RESPONSE BY FACULTY OF SOLICITORS OF DUNBARTONSHIRE TO CIVIL COURTS REVIEW – CONSULTATION PAPER

The Faculty of Solicitors of Dunbartonshire has 18 solicitors practising solely or mainly in the civil courts mainly at Dumbarton but also Paisley and Glasgow Sheriff Courts. This response represents the views expressed by those practitioners. In keeping with paragraph 1.21 of the Review it is not intended to answer every question on which the Review is seeking a response but to restrict answers to those questions which are within areas touching our experience.

Accordingly, we respond to the questions raised by the review as follows:-

CHAPTER ONE: 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?*

   We agree that the system should be designed to encourage early resolution of disputes but not that it would be preferable for this to happen without resort to the courts. We would be concerned if in an effort to achieve the former by, for instance, encouraging alternative methods of dispute resolution access to the courts were to be restricted. In our experience actions are raised in the Sheriff Court currently only as a last resort and of those that do only a small percentage progress to a decision on the merits. This would seem to indicate that in the Sheriff Court the raising of an action provides the most accessible means by which the parties are able to negotiate a resolution of their dispute and that a judicially determined outcome is the exception rather than the rule. We take the view that if the law prescribes a remedy then access to justice requires that the means by which that remedy is to be obtained are readily available which, in turn, depends upon (i) having readily available competent legal advice and representation, (ii) funding for that advice and representation and (iii) a system to administer applications for a legal remedy. We consider that the courts should remain the main system for administering applications for legal redress.

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

   We see difficulties and unfairness as being likely to arise if the proportionality principle as illustrated in paragraph 1.11 becomes synonymous with what are regarded as low value monetary disputes being treated as a relatively low priority. There are already disincentives both in respect of the extent of any expenses that may be awarded in claims up to £5,000 and the availability of Legal Aid for claims up to £3,000 which we consider are a denial of justice. It is unacceptable that a Small Claim or Summary Cause claimant, whether a private individual or a business, should be unable to recover his legal expenses on a solicitor and client, client paying basis. We are concerned that the proportionality principle will be used to extend these disincentives. All too frequently in

our experience what is at stake might by some standard be regarded as small in monetary terms but no less significant to the client for that. As the Review recognises at paragraph 1.13 the monetary value should not be the sole determining factor as to how much resources should be expended on a case. Nonetheless, the rules relating to Small Claims and Summary Causes do make monetary value the sole (and arbitrary) determining factor and we perceive a risk that the proportionality principle will be subverted so as to extend this. We consider that the "make the wrongdoer pay" principle should also guide and inform the Review's recommendations.

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

   We would refer to our answer to question 2.

CHAPTER TWO: ACCESS TO JUSTICE

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

   We agree that better public awareness of rights and obligations under the law would be helpful in improving access to justice but we also agree with the opening sentence of paragraph 2.3 that knowledge on its own will not be enough to avoid or resolve disputes.

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?*

   We are one of the rural areas affected by solicitors withdrawing the provision of Civil Legal Aid and Advice & Assistance owing to the low level of reward compared to the increasing cost of running a legal practice. As a result cases which have merit are not being raised at all or are being raised by litigants in person. This partly accounts for the increase in the number of party litigant actions.

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?*

   As we have not been involved in any of the pilot projects mentioned in the paper we consider that we are not in a position to comment on this.

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 concern we expressed in our answer to question 2 in chapter 1 remains relevant here in relation to "low value cases". We can see a case for the business of the Sheriff Court being arranged around sessions dealing with particular categories of case, regardless of value, rather than according to the set of rules that apply to that kind of case. For example,

it might lead to a better use of court time if the large number of Local Authority and Housing Association eviction actions which currently are raised as Summary Cause heritable cases, were dealt with alongside mortgage repossession and Mortgage Rights Act applications (which are raised as Ordinary Actions) in one dedicated session. These cases frequently involve unrepresented parties which makes them time-consuming and it is unfair that parties involved in other types of case, some of whom might be paying to be represented, should have to wait throughout a court of unrelated business only to find that the Court has insufficient time to deal adequately with their business. Similar such "streaming" according to the nature of the case, rather than value, or the set of rules under which it has been initiated, would, it is thought, increase the efficiency of the Sheriff Court. We are not convinced, however, that such cases simply because of their nature or the relatively low monetary value involved ought to be "farmed out" from the existing court structure recognising as we do the importance of the subject matter in all such disputes to the parties involved.

CHAPTER THREE: 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?*

   In the more straightforward case the changes to the table of fees recoverable in Ordinary Sheriff Court actions have meant that nearly 100% of fees incurred are able to be recovered under an award of expenses. These are cases where the issues have been quite clearly focused at the stage of the Options Hearing and a Proof has taken place without further intervening procedure. Such cases tend to be rare, however, and much depends on what happens after the closing of the Record. If the pleadings undergo amendment this not only drives up the cost of the action but also reduces the percentage of costs actually incurred which are recoverable under an award of expenses. This is because the relevant table of fees confines the parties to recovering only what are called "proper expenses of process" which does not include the time and correspondence involved in making the investigations and conducting the legal research involved in the more complex sort of case which is where amendment will more frequently be encountered. In such cases we would expect that the award of expenses would cover between one half and two thirds of the costs actually incurred.

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

   The cost of litigating in the Sheriff Court, which is where we practise, is a significant deterrent for those not in receipt of Civil Legal Aid. Owing to the unpredictable nature of litigation it is rarely possible to give clients a realistic estimate of what an action is likely to cost in fees and then there is the possibility that if they lose they might be found liable to pay expenses to their opponent.

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

   In our experience the system of levying court fees does not affect access to justice. Those who are in receipt of Civil Legal Aid are exempt from paying court fees and those who are not exempt are not deterred from proceeding with actions in the Sheriff Court through having to pay court fees.

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

   No. It is hard to explain to clients that even though they may be successful in their action an award of expenses does not carry with it all the costs they have incurred and that any shortfall will have to be paid for out of the principal sum, if any, that was in dispute or funded out of their own pocket. We consider that the English model that "costs means costs", ie that the successful party is not limited by artificial barriers such as the Scottish process rule in being able to recover reasonable expenses necessarily incurred in order to obtain justice, should apply in Scotland. This could be achieved by abolishing the rule which prevents accounts of expenses being charged partly on the basis of the inclusive fees and partly on the basis of the detailed fees of the table of fees and by making it clear that in the taxation of accounts "proper expenses of process" means <u>all</u> items of charge which a party can justify as having been reasonably necessary.

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

   No. Practice varies between auditors and frequently too much is left to the discretion of an official who, whilst having experience of taxing accounts, will have had no experience of conducting litigation. Auditors are not well placed, therefore, to decide whether and to what extent the expenses chargeable on the party and party basis are reasonable to conduct the litigation in a proper manner and no more.

6. *To what extent and in what respects does the availability of Legal Advice & Assistance and Legal Aid affect access to justice?*

   Instances of cases where clients have been found eligible for Civil Legal Aid but who because of the size of their contribution decline the offer of a Legal Aid Certificate are unusual. In our experience the difficulty clients have who are financially eligible for Civil Legal Aid is finding a solicitor who is willing to undertake the case. Legal Advice & Assistance remains the most useful way for clients to obtain advice and help in resolving whatever legal issue they have without proceeding to court. A number of solicitors in the Faculty who no longer provide Civil Legal Aid continue to provide Advice & Assistance out of a sense of moral obligation to the community they serve but if the problem cannot be resolved without litigation these clients frequently have to find another solicitor who does provide Civil Legal Aid. If they can find such a solicitor they can expect that the level of attention they receive will be commensurate with (a) the

level of remuneration that the solicitor is entitled to under Legal Aid and (b) the efficient, and hence profitable, solicitor confining himself to that which has to be done to complete the block fee criteria and no more.

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

   Clients seeking a matrimonial or common law non-molestation interdict, a non-harassment order or any other form of emergency order which would require to be undertaken under the Special Urgency provisions of Civil Legal Aid will find that they are turned away from nearly every firm in the Faculty which still provides Civil Legal Aid and if they are able to find such a solicitor they balk at having to complete a 35 page financial assessment and several other forms before the solicitor will agree to undertake the work.

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

   As a Faculty we have had very little experience of speculative fee arrangements. One area where this is increasingly common, however, as an alternative to Civil Legal Aid is the divorce action involving claims for financial provision where there is likely to be property recovered and a prospect, therefore, that the solicitor's fees will be paid which the client might not otherwise be able to afford. In such cases, however, as there is no Legal Aid Certificate the client cannot seek modification of any adverse award of expenses. If such cases were to be conducted under Civil Legal Aid the client would have to pay the Civil Legal Aid account out of the property recovered. It follows that these cases are self-funded be that on a speculative fee basis or under Civil Legal Aid. The speculative fee agreement has enabled clients to obtain legal representation when they otherwise might not have been able to do so. The risk which clients instructing solicitors on this basis are obliged to accept is that if they are found liable in expenses they cannot seek modification under the protection of a Legal Aid Certificate. The rules on Civil Legal Aid ought to be amended to enable solicitors to charge on a private fee paying basis where the client has recovered property. This would mean that the client who has not recovered any property and has been found liable in expenses would be able to seek modification whilst in the same circumstances the solicitor would be able to seek remuneration under the Legal Aid Certificate. This would make Legal Aid work more attractive to solicitors.

CHAPTER FOUR: 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. The fact that court fees contribute 57% of the cost of running the court system (paragraph 3.8) but the proportion of sitting days allocated to civil business in the Sheriff Court is just over 30% (paragraph 4.18)

shows that while subsidising the running of the courts litigants are not being given a sufficient proportion of the courts' time.

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

   We consider that we have not enough experience of the Supreme Courts to comment on (a). We agree that there is a case for specialist Sheriffs in the larger Sheriff Courts such as Glasgow, Edinburgh and Aberdeen but in smaller Sheriff Court districts such as ours we are not convinced that this would offer any material advantage and we are not attracted to the idea of a national Sheriff Court where because a case falls within a particular category falling within a particular Sheriff's specialism it has to be dealt with by that Sheriff. We do not see how it will increase access to justice if parties and their representatives have to travel to wherever that Sheriff happens to be based. It is possible for us at present to have access to the commercial Sheriffs at Glasgow by prorogating the jurisdiction to that court if there are thought to be advantages to it. We do not see how increased specialisation within Sheriff Court districts will improve access to justice for the kind of cases that we deal with.

3. *Should the sheriff courts be separated into Civil and Criminal divisions? What would be the advantages and disadvantage of such a separation?*

   No. The disadvantage of splitting their functions is that in a three Sheriff court such as Dumbarton, the current number of sittings allocated to the Sheriff Court (30%) would mean that whilst there would be two permanent Sheriffs dealing exclusively with criminal business there would be only one Sheriff dealing with civil business and it would be necessary to have a floating Sheriff or series of part-time Sheriffs to take his place whilst on annual leave, writing days, study leave, sickness etc. It is likely that the permanent Sheriff would become the "sifting" Sheriff attending to the procedural callings with as much likelihood as at present that Proofs would be "farmed out" to the floating or series of part-time Sheriffs with associated scheduling problems that we already experience. One possible advantage might be if the permanent civil Sheriff could be available on consecutive days to hear Proofs leaving the procedural callings to the floating or part-time Sheriff.

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 can only comment that in our experience in the Sheriff Courts in which we practise (Dumbarton, Paisley and Glasgow) there already exists a sufficient degree of specialisation.

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?*

   Cost and distance ie travelling time. Without an office in Edinburgh we find it necessary to instruct Edinburgh Agents which adds significantly to

the cost of litigating in the Court of Session as does instructing Counsel. Owing to the perceived need for Edinburgh Agents if a case is sufficiently complex to require that Counsel be instructed it is significantly less expensive to raise the action in the Sheriff Court. The problem of recovering a realistic measure of expenses when acting for a client who has been successful is all the more acute where the action has been raised in the Court of Session. This is because the Account of Expenses must be prepared as if only one solicitor was conducting the proceedings. This means that whilst the expenses recovered might go a substantial way towards covering the Edinburgh Agent's fees they will not be sufficient to cover also the instructing solicitor's fees to the client.

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

   It is said that one of the reasons it can take two years from a Motion seeking a Proof before a date in the Court of Session can be allocated is that the Court of Session is cluttered with reparation cases of a very low value where the expenses invariably exceed the sum sued for owing to the number of lawyers involved – instructing solicitor, Edinburgh Agent and Counsel. There ought to be a minimum value for that kind of case to be raised in the Court of Session, perhaps £50,000. We are conscious, however, that this would result in an increase in the workload of the Sheriff Court and there would need to be an increase in the capacity of the Sheriff Court to cope with this. Otherwise, we don't see any reason to change the present rules on the privative jurisdiction of each court.

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

   No. We consider that the existing system where actions can be brought in most cases either in the Court of Session or the Sheriff Court with in the case of the Sheriff Court a right of appeal to the Sheriff Principal and/or Court of Session works satisfactorily.

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?*

   For certain types of action, eg to reduce a decree in the Sheriff Court or in applications for Judicial Review the Court of Session does already operate more or less as a court of appeal even though these are technically actions in the Court of Session at first instance. One way in which this could be expanded, if desirable, would be to extend the rules of privative jurisdiction so that certain types of action of a more complex nature would require to be raised in the Court of Session. We would be opposed to that on the ground that litigating in the Court of Session is invariably more expensive than the Sheriff Court (see our answer to question 5) and this would therefore only further restrict access to justice. The Court of Session will no doubt continue to be the forum of first choice for firms based in and around Edinburgh and provided the volume of Outer House business does not impinge greatly on the waiting time for

appeals to the Inner House we do not see any reason why the Court of Session should be restricted to a court of appeal only.

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

   We would refer to our answer to question 6.

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

    We rarely come across cases where this question arises.

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?*

    No. We consider that for cases which are currently dealt with in the Sheriff Court to be dealt with at a lower tier because they are considered of a low monetary value or otherwise relatively unimportant to be dealt with below the level of the Sheriff Court would amount to justice on the cheap.

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

    We consider that there should continue to be access to local courts close to where the parties live or where the subject matter of the dispute arises. Local knowledge on the part of Sheriffs can play a part in the quality of justice. For instance, most permanent Sheriffs are familiar with the local dialect, areas of special housing need and the range and quality of public services available for those who need them. The interaction between lawyers and the court is one of the intangible areas that helps oil the system. Greater centralisation would undermine that.

14. *Are the current arrangements for dealing with undefended actions 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 the disposal of commissary business satisfactory?*

    We see no reason why uncontentious and therefore largely administrative functions, such as the appointment of executors dative and the granting of Confirmation which are judicial acts should not continue to be dealt with in the Sheriff Court.

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 are against the idea of a national Sheriff court. We believe strongly in a local court system.

18. *Is there a case for all Sheriffs to have all-Scotland jurisdiction?*

    We consider that this would be relevant only in the context of more remits between different Sheriff Courts and as that would undermine the benefits we perceive in a local court system we would be against this.

20. *Are the existing appeal arrangements satisfactory?*

    Yes. The option of an appeal to the Sheriff Principal enables a Sheriff's decision to be reviewed without the expense and delay of an appeal to the Inner House whilst the option of a further right of appeal to the Inner House should remain.

21 *Should the office of the Sheriff Principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?*

    The office of the Sheriff Principal should be retained and should remain judicial as well as administrative. If all appeals from the Sheriff Court had to be made to the Court of Session that would drive up the cost of litigation in the Sheriff Court because (a) unless the solicitor who conducted the case at first instance is a Solicitor Advocate the same solicitor cannot present the appeal and (b) unless the firm involved has an office in Edinburgh it will also be necessary to instruct Edinburgh Agents.

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

    No. There ought to be a special appellate body such as the Employment Appeal Tribunal, led by a judge from the Court of Session with particular expertise in the area concerned. This would help create greater consistency of approach and enable a body of case law to develop in areas which are currently dealt with by specialist tribunals. The current system of appeals to the Inner House can undermine this.

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

    Whilst part-time Sheriffs enable the system to function and without them the system would be severely hampered, the main disadvantage is the difficulty of scheduling when the Sheriff will be available to continue consideration of any part-heard business. Most Proofs and Debates are unsuitable for part-time Sheriffs for precisely that reason. Once a case involving a part-time Sheriff is underway it can be weeks or months

between one day's business and the next which most clients have difficulty reconciling with a properly funded court system. Most solicitors are reluctant to begin a Proof or Debate where a part-time Sheriff is involved unless the hearing is likely to be completed in a single day. Floating Sheriffs, although slightly more available than part-time Sheriffs, are in much the same category.

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

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?*

   As a Faculty we have had very little experience of mediation and other forms of ADR. In family actions involving disputes over contact with children it is usually possible for the Sheriff to mediate some form of settlement through the use of Child Welfare Hearings. These have been extremely useful largely because (a) the parties require to attend and the Sheriff can speak to them direct, (b) the same Sheriff will usually indicate if it is a case which should come back before him if matters remain unresolved and (c) the parties are usually reminded that if they fail to cooperate in making the arrangements for contact work satisfactorily an order can be imposed on them. Whether a similar form of judicial mediation would be possible in, for instance, actions having a monetary value is more doubtful. Whilst mediation is usually seen as an alternative to court-based litigation we doubt whether it would work without the sanction of being able to impose a settlement on the parties and we therefore believe that if mediation is to have a role it has to be as part of rather than an alternative to an action raised in the Sheriff Court. We are also concerned that if mediation is to play a bigger role in the resolution of disputes it will need to be adequately structured and funded.

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

   In divorce actions it might be possible at the stage of the Options Hearing, which the parties are meant to attend, for the court to enquire what negotiations there have been between the parties and whether there are any issues that the court may be able to deal with summarily or by way of preliminary proof or some other procedure which would assist or further inform those negotiations. In this way it would be possible for the parties to enlist the help of the court in resolving outstanding financial issues and perhaps avoid lengthy Proofs which in such cases often resolve into what a reasonable settlement for the parties should be.

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.*

   Reparation actions, contractual and other "black letter of the law" disputes which do not involve the exercise of judicial discretion but rather a fact and law based determination.

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

   As set out in our answer to question 2 we consider that such methods should take place within the structure of the existing court system.

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

   We agree broadly with the comments of the Review at paragraphs 5.29 to 5.34 and have nothing to add.

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

   In our view the increased role of the Sheriff in case management heralded by the 1993 Sheriff Court Rules change has simply not materialised. The idea was that apart from incidental Motions the action would come before the court for the first time at the Options Hearing and would move rapidly through the system thereafter. In practice, however, Options Hearings are continued with very little resistance from the court and when amendment procedure is invoked all momentum appears to be lost. Sheriffs have the power at present to take a greater degree of control over cases at the stage of the Options Hearing but seem reluctant to do so. It is up to Sheriffs to exercise the powers they have at present to exercise the desired control over the conduct and pace of litigation.

CHAPTER SIX: WORKING METHODS OF THE CIVIL COURTS

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

   No. It strikes us that having a uniform set of rules governing civil procedure in both the Court of Session and the Sheriff Court is unnecessary and in so much that it would represent little more than change for change's sake it would in our view be undesirable.

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?*

   We consider that the form of initial writ prescribed in the Sheriff Court Rules serves the necessary functions of an initiating document: it describes the nature of the order sought, provides a statement of the facts which it is claimed justifies the order and summarises the legal grounds underpinning the application for that order.

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

   As with our answer to question 6 we consider that this would amount to little more than change for change's sake.

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

   Yes. The Ordinary Court with its mixture of Motions, Rule 18.3 Hearings etc is probably the only practical method of disposing of incidental procedural business.

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

    No. A great deal of incidental procedural business has a significant bearing on the direction which a court action takes and it is important, therefore, that the Sheriff disposing of such business can be expected to be involved also in the disposal of the case on its merits at a later stage.

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

    Yes.

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 notoriously difficult to predict with accuracy how long a hearing will take as much depends on the extent to which (a) the Sheriff is familiar with the papers and (b) the Sheriff wishes to clarify or discuss with parties' agents the issue in hand. It would accordingly be unfair to hold parties' agents to any estimate given by them except perhaps where such estimate has been offered with a view to increased priority being given to that hearing over other cases. We do not consider that hearings should be time limited as parties may perceive that their case is being rushed through in order to meet some arbitrary timetable.

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

    Yes. It would no doubt save time in that the court would not have to note the oral submissions of the parties and perhaps more clearly focus the issues for discussion at the hearing. Greater use of written rather than oral arguments will not occur without changes to the rules making it compulsory.

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

    As one of the matters to be canvassed at the Options Hearing parties should be required to produce beforehand a list of any documents or physical evidence in the hands of or held on behalf of their opponent and the court should determine at that stage whether an order should be made to produce the material sought. In this way it ought to be possible

for each party to possess all the documents that they expect to have to rely on at Proof and to be able to lodge them timeously.

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

Yes for the reasons given at paragraph 6.66.

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?*

No. We consider that the existing powers to penalise a party in default by an adverse award of expenses or in an extreme case by dismissing the action or granting decree by default work reasonably well. Any system for penalising non-compliance will inevitably require a dispensing power which, in turn, will require the court to exercise its discretion which is precisely what happens at present.

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

It ought to be possible for the court at any stage in the proceedings to determine that the action is incurably without merit and to dismiss with reasons.

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?*

The rules ought to allow party litigants to be assisted by lay representatives provided those willing to provide this service have undergone training in the rules and procedures of the court and have a certificate of competence as proof of this.