RESPONSE BY EAST AYRSHIRE COUNCIL

TO

SCOTTISH CIVIL COURTS REVIEW
CONSULTATION PAPER

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 feature of such a system?

We agree that the system should be designed to encourage early resolution of disputes. However, we would not like to see a system in which the Council are required to take certain steps before being able to access the Court system. In many instances, for example in recovery of heritable property and anti-social behaviour cases a court order is required in order to resolve matters and further additional steps simply add delay in achieving the necessary ruling.

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 supported by other factors?

Yes.

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

No.

CHAPTER 2: ACCESS TO JUSTICE

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

Public Legal Education may contribute greatly to the improvement of access to justice. It would allow parties to assess the merits of their case and inform the process and manner of their discussion and negotiations with any other party involved in the dispute without necessarily having recourse to a potentially lengthy and costly formal Court process. That being said the nature and extent of the Public Legal Education and the point it is taught could still bring out inequalities in the way disputes are dealt with resulting in no greater benefit to an individual than that which exists at the moment.

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?

   It is always desirable to design Court procedures with a view to enabling litigants to take part in the process without legal representation. This ensures that they have been able to contribute to the Court process and have their views considered.

   As to feasibility, Court procedures, particularly in relation to small claims and summary cause actions, already do this. They allow the sheriff to take a more pro-active approach with parties whether represented or not at a First Calling in order to determine the issues in dispute and the scope of evidence required at proof if necessary. That being said, the Ordinary Cause procedure can be overly legalistic for party litigants and further consideration could be given to case management discussions as a way of allowing all parties including party litigants the opportunity of effective participation in a Court process.

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" Services and Court based advice services can and do contribute to the improvement of access to justice for party litigants. The Council is aware of the advice and assistance already provided to party litigants by the In –Court Adviser at Kilmarnock Sheriff Court and the Sheriff Clerks at Kilmarnock and Ayr Sheriff Courts.

   Further use of Self-help" and Court based advice services could allow parties the opportunity at an early stage to assess the merits of their case and consider whether or not the assistance of a third party such as a Solicitor is required.

5. -

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?

No. The existing Court structure is able to effectively and efficiently deal with low value cases. However, if there was a case for considering a new method of dealing with low value cases, by, for example a Housing Tribunal, concerns would exist in relation to the location of such venues (particularly if parties required to travel a distance to such a venue); the cost or expense of such processes; and whether legal representation still required to be made in any event.

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 compared with sums awarded by the Court or settlement figures?

Figures can be given as follows:

Type of Action	Principal Sum	Expenses
Debt	£ 8,027.83	£1,828.06
Debt	£ 9,411.43	£2,049.15
Recovery of Heritable Property	£ 558.58	£1,114.55

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

The cost of litigating is a material factor in determining whether to pursue or defend cases in Court. People wish to know how much such litigation will cost and whether they will be able to recover this in whole or part from the other party. In coming to a decision the following considerations apply:

(i) Eligibility for Civil Legal Aid or Legal Aid Advice and Assistance;
(ii) Financial assistance from Insurance Policies or Trade Union;
(iii) Privately funding the litigation;
(iv) Solicitors/advocates fees compared to Court Expenses;

(v) Likely prospect of recovering expenses.

3. Does the Current systems of levying Court fees affect access to justice? If so, how and in what kinds of cases?

The current system of levying Court fees does not affect access to justice. Those that can afford to pay do so and those that can't may qualify for financial assistance.

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

No. The normal rule is that expenses are calculated on a party to party basis. This fails to take account of the additional expense incurred by the person to his Solicitor in the conduct of a litigation which is assessed on an agent client basis. If someone is put to the expense of defending or pursuing a litigation they should be entitled to recover standardised expenses that are a better reflection of their costs from the losing party.

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

Yes, the current arrangements are satisfactory.

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

The availability of legal advice and assistance and legal aid allows those persons who financially qualify to present their position in a litigation or negotiate over a dispute in circumstances where they may not otherwise have been able to.

Questions 7 – 10 have not been answered.

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, whilst as a local authority many of the types of actions we raise receive a high priority from the local Courts, such as actions relating to children and actions relating to anti-social behaviour, there is no doubt that the availability of proof dates is severely restricted by the priority given to criminal business. We are of the view that viewed objectively a lot of civil business is of more significance to parties and society in general than much summary criminal business and accordingly greater priority should be attached to such cases. Further, civil Courts sometimes start late due to Sheriffs hearing criminal custodies.

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

In principle, this would be a good idea. Larger Sheriff Courts already have Sheriffs who specialise in particular areas of work and, from a civil Court users prospective, it would be good to know that some Sheriffs are always available for civil business.

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

We consider this might be a step too far in that it may reduce the flexibility of smaller Courts to react to particular pressures of work.

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

In principle, we agree that a greater degree of specialism within civil Courts would be a good idea, but the ability of Courts to obtain such specialism may be limited in smaller Courts. So, for example, while it may be possible for Glasgow Sheriff Court to have Sheriffs specialised in adoption it may not be possible in a smaller Court such as Kilmarnock, that has a smaller adoption case load and fewer Sheriffs.

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?

As defenders we have experience of reparation cases in particular being raised in the Court of Session as a means of upping the pressure on the defenders to enter into an economic settlement due to the high costs involved. Pursuers may also prefer the

Court of Session to up the anti, due to the complexity of the case or to avoid what they may see as the lottery of Sheriffs. That said this authority always raises actions in the Sheriff Court where possible due to the costs involved in the Court of Session litigation, the quality of Sheriffs locally in Kilmarnock and Ayr Sheriff Courts and the speedier conclusion of Sheriff Court actions.

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

In our view the Sheriff Court should have exclusive first instance jurisdiction in virtually all civil actions with the possible exceptions of all Scotland interdicts, child abduction cases, complex family actions and judicial reviews where they raise important points of public or administrative law. As an alternative we consider that the privative jurisdiction of the Sheriff Court should be greatly increased from the current sum of £5,000 as the costs for litigants in Court of Session proceedings for such small sums are out of all proportion to the value of the dispute. Whatever is done we consider it would be a good idea to largely remove the discretion Pursuer's agents currently have to decide which Court to use by rules that clearly specify each Court's exclusive jurisdictions.

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

We do not consider there is a sufficiently strong argument for such a radical change.

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 would not wish to see the Court of Session becoming exclusively a Court of Appeal as we consider it is an effective forum for dealing with certain disputes as mentioned in our response to question 6. While in general terms we wish to see an increase in the Sheriff Court's exclusive jurisdiction if the Court of Session became an appellate Court only we fear in might lead to an increased number of appeals from parties who would have wanted the Court of Session to consider cases in the first place.

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

In our view the privative jurisdiction of the Sheriff Court should be set at a very high level, perhaps £150,000. However, we would also observe that the amount of money involved does not always reflect the complexity of the case and, if the Court of session retains a first instance jurisdiction, it would, in our view, be more appropriate for the Court of Session to deal with the most complex cases which are not, necessarily, those with the highest monetary value.

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

We imagine it would be prohibitively expensive to set up a tier of civil Court below the level of the Sheriff Court. We do not consider a sufficiently strong argument has been made for such a radical change and, in any case, we consider the Sheriff Court is an extremely efficient forum for dealing with Summary matters. Experience with some actions that have been removed from the Sheriff Court has shown that alternative forums can be far less efficient and consequently more expensive.

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

We would not agree with this proposal. We consider that having different tiers of judiciary within the Sheriff Court would reduce the flexibility available to the Sheriff Courts in meeting operational needs.

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

In principle, the division of the Sheriff Court into distinct geographical jurisdictions does not create particular difficulties. However, given East Ayrshire traverses more

than one Sheriffdom difficulties arise when this authority is seeking interdicts to cover the entire local authority area. We would consider it preferable if the boundaries could be redrawn so that East Ayrshire falls within one Sheriffdom. This issue also arises in the local authority areas of South Lanarkshire and East Dunbartonshire and, accordingly, may be an issue for those authorities.

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

Yes

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

The arrangements are satisfactory although we have concerns over the delays which seem inherent in the Court of Session procedure. However, if the Court of Session became, largely, a Court of Appeal the larger capacity available may address this problem.

16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?

We do not have sufficient experience to be able to comment on the current arrangements for the disposal of commissary business and defended divorce actions.

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?

We consider that this idea may be worthy of further consideration as envisaged within the consultation document. That said we are concerned that such a proposal would lead to extra administration of cases by requiring administration at a national then a local level which could have significant cost implications. It would also create difficulties where cases have to be warranted and served as a matter of urgency, such as where an action is about to become time barred.

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

If the proposal detailed in question 17 is proceeded with then we consider Sheriffs would require to have an all Scotland jurisdiction. That said if there is to be a National Sheriff Court we consider that cases should primarily be raised within the local Sheriff Court in order to minimise inconvenience and costs to parties, litigants and the profession.

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 consider such a power would be desirable. In the case of references from the Sheriff to the Court of Session the complexity of the case may be taken into account and, perhaps, the importance of the legal question which will require to be answered.

20. Are the existing appeal arrangements satisfactory?

We agree that there should be a wider requirement for leave to appeal where an appeal has already been taken from the Sheriff to the Sheriff Principal. Other than that we consider the current appeal arrangements operates satisfactorily.

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?

We consider the office of the Sheriff Principal should be retained. We consider the current arrangements for appeal to the Sheriff Principal provide parties with a comparatively cost effective and efficient mechanism for having first instance decisions reviewed.

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

The answer to this question depends on whether the Court of Session is to become, primarily, an appeal Court. If the Court of Session remains a Court of first instance then we consider the current arrangements to be satisfactory. If, however, the Court of Session becomes primarily an appeal Court then consideration will require to be given to the respective jurisdictions of the inner and outer houses.

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?

Our concern here would be if the number of levels of appeal is to be limited, parties may choose to leapfrog the Sheriff Principal and go directly to the Court of Session. This would, of course, increase the cost of the appeal.

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

We consider there are a number of disadvantages which arise from the reliance on part-time Sheriffs. Ideally there would be sufficient local Sheriffs to deal with all the business. Then a local Sheriff could, as previously was the case in Kilmarnock Sheriff Court, have ownership of a case from start to finish. We believe this would increase both the efficiency of judicial decision making and the expertise of local Sheriffs. The reliance on part-time Sheriffs can result in inconsistent interlocutory decisions being taken during the course of an action. We also have experience which suggests some part-time Sheriffs are more reluctant to make difficult or final decisions on matters than local Sheriffs. This can result in repeated unnecessary callings of cases, in particular heritable cases, which is not conducive to the efficient conduct of business. We consider the provision of an adequate number of local Sheriffs facilitates an increase in the knowledge and experience of those Sheriff's in dealing with local agents and issues which is lost by the over reliance on part-time Sheriffs.

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 that overriding objective or statement of philosophy be?

We have no difficulty with the rules of civil procedure having an overriding objective or statement of philosophy. If there is to be such an overriding objective then we consider the wording of the objective in the English Civil Procedure Rules, would be a very good basis for such philosophy.

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

We consider there are many benefits to mediation and a Court should certainly encourage parties to consider mediation. That said we would not agree that mediation should be required as we consider parties themselves are best placed to judge whether mediation is likely to deliver a resolution. Further, we do not consider sufficient evidence exists in Scotland as to the benefits of mediation in ensuring a quick, cost effective and just resolution of particular cases to warrant compulsory references to mediation. Having said that an exception to our foregoing view is Family cases which take up a lot of Court time and due to the emotional issues involved could well be suitable for compulsory mediation.

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

We consider the most appropriate point to consider referring a case to mediation would be after defences are lodged when ordinary cause, the issues in question should be apparent to all the parties. In the Sheriff Court this would, of course, be before the Options Hearing. Perhaps the lodging of defences could trigger a letter from the Sheriff Clerk, requiring parties to consider mediation and if they avail themselves of that opportunity the adjustment period could be suspended and the Options Hearing consequently delayed. Alternatively the Clerk could supply a letter for service with the writ asking parties to consider mediation within a set period. If the parties agreed

the process of the case could be suspended. That said parties could agree to make use of mediation at an earlier stage.

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.

We agree with the extract from the Scottish mediation network which suggests that it is inappropriate to mediate where there is a requirement for an interim interdict or summary judgement, vexatious litigant, a need for legal precedent to clarify the law or inform policy, a view that a settlement would not be in the public interest or an alleged abuse of power. In general terms we would only consider mediation appropriate where there is some scope for settlement between the parties. So, for example, where the Local Authority proceeds with an action for recovery of possession on anti-social grounds it would be inappropriate for such a case to precede to mediation as, other than the defender rectifying their anti-social behaviour, there is unlikely to be any scope for middle ground between the parties. Similarly, in a debt recovery action where the sums are clearly due it would be inappropriate to require matters to be referred to mediation. That said where there is a dispute as to the quantum of a debt recovery action there may be scope for middle ground and accordingly a benefit in mediation.

5. -

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

We would welcome increased use of modern communication and information technology by the civil Courts. We have significant experience of case management discussions held by way of telephone conference by the Employment Tribunal and consider this practice could at certain points in complex actions assist parties. We welcome the intention to commence piloting the electronic transmission of civil documents and consider that, if successful, the pilot should be extended.

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

We consider the Courts should control the conduct and pace of litigation informed, of course, by the submissions of the parties.

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

We consider, given the benefits of the new rules for Court of Session personal injury actions, that most defended cases would benefit from case flow management. That said, particularly complex cases such as very technical contractual disputes, cases with significant numbers of witnesses, defended adoption and parental responsibility orders and, in the future permanency order cases, would benefit from personalised judicial management.

We would also wish to add that while many of the proposals in the consultation paper could minimise delay in the Civil process the most significant thing that could, in our view, be done to minimise delay in the Civil process would be to speed up the time it takes to determine legal aid applications.

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

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

Our experience in defended personal injury cases is that the pre-action protocols are extremely useful. They ensure that the Insurance Company cannot ignore correspondence, that the Pursuer is well prepared for litigation and that the parties are forced to correspond with each other. The pre-action protocols work well between the profession and the Insurance Company. They would, however, in our view be difficult to operate where party litigants are involved.

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

We agree that there may be scope for greater use of pre-action protocols. However, we do not see these as being of much assistance in matters relating to housing, anti-social behaviour or many matters concerning children. In many instances the local authority require the order of the court to regulate certain behaviour and pre action protocols would merely result in further delay in obtaining that order. We also do not

consider that they would be effective in cases which come within the small claim or summary cause limits which involve a large number of party litigants and where the emphasis is on a less formal process and early intervention by the sheriff to ascertain the issues in dispute.

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

We consider that they would only operate effectively if compulsory and with the necessary impact on expenses for failure to comply.

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?

As part of the overall objective to ensure greater access to justice we would not wish to see excessive gate-keeping in the sheriff court. This is however, subject to what we have already said regarding leave to appeal.

5. -

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

We believe that this would make the judicial system more easily understandable and more accessible to all.

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?

The small claim and summary cause procedures are already initiated by a set form which in our view operates well. We do not consider that there is a real need to rationalise the initiating documents further. We would however, agree that the Courts would be more accessible if these documents could be received electronically.

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

We are of the view that there remains the need to ensure that parties are made fully aware of the case against them and that parties should be required by way of pleas in law or otherwise to specify the legal basis of their case and not simply a brief narration of facts (relevant or not). If this is not to be done by way of full written pleadings then it would require to be addressed at a calling of the case before the sheriff.

9. Are the current arrangements for summary disposal satisfactory?

The summary decree process works well and we consider it would be useful if there was a remedy for Defenders equivalent to the Summary Decree open to the Pursuer to address at an early stage (prior to debate) spurious claims.

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?

We would not consider that different categories of Sheriff would be useful. This would we consider result in less flexibility in the operation particularly of the smaller courts.

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

Yes.

12. Should the Court have a greater degree of impute 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?

The Court is already concerned in allocating time to be set aside for Hearings although reliance is clearly placed on the parties' view of the matter given that they are, in particular, concerned in the number of witnesses to be called and the likely extent of their evidence. Although there may very well be more scope for the sheriff to be concerned in those matters we do not consider that it would be appropriate for Hearings to be limited in time. The parties remain best placed to determine how long will be required for a case to be heard.

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

Having had experience of both written and oral arguments we would consider it more efficient for oral arguments to be made where possible. This allows the Sheriff to interact while the arguments are being made and a response to be made to each party's position without the need for further consultation or exchange of written submissions.

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

It is our view that the mechanisms for disclosure of evidence in operation now are satisfactory.

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

Whilst it may be sensible for the Court to encourage the use of joint experts to relieve pressure on Court time, costs and to diminish the issues in dispute, it is not our view that it would be appropriate for the Court to determine that joint experts be required. It is often the case that experts disagree and there is therefore a need for two or more experts. It is not difficult to envisage a situation in which for example doctors may disagree as to the cause of an injury to a child or expert surveyors disagree on matters of valuation.

16. Should a persistence of Pursuers offers be introduced into the civil Courts procedure? If so, what feature should such a system have?

This is not regarded as a necessary introduction. Pursuers should remain required to justify any claim that they make and as such any system of Pursuers offers is in our view not needed and may indeed undermine this principal.

17. -

18. Should written judgements be required in all cases?

No. It is entirely feasible that a Sheriff may make a determination following a Proof without the need to reduce his judgement to writing.

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

There is an issue concerning the compliance with Court rules and different Courts and different Sheriffs take different views as to the seriousness of non-compliance with certain procedural rules. There may be scope for the greater use of awards of personal expenses against Solicitors or parties who behave unreasonably, but it is accepted that breaches of the Court rules often result in sanction against the party rather than the Solicitor responsible. We would not consider it feasible for any such breaches to result in automatic sanctions and that any sanctions require to be considered in each individual case in all the relevant circumstances.

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

Now that the thresholds have been raised for ordinary cause cases making it easier and more cost effective for party litigants to raise actions for less than £5,000 there may be merit in considering a process of screening of ordinary cause cases instigated by party litigants.

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

Our experience of the vexatious litigants provisions are that they are cumbersome and results in excessive cost particularly where the litigations complained of are raised in the sheriff court and yet to have someone declared vexatious requires court of session procedure. We would be in favour of a system available in the Sheriff Courts with an accessible list available of those declared vexatious.

22. 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?

No. Whilst access to justice is clearly of vital importance there is a need to ensure a balance to allow cases to be progressed efficiently.

23. -

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

The rule works well, but there is an issue about the timing of Hearings. Further reforms envisaged in particular to limit the jurisdiction of the Court of Session may speed up this process so that the Hearing does not take place many months after the decision is taken.