

SUBMISSION TO LORD GILL REGARDING THE REFORM OF CIVIL PROCEDURE

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1. **Separate Sheriffs to deal with either Civil or Criminal Business, not both**

Currently, criminal business takes precedence over civil business in the Sheriff Courts, and too often Sheriffs must deal with the former causing delay in progress of the latter. It is proposed that Sheriffs be allocated either to hear criminal business or civil business, but not both.

2. **Amalgamation of the Rules of Procedure**

Currently, the rules of "Ordinary" procedure in the Court of Session and Sheriff Court differ in material respects. There appears to be no good reason why this anomaly should remain. (It might be noted that Solemn Procedure is essentially the same in the High Court and Sheriff Court. It is proposed that a similar regime should apply as regards Ordinary civil business whether proceedings are raised in the Court of Session or Sheriff Court.) This conformity in the procedural rules for Court of Session and Sheriff Court actions should extend to include Family Law cases and cases raised in the Commercial Court.

3. **Specialist Courts**

Consideration should be given to introducing specialist courts in each Sheriffdom. Certainly, a specialist Family Court should be available in each Sheriffdom. In that last regard, in the physical absence of a specialist Sheriff an emergency application (for example, for interim interdict or interim custody) might be dealt with by a non-specialist Sheriff, but it is proposed that as a general rule as regards all further procedure a specially qualified Sheriff would preside in a specialist Family Court.

Likewise, each Sheriffdom should have a Commercial Court as currently available in only a few.

Consideration should be given to the introduction of Tribunals to deal with "minor" legal disputes. For example, the Sheriff's powers could include jurisdiction to "sift" cases to identify those which are *ex facie* "straightforward" actions which the Sheriff may remit to a Tribunal whose Chairman (sitting alone or with a lay person of suitable expertise) would adopt a "hands-on" approach to resolution of the dispute. Cases suitable for

such a remit would not involve complex legal issues, and might include "simple" debt recovery actions and actions for the recovery of possession of heritable property.

4. **Active Case Management**

It is proposed that there be active case management of all litigation, as is currently the procedure only in Commercial actions. Significant time and costs would be saved.

5. **Limitation on Court Appearances**

As a general rule, it is proposed that all procedure (up to and including, where appropriate, callings on the Court of Session Procedural Roll and Sheriff Court Debates) should be carried out by email or conference telephone calls (as is currently the case in much of the Commercial Court procedure). It is recognised that on occasion a Sheriff or Judge may require appearance in Court by parties' agents (in addition to appearance at proof), but the greater use of IT should result in fewer Court appearances thus freeing up Judges, Sheriffs and agents. Judge and Sheriff should have discretion to allow Procedure Roll hearings and Debates to be conducted by conference telephone call or written submissions.

6. **Expenses**

The current system of limited recovery of a party's actual legal costs should be reformed. As a general rule, the successful party should be entitled to recover 100% of its actual legal costs, subject to taxation to avoid exorbitant claims. This reform would be an incentive for potential defenders to abandon dilatory defences, and encourage early settlement. Currently, there is the anomaly of Counsel's fees being largely recoverable in all awards of expenses, while sometimes as little as 50% of the fees charged by the instructing agent (or those of the solicitor/agent in Sheriff Court actions) being recoverable. The current system cannot be justified to clients, and is unfair.

Further, a party should be entitled to include in its claim for judicial expenses the premium paid for "legal expenses insurance". In support of this proposal, firstly, it is (arguably) foreseeable that an individual will have taken out legal expenses insurance as part of that person's home building or contents insurance (or, indeed, may have some other form of privately funded insurance cover for legal expenses). Such insurance is now widely available in a mature market (and increasingly taken-up). (In principle, there is no need to distinguish between individuals and other legal persons such as limited companies who have insurance for legal expenses.) Secondly, legal expenses insurance may be the only method by which those individuals who are not so poor as to qualify for legal aid but not so rich as to fund litigation easily can fund access to justice. (There will be many small businesses in a similar situation.) In short, legal

expenses insurance may be the only realistic method by which many people and businesses may vindicate their rights. Thirdly, it is understood that in England and Wales an award of judicial expenses may include recovery of premiums paid for legal expenses insurance. If that is correct, there is not a "level playing field in the UK for the provision of legal services, which is to the detriment of Scotland and its legal system. For the avoidance of doubt, it is proposed that the insurance premium recoverable as part of an award of judicial expenses should include premiums paid whether for "before the event" or "after the event" insurance. The cost of funding such premiums should also be recoverable.

7. **Mediation**

The current availability of a formal Mediation Service in certain Sheriff Courts should be extended to all Courts. A referral to Mediation by the Judge/Sheriff of all aspects (or part) of a case should be discretionary. Failure to settle a case by Mediation should not be a matter which either party may found upon in any subsequent litigation, nor should it lead to a party being penalised by an adverse award of expenses.

8. **In-Court Advice Service**

Judges and Sheriffs should have the power to compel a party litigant to meet with a representative of the In-Court Advice Service for advice on Rules of Procedure. Failure to use the Service following such a referral should sound in expenses.

9. **Pursuer's Tender**

This should be re-introduced, and be applicable in all litigations where (currently) a defender's Tender is competent. It may expedite settlement of cases.

10. **Summary Decree Procedure for Defenders**

This should be introduced. It may expedite progress of cases.