Comments in Response to the Discussion Paper on the Civil Justice Review (my own, rather than a Faculty response)

I wholeheartedly agree that a key issue is whether the Court is a remedy of last resort or one of a number of options on a "menu". Indeed, the issue may be as simple as whether persons (natural or juristic) are to be encouraged to litigate or discouraged from doing so. At present, I would discourage litigation because it is expensive, often disproportionate, time-consuming, stressful and sometimes unfulfilling. I would exempt from this the new personal injury procedures in the Court of Session, which appear to me to work reasonably well.
I shall try to answer the questions where I feel I can offer comment.

Chapter 1

2. It is plain that dispute resolution should ideally be proportionate – neither too expensive nor too slow. The more elusive commodity is, however, quality. What is it that the dispute resolution process is trying to achieve? There are a number of ideals referred to in the paper, not all of which are necessarily synonymous. Firstly, there is a requirement that a case be "meritorious", referred to in paragraph 1.12 as a precondition for access to justice. This seems to me a highly subjective term, and to be something which may only be obvious when the dispute has been ventilated. And some claims which are well-founded in law would not easily be described as having "merit", and vice versa. I would prefer the more modest attribute – that a case not be obviously unstateable. Secondly, there is the requirement that a solution be "fair" (1.11). This is also rather subjective. Lastly, although obviously not least, there is the concept of justice itself. I think that this may mean "a solution which represents the entitlement of parties according to law". The basic question is – should it always be possible to have your dispute resolved according to law, by which I mean the substantive rights of parties? Some of what is discussed appears to me to proceed on the basis that what will be offered will be something different from this (with which I would not necessarily disagree). If this is so, are there problems with Article 6?

Chapter 2

2. Yes – subject areas would be housing, social security, immigration – the areas which have fallen into the category of unmet legal need for as long as I have been learning about and practising the law. I suspect also that there is little help for people dealing with HMRC. My perception is that CAB's are bearing much of the load of providing advice in these areas. They are difficult, time-consuming and probably not very remunerative for solicitors. But there can be imbalance, particularly if there is some sort of hearing where the State body will be represented, usually by a specialist.

3. I don't think this point is made in the Paper, but the answer may differ depending on whether we are discussing the lower value claims in the Sheriff Court, where people should be assisted to use procedures themselves, or mainstream litigation in the Court of Session and the Sheriff Court, which attracts a particular sort of party litigant (e.g. members of the Society Against Crooked Lawyers).

4. Genuine self-help seems unexceptionable, but the Internet has opened up the possibility of going to law becoming more not less complex. I am thinking of the

growth of “Claims” organisations; I am told that there is now a market in claims, where those who contact a claims organisation, often on the Web, because they have had an accident, then have their claims sold to solicitors. I gather that some such organisations charge a solicitor £300 per claim. How is this expense to be made up by the solicitor?! The solicitor then becomes remote geographically (and in other ways) from the client, with a colleague having recently been instructed in a claim by a pursuer in Dundee against the local council which had been dealt with by solicitors in the south of England. And solicitors in England and Wales are said to be attempting to “sell” clients who have responded to their websites to solicitors in Scotland.

6. Yes, although I cannot see that introducing a tribunal to deal with low value cases (2.18) is required. Necessarily, a tribunal is more resource-intensive than a single person and there would, in my view, be a real threat to proportionality with this suggestion. It would also be more intimidating than a single person.

Chapter 3

As I am sure others have pointed out, the Law Society has now terminated the Scheme for the Recovery of Counsel’s fees.

1. I think it needs to be acknowledged (as it is elsewhere in the Paper, at paragraph 4.30) that the law is more complex now. This necessarily contributes to expenses, and spotlights the issue of whether all those with disputes should be offered the option of having resolution according to law – see comments on page 1.

7. Please see 9. below.

8. It seems to me that, by definition, the uplift provisions must have diminished access to a just outcome for those individuals who incur them. No doubt the idea is one of cross-subsidy across a range of clients, but I am not sure that this works in practice.

9. I have acted for clients in expenses-funded medical negligence cases where there is considerable anxiety that the ceiling of £50,000 will not be enough to cover the other side’s expenses if the pursuer loses. Professional negligence (especially medical) raises particular funding problems, because a case defended on liability is actually likely to be lost by the pursuer; this is, however, a matter of substantive law as much as of funding. So I suspect the potential for insurance to fill the gap in funding is limited. Having said that, I am not sure that it is appropriate for the State to bear the expenses risk of professional negligence actions. Where it does, I consider that far greater use should be made of the possibility of splitting a proof on liability from a proof on quantum. There have been several obstetric negligence cases recently in the Court of Session where the case has been prepared on both aspects and then been lost by the pursuer on liability. Preparation of such cases is enormously expensive. If you are a pursuer with a serious head injury case you would expect to have a minimum of 12 experts on quantum. But there is reluctance, especially on the part of pursuers’ agents, to contemplate separation of the issues. It may be that some form of compulsion has to be considered.

Chapter 4

With this chapter, it is difficult to answer the questions individually, as a number of them inter-relate. I would like to make a general comment. In the late 1980's, following the introduction of the power to remit actions from the Court of Session to the Sheriff Court by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, a head of steam built up behind the practice. This was more or less brought to a halt by McIntosh v British Railways Board, 1990 SLT 637. It may be that this was a wrong turning. I would like to know in detail why the systems developed by some solicitors for raising actions in the Court of Session could not be adapted for the Sheriff Court (paragraph 4.42).

2. I find this very difficult to answer, as I can see both sides. Would it be possible to have a trial period or a pilot scheme?

5. One factor is whether the solicitor wishes to instruct counsel – that tips the balance in favour of the Court of Session. Albeit this may be a matter for the profession rather than for the Review, I would like to mention here the practice of having "correspondent" solicitors where a case is from outwith Edinburgh and is being brought in the Court of Session. Surely in the age of high-tech communication systems, this is an over-complicating feature?

6. I would favour the continued exclusive jurisdiction of the Court of Session in Judicial Review. I do not agree that "many" judicial reviews "deal with what are essentially private law disputes" (paragraph 4.46). I accept that an example is given but the "golf club" challenges are not common. The number of petitions for Judicial Review is not high (see Annex D) and individual sheriff courts or solicitors in sheriff court towns are therefore unlikely to build up expertise in dealing with these cases. At the Bar, there are public law groups, exchange of ideas and a first class library – this being an area where comparative jurisprudence is of assistance. There are procedural advantages in having a pan-Scotland jurisdiction for dealing with what are essentially matters of public administration. It would also be necessary to confer on the Sheriff Court power to grant reduction, a change of substantive law.

8. It is difficult to answer this question without provoking accusations of being no more than a vested interest. But I believe that there are some cases which should be in the Court of Session. The Court of Session bench offers extremely high quality intellectual ability to resolve disputes. It is a corollary of that, in my view, that the most difficult, and/or the most high value cases should be initiated there. I have already commented on Judicial Review. Some of the same comments can be made about high value personal injury work. These are quite specialist claims, particularly in relation to quantum, and having them dealt with centrally allows the Bar to develop expertise which is then available for the whole country.

9. £50,000. Is there any possibility of an upper limit to the jurisdiction of the Sheriff Court?

19. Yes. And I do not think that the Sheriff should require to seek permission to remit a case to the Court of Session. S/he does not require such permission at present (s. 37(1)(b) of the 1971 Act, I think).

20. It is difficult to have a sense of the big picture. I suspect that the matter is self-regulating, with the more challenging cases being the ones that come straight to the Court of Session.

22. I cannot see any reason why some such appeals could not be dealt with by a Lord Ordinary.

Chapter 5

I would like to make another general comment. People very commonly say that what they want is an apology, or "to prevent the same thing happening to someone else" (paragraph 5.18). I am not convinced that this is always accurate. Most litigants I meet are indignant. They believe that people should honour their contracts and right their wrongs (perfectly reasonably) and this belief explains, at least in part, why they are there. There is a danger in taking people at their word and assuming that procuring for them an expression of regret will be adequate.

7. I say, with great respect, that one of the points at which the Judiciary itself has some control over the pace of litigation is when a case goes to avizandum. From time to time, there are delays of more than a year in issuing judgements. While there are often good reasons for this, from the perspective of the parties, it is too long. There are steps which could be taken to ameliorate this.

8. There needs to be more judicial involvement in serious personal injury cases. The experience of the Long Proof By Order Roll in the 1990's was not encouraging, but ideally, allocation of a large case to a particular judge, with a Pre trial Meeting say 8 weeks in advance, to be minuted and those minutes passed to that Judge would be a useful start. Also, as mentioned before, consideration of whether liability should be separated from quantum would help.

Chapter 6

4. I think that the current requirements for obtaining leave are about right, with one exception. There is, in my opinion, a case for supplementing the right to ask for leave from the decision maker with a right also to seek it from the appellate Court if the decision maker refuses. At present, that is possible in some but not all situations. The principle involved seems to me equally applicable in all appellate matters.

10. Yes. Empirically, the removal of all the sorts of application which used to require an appearance (late defences etc) appears not to have reduced the time taken by the Motion Roll. Those appearing just speak for longer. Removal of all incidental business from Judges with a Hearing to conduct would be very welcome.

12. Yes. Time-limited hearings appeal to me. We should be able to be concise. Almost the greatest evil of all is the part-heard case. It is ghastly to return to, and the quality of decision-making is threatened by long gaps between witnesses or submissions.

16. Yes. Features could be much like the ill-fated system. I thought it was fine.

24. Yes, with the exception of the permissibility of producing answers in Judicial Review petitions at the last minute. There needs to be a time limit for answers – in my opinion. As far as time limits for the raising of proceeding are concerned, I think the doctrine of *mora* (delay) works reasonably well, and is suitably flexible.

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