a pre-requisite of access to the courts, then it may be in the interests of one party to stall and thereby frustrate necessary regulation by the court of interim matters.

It ought also to be borne in mind that certain cases will not be suitable for mediation. Reference has been made above to cases where there is a failure to co-operate in disclosure, e.g. in divorce actions with financial ancillary craves, but also where one party may be vulnerable or where there is a substantial imbalance in bargaining power.

It is submitted that any such gatekeeper role should be a judicial rather than an administrative role.

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

In personal injury cases, earlier pre-trial meetings should be held which would be funded by the unsuccessful party.

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

   E-mail should be used for the intimation and lodging of documents, and conference calls used for procedural hearings

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

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

   NB Questions 7 & 8 taken together.

   The courts should, to large extent, control the pace of litigation but within reasonable limits. There must always be a general dispensing power retained.

   The Court of Session commercial court an excellent example of judicial intervention in case progress but it has proved to be very time consuming and expensive. The Coulsfield reforms are a very successful example of effective case management in personal injury cases and should be rolled out to the sheriff court forthwith.

   From a family law perspective, it is essential that the court control the conduct and pace of litigation. It is submitted that the court ought to adopt an interventionist approach and there is an opportunity for much greater intervention within the current procedural rules at Child Welfare Hearings, Options Hearings and Pre-Proof Hearings. Agents and indeed, parties ought not to be allowed to churn cases. Solicitors ought to ensure and the courts ought to require evidence that parties are fully engaged in their litigation, are aware of costs and the implications of there being an award of costs if criticism can be made of one party's conduct or if one party is unsuccessful. Similarly, agents ought to ensure that the parties are aware of the powers of

the court and possible outcomes. There is a concern that parties can instruct proceedings to be raised and proceedings are commenced without the above issues having been fully explored with parties. The courts ought to ensure that solicitors and parties are fully engaged in the litigation.

It is submitted in family cases that there should be judicial case management rather than case-flow management. There could be much greater judicial intervention in requiring disclosure, in particular in financial disputes. It is submitted that the structure to support greater intervention is already present in terms of Options Hearings, Child Welfare Hearings and Pre-Proof Hearings.

## CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

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

   The advantages are that they can help narrow the issues in dispute between the parties, either avoiding litigation or making for a speedier and less costly resolution of the dispute between the parties. One disadvantage is that, in an attempt to settle before getting to court, one may not achieve the best deal for one's client.

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

   Yes, for personal injury actions.

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

   Compulsory.

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

   The current proposals are fine.

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

   Yes. The Rules Councils work extremely hard.

6. **Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?**

An effort should be made to harmonise the rules.

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

   It is not felt that this is required or would add anything to our present system. It would probably only amount to more form-filling/bureaucracy.

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

   This makes sense and is in line with what has been adopted under the Coulsfield reforms. There may be an argument against such, however, in more complicated cases, e.g. clinical negligence, abuse/time-bar cases.

9. **Are the current arrangements for summary disposal satisfactory?**

   Yes.

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

    No. Adequately trained clerks should be able to deal with such matters (subject always to a right of review by a judge).

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

    In the Court of Session, yes. However, there could be a greater reliance on technology e.g. email and conference calls.

    Could motions and by orders not be allocated to a few designated Judges and scheduled? They could call at say 10am then 11.30am and 3pm. Agents and

Counsel could then attend for their designated slot, thus reducing the amount of time and resources wasted in waiting for one's case to call.

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

It is impossible to envisage how this could work in practice. Parties are best placed to assess the likely evidence and numbers of witnesses that are likely to be called in support of their side's case.

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

Setting out arguments in advance may assist in achieving extra-judicial settlement, but more importantly, would reduce the amount of time taken up in substantive hearings and would assist the judge in the expeditious preparation of his or her written decision.

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

To a large extent, as early disclosure as possible, would assist with the expeditious progress of a case and the likelihood of an earlier extra-judicial settlement. This would reduce the burden on judicial resources.

From a family law perspective, the court ought to be more interventionist in requiring the earliest financial disclosure. Once a financial disclosure has been made, the parties ought to be focused on the earliest possible resolution.

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

The court should, perhaps, have some control. If the court authorises the employment of an expert, there can be no question of non-recovery of an often substantial outlay.

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

Yes – Pursuers' tenders.

17. **Should civil jury trials be retained?**

Yes. A trial by one's peers is a civil right.

18. **Should written judgements be required in all cases?**

After proofs and debates, yes. We need case law for precedents and development of the law.

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

It is felt that these powers are, in fact, already available within the rules but that there is, perhaps, a reluctance to use them. They should be used in the event of wilful non-compliance with the rules or a blatant abuse of process which causes prejudice to the other party. The sanctions imposed should be financial penalties.

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

Judges should have discretion to throw out vexatious cases.

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

    No comment.

22. **Should a person with a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?**

    Yes, but only in the small claims court. Otherwise, they are hardly party litigants!

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

    No.

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

    The rules are generally satisfactory. There should be no time limits as there is already the resort of taking a plea of mora, taciturnity and delay. Neither should there be further filters. The current filter of first orders is sufficient. There have been numerous occasions when first orders have only just been passed by the court but the cases have been ultimately wholly successful.

    Currently, a grant of legal aid is notified to both the applicant and the respondent and we see no reason why this should not, also, be notified by the Board to the Deputy Principal Clerk of Session. This would seem an appropriate point to start the clock ticking. Allied with that, there may be the possibility of some sort of automatic letter being issued by the Court (where a legal aid application has not been determined within 2 months of the petition being presented) that must be responded to within, say, seven days to ensure that these matters are being actively pursued by agents and considered by SLAB.

It may also be desirable to have early disposal of these cases although currently the waiting time is around 1-2 months for a hearing. It would also seem sensible to have sittings/diets dedicated to dealing with immigration cases which often involve the same issues and counsel. Due to the specialised nature of such cases there should be designated immigration judges to allow them to develop a specialisation in this complex area of law.