

**GLASGOW BAR ASSOCIATION**  
**RESPONSE**  
**TO LORD GILL'S**  
**CIVIL COURTS REVIEW**

**INTRODUCTION**

Glasgow Bar Association is the representative body for civil and criminal court practitioners within Glasgow. The Review paper raises issues of wide-spread importance. However, even amongst our members there is a diverse range of views on many of the questions raised. However, we have endeavoured to provide as full a response as possible in all areas.

**CHAPTER 1**

**Q1 : 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 believe that the Civil Justice System should be designed to encourage early resolution of disputes, preferably without resort to the Courts. In our view, solicitors currently try to bring about the early resolution of disputes and proceeding to Court is a last resort. Primarily, the cost of proceeding to Court is a disincentive to litigate and it encourages resolution by parties without resorting to Court. The risk in relation to Court expense and the fact that “expenses tend to follow success” also assists. However, this can mean that people do not go to Court or settle disputes in order to avoid Court rather than because their case would not succeed. We also recognise that there is a large proportion of society who cannot currently afford to have resort to the courts, which risk becoming the sole preserve of those on legal aid, the super-rich and those with some other method of funding. There is a fine line to be drawn to enable the courts to be sufficiently accessible to all, but not so accessible as to make them the first, rather than last, resort.

We believe that the key features of any system should be to remove lower value cases from the Sheriff Court and then give the Sheriff a proactive role in case management of higher value cases.

**Q2 : DO YOU AGREE THAT THE PRINCIPLES AND ASSUMPTIONS DISCUSSED IN PARAS. 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. We do not believe that they should be supplemented by other factors.

**Q3 : ARE THERE ANY MATTERS WITHIN THE REVIEW'S REMIT ABOUT WHICH YOU HAVE CONCERNS AND WHICH ARE NOT DEALT WITH IN THIS PAPER ?**

We consider that there is a lack of focus on or mention of children's referral matters which, traditionally, are viewed as neither criminal nor civil matters.

## CHAPTER 2

### Q1 WHAT CONTRIBUTION CAN PUBLIC LEGAL EDUCATION MAKE TO IMPROVING ACCESS TO JUSTICE ?

Such education can usefully point the member of the public in the correct direction to obtain further advice, whether that be from a solicitor, law centre or whatever.

### Q2 : ARE THERE ANY PARTICULAR GEOGRAPHICAL OR SUBJECT AREAS IN WHICH THERE ARE GAPS IN PROVISION IN RELATION TO CIVIL LEGAL ADVICE AND REPRESENTATION ? IF SO, WHERE ?

It is the view of the Association that the reforms of civil legal aid in 2003 have led to a large scale withdrawal of solicitors prepared to carry out civil legal aid work, particularly family law work. This is particularly so in rural areas rather than urban areas. However, even cities such as Glasgow and Edinburgh now lack provision.

### Q3 : TO WHAT EXTENT IS IT (A) DESIREABLE OR (B) FEASIBLE TO DESIGN COURT PROCEDURES WITH A VIEW TO ENABLING LITIGANTS TO TAKE PART IN THE PROCESS WITHOUT LEGAL REPRESENTATION ?

We believe that it is desirable that litigants can take part in the process without representation but that such a system is not easy to achieve and may not be feasible. The retention of rules and procedures is necessary, in our view, to properly focus the aim and purpose of litigation but has the effect of making involvement difficult for the lay-person.

### Q4 : WHAT CONTRIBUTION, IF ANY CAN (A) SELF-HELP SERVICES FOR PARTY-LITIGANTS AND (B) COURT BASED ADVICE SERVICES MAKE TO IMPROVING ACCESS TO JUSTICE ?

We believe that these services both have an input to make. However, at the end of the day law is a profession that requires a high level of training. It is not realistic to expect a party-litigant to be able to carry out most legal work for themselves.

### Q5 : ARE THERE ANY OTHER ISSUES WHICH IMPACT ON ACCESS TO JUSTICE IN SCOTLAND WHICH THE REVIEW SHOULD CONSIDER ?

No.

### Q6 : 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 ?

Yes. The Association believes that low value cases should be removed from the Sheriff Court and dealt with either in a tribunal setting or at mediation, with a right of referral or appeal to the Sheriff Court (and not beyond). It is thought that most small

claim and summary causes would be suitable for such treatment and that cases with a value of up to £10,000 may be suitable.

### **CHAPTER 3**

Q1 : WHAT, IF ANY, INFORMATION CAN YOU GIVE THE REVIEW ABOUT LEVELS OF LEGAL EXPENSES IN LITIGATION, AND HOW SUCH EXPENSES CAN COMPARE WITH SUMS AWARDED BY THE COURT FOR SETTLEMENT FIGURES ?

In our experience it would be unusual for legal expenses to exceed the amount awarded by the Court in settlement. However, as observed previously, that will often be because one party will realise that it is uneconomical to continue with litigation and will settle to avoid such an end result.

Q2 : TO WHAT EXTENT DOES THE COST OF LITIGATING DETER PEOPLE FROM PURSUING OR DEFENDING CASES IN COURT ?

We consider that this is a very real factor. Often, people simply cannot afford to commence an action so the matter that they require adjudicated on simply falls into abeyance or they cannot afford to defend an action so they reach a settlement. However, as already observed, the former can be useful in keeping the court free of a larger volume of cases.

Q3 : DOES THE CURRENT SYSTEM OF LEVYING COURT FEES EFFECT ACCESS TO JUSTICE ? IF SO, HOW AND IN WHAT KIND OF CASES ?

We believe the level of court fees is such that it does effect access to justice. It is the cost of paying for legal representation that has this effect.

Q4 : ARE THE CURRENT RULES FOR RECOVERY OF JUDICIAL EXPENSES SATISFACTORY ?

No. It would be preferable if the rate of judicial expenses was more in line with the party and party expenses.

Q5 : ARE THE CURRENT ARRANGEMENTS FOR THE TAXATION OF JUDICIAL ACCOUNTS OF EXPENSES SATISFACTORY ?

We believe that they are.

Q 6 : TO WHAT EXTENT AND IN WHAT RESPECTS DOES THE AVAILABILITY OF LEGAL ADVICE AND ASSISTANCE AND LEGAL AID AFFECT ACCESS TO JUSTICE ?

In our view there are two aspects to this, both of which are very different.

The first is that the lack of remuneration for solicitors working in the field of civil legal aid has resulted in a large scale withdrawal of solicitors in this field. Accordingly, that has greatly reduced the availability of civil legal aid and consequently the ability of the public to obtain access to justice in such cases.

However, secondly, there is the fact that having the benefit of legal aid can substantially assist one party to the detriment of the other party in litigation. Effectively, the legally assisted party does not have to give the same level of consideration to the on-going cost of litigation and make any kind of commercial decision in that regard. That can be to the disadvantage of the non-legally assisted party.

Our Association believes that there are persons who are just outwith the financial scope of the current civil legal aid provisions but who would not have any likelihood of being able to fund civil litigation due to the cost in comparison to their income.

In our view it is imperative that the civil justice system be properly funded by the state. The amount expended on civil legal aid has not increased above inflation for many years. The level of recovery by the legal aid fund in civil cases is high. There is a need for an increase in the fees available to solicitors to bring them much more into line with private cases. At present the legal aid rate is approximately fifty percent lower than the private rate and is not economically viable for most firms.

Q7 : ARE THERE SPECIFIC AREAS IN WHICH YOU BELIEVE THERE IS A PARTICULAR PROBLEM IN OBTAINING FUNDING FOR LITIGATION ?

No.

Q8 : WHAT IMPACT HAVE SPECULATIVE FEE ARRANGEMENTS HAD ON ACCESS TO JUSTICE ?

We believe that this type of arrangement has meant that a “cherry picking” of cases has resulted, with some perfectly good cases not being funded because of the reduced likelihood of success.

Q9 : 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 ?

Again, we consider that such insurance is worthwhile where it is “before the event”. However, “after the event” insurance could lead to only those cases that are most likely to succeed reaching the courts.

Q10 : WHAT IMPACT WOULD THE ABILITY TO RECOVER “AFTER THE EVENT” INSURANCE PREMIUMS FROM UNSUCCESSFUL PARTIES HAVE ON LITIGATION ?

We believe that this would increase the effect mentioned in answer 9.

## **CHAPTER 4**

### **Q.1 : DO YOU AGREE THAT THE CONDUCT OF THE CIVIL BUSINESS OF THE COURTS IS ADVERSELY AFFECTED BY THE PRESSURE OF CRIMINAL BUSINESS ?**

Yes. Due to many of the time limits operating in criminal cases and the need for these to be complied with, it is common for criminal business to be given “priority” in the Sheriff Court. For example, it is common for a Sheriff due to hear civil proofs to require to deal with several criminal deferred sentences before doing so. That often leads to the late start of the civil court.

### **Q2 : SHOULD (A) SOME JUDGES OF THE SUPREME COURTS AND (B) SOME SHERIFFS BE DESIGNATED TO DEAL WITH CIVIL BUSINESS ?**

The Association can see advantages and disadvantages to this. On the one hand this would lead to the advantage of civil business being that Judge’s first priority. It would also lead to a greater expertise by that Judge in the area of civil work. It may also lead to greater time being available to that Judge in the area of case management. However, it may reduce the variety of work available to the Bench and thus reduce the attractiveness of the job as a whole. Overall the Association favours such an approach.

### **Q3 : SHOULD THE SHERIFF COURTS HAVE SEPARATED INTO CIVIL AND CRIMINAL DIVISIONS ? WHAT WOULD THE ADVANTAGES AND DISADVANTAGES OF SUCH A SEPARATION BE ?**

See above. However, it is also thought that a separation may advantage the public. At present, persons attending the Sheriff Court to deal with civil business can be exposed to the high police presence and individuals accused and convicted of serious criminal activity. In addition their case may be dealt with in a court room designed to accommodate an accused and sometimes a jury.

### **Q4 : 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 ?**

The Association believes that the current specialist courts within Glasgow, such as the commercial court and family court have been a great success. They have led to a consistency of approach from the Bench and have led to a more expeditious resolution of such business. “Ownership” of a particular case by a particular judge has been beneficial in reducing the time previously needed to rehearse background before a new judge. The Association would like to see these specialist courts replicated throughout Scotland. In smaller jurisdictions the Association believes this could be

done by the nominated Sheriff travelling to different courts within a particular Sheriffdom.

Q5 : 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 ?

(A) Cost, (b) convenience, (c) complexity.

Q6 : IN WHAT, IF ANY, TYPES OF CASE SHOULD (A) THE COURT OF SESSION (B) THE SHERIFF COURT HAVE EXCLUSIVE JURISDICTION ?

The Association does not see a need to change the current situation which pertains, except to greatly increase the lower limit re value of cases which can be raised within the Court of Session.

Q7 : SHOULD THE JURISDICTION OF THE COURT OF SESSION AND THE SHERIFF COURT BE UNIFIED TO CREATE A SINGLE CIVIL COURT ?

No.

Q 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 believe the Court of Session should retain a first instance jurisdiction for cases involving large sums of money or actions involving a great deal of complexity. This is due to the higher level of expertise amongst the judiciary and the level of importance of such cases.

Q9 : IF THE CURRENT STRUCTURE OF THE COURTS IS RETAINED, AT WHAT LEVEL SHOULD THE PRIVATIVE JURISDICTION OF THE SHERIFF COURT BE SET ?

We do believe that there is a case for ensuring that low value cases are not raised in the Court of Session as a first instance jurisdiction. We would like to see £50K as the level.

Q10 : ARE THE CURRENT POWERS TO TRANSFER CASES BETWEEN SHERIFF COURTS AND BETWEEN THE COURTS OF SESSION AND THE SHERIFF COURT SATISFACTORY ?

Yes.

Q11 : 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. We believe that this would be useful in dealing with many small claims and summary cause matters. It would also be useful in dealing with matters such as undefended divorces and undefended actions of other kinds.

Q13 : DOES THE CURRENT DIVISION OF THE SHERIFF COURT INTO DISTINCT GEOGRAPHICAL JURISDICTIONS PRESENT DIFFICULTIES OR DOES IT HAVE ADVANTAGES ?

We believe that this is advantageous. The primary advantage is in convenience to either both parties or the defender as the court will be local to them. The other advantage is in providing the judiciary with local knowledge when dealing with matters.

Q14 : ARE THE CURRENT ARRANGEMENTS FOR DEALING WITH UNDEFENDED ACTIONS SATISFACTORY ?

It is felt that a streamlined procedure could be put in place to deal with undefended actions, perhaps within a lower tier of court or within a central administrative office.

Q15 : ARE THE CURRENT ARRANGEMENTS FOR THE DISPOSAL OF CASES RAISING ISSUES OF PUBLIC OR ADMINISTRATIVE LAW SATISFACTORY ?

Yes.

Q16 : ARE THERE TYPES OF BUSINESS IN THE SHERIFF COURT WHICH COULD MORE EFFICIENTLY OR APPROPRIATELY BE DEALT WITH BY ADMINISTRATIVE RATHER THAN JUDICIAL PROCESSES ? FOR EXAMPLE, ARE THE CURRENT ARRANGEMENTS FOR THE DISPOSAL OF COMMISSARY BUSINESS SATISFACTORY ?

We believe that there is a case for trying to remove from the Sheriff Court matters which are undisputed, such as simplified divorces, which are often simply an administrative exercise, as is much of commissary business. We believe that such business could appropriately be dealt with by a lower tier of court or in a centralised office for the whole of Scotland.

Q17 : IS THERE IS 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 do not consider that a national Sheriff Court would assist the public, many of whom find it difficult enough to reach their own local sheriff court, nor would it assist the solicitors profession, many of whom retain offices close to their existing Sheriff Court.

Q18 : IS THERE A CASE FOR ALL SHERIFFS TO HAVE AN ALL SCOTLAND JURISDICTION ?

Yes, if this would help to promote the efficient resolution of civil business in Scotland. However, even at present many Sheriffs who are nominally “All Scotland floating Sheriffs” actually only ever sit in a few particular courts. Therefore, such jurisdiction would only be appropriate if Sheriffs were actually going to be used elsewhere.

Q19 : 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 ?

Yes, we believe that there would require to be a power of transfer based on factors such as the value of the claim, the complexity of the claim and the legal importance of the case.

Q20 : ARE THE EXISTING APPEAL ARRANGEMENTS SATISFACTORY ?

We believe that there should be some kind of sift provision, such as exists in criminal business. This would reduce the number of appeals and allow those appeals where there is merit to have resources concentrated on them.

Q21 : 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 believe that the office of Sheriff Principal should be retained.

Q22 : SHOULD THE MAJORITY OF STATUTORY APPEALS CONTINUE TO BE DEALT WITH BY THE INNER HOUSE OF THE COURT OF SESSION ?

As already stated, we would like to see some kind of sift procedure. However, thereafter, we do believe that appeals should continue to be dealt with by the Court of Session. However, there is an argument that these could be routed to the Outer House.

Q23 : 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 ?

We believe that the current system which allows four different levels of appeal is inappropriate. However, we do need to be careful to retain an ability to fine tune complicated, untested areas within civil law. To that extent we believe that provision should be retained to deal with exceptional cases. These should be defined by criteria.

Q24 : WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF RELIANCE ON TEMPORARY JUDGES AND PART-TIME SHERIFFS ?

The advantages are the ability to retain flexibility as to the number of Judges within the system, the different backgrounds and experience that Judges will bring to the post, the fact that part-time Judges may retain a connection with “real life” and the general public and the fact that they are available to travel throughout Scotland.

Disadvantages include the potential lack of consistency in their approach, the fact that they will often lack experience in either civil or criminal work and the fact that they may lack local knowledge.**CHAPTER 5**

Q1 : 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 ?

No.

Q2 : SHOULD THE COURT (A) ENCOURAGE, (B) REQUIRE OR (C) IN SOME OTHER WAY FACILITATE THE USE OF MEDIATION OR OTHER METHODS OF DISPUTE RESOLUTION ?

Yes. We believe that the court should encourage and facilitate mediation and other methods of dispute resolution as such methods are often successful, even when success was not anticipated. However, it is difficult to formulate a way in which this can be done.

Q3 : IF SO, HOW SHOULD THIS BE DONE AND AT WHAT POINT OR POINTS IN THE PROGRESS OF A DISPUTE ?

We consider that if this is to be done it should be done at an early point of a dispute, hopefully before positions have become entirely entrenched. We believe that there would be merit in parties being required to state whether they would be prepared to attend for mediation and if not, why not. That then could be a factor that could be taken into account by the court in managing the case. We do believe that many cases would be resolved by alternative methods of dispute resolution.

Q4 : 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.

Where matters of fact are in dispute or where there is a huge power imbalance between the parties it is thought that mediation or other methods of dispute resolution would not be appropriate. This is also true where the issue in dispute is a determination of an undecided area of law.

Q5 : WHAT FORM SHOULD MEDIATION OR OTHER FORMS OF DISPUTE RESOLUTION TAKE AND HOW WOULD THIS BE FUNDED ?

The lack of trained individuals to undertake mediation or alternative dispute resolution is thought to be a difficulty. Also, the cost of properly funding such a remit

is difficult. Our view is that this should be funded by Legal Aid where that is available to one of the parties or by the parties themselves. It should be funded at a suitably high rate in order to encourage quality individuals to practice in this area.

Q6 : IN WHAT RESPECTS CAN MODERN COMMUNICATIONS AND INFORMATION TECHNOLOGY BE HARNESSSED TO IMPROVE ACCESS TO THE CIVIL COURTS ?

The Association supports the extended use of information technology. We believe that the extended use of e-mail could make the courts and Judges more accessible and the ability to communicate with the courts and with Judges in such a way should be encouraged. We do not see any reason why papers cannot be submitted to court electronically, except that if they were not then sent to the judge electronically SCS would require to print these. Systems would also require to be created to provide an ability to obtain a warrant to serve and so on, by such a method.

Q7 : TO WHAT EXTENT SHOULD THE COURT CONTROL THE CONDUCT AND PACE OF LITIGATION ?

We believe that it is crucial that the court should control the conduct and pace of the litigation as much as possible and that by doing so the best chance for swift and cost effective resolution is provided.

Q8 : WHAT TYPES OF CASES WOULD BENEFIT FROM (A) JUDICIAL CASE MANAGEMENT AND WHAT TYPES OF CASE WOULD BENEFIT FROM (B) CASE FLOW MANAGEMENT ?

We believe that all types of cases would benefit from judicial case management. However, the traditional burden of this on the number of callings in court and on the judiciary is of concern. However, it is believed that family cases are most suited to judicial case management. Personal injury and other cases are more suited to case flow management.

**CHAPTER 6**

Q1 : WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF PRE-ACTION PROTOCOLS ?

The advantages are the early focussing of each party's position and the fact that the court becomes a matter of last resort. The disadvantages are that the parties can become bogged down in correspondence and that the right to proceed to court can be effectively removed until the protocol is complied with.

Q2 : SHOULD THERE BE GREATER USE OF PRE-ACTION PROTOCOLS ? IF SO, IN WHAT COURTS, AND FOR WHAT TYPES OF ACTION ?

No.

Q3 : SHOULD COMPLIANCE WITH PRE-ACTION PROTOCOLS BE VOLUNTARY OR COMPULSORY ?

If protocols are going to exist then these would require to be made compulsory or be fairly pointless.

Q4 : 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 ?

Current provisions for gate keeping by the court are thought sufficient.

Q5 : ARE THE CURRENT ARRANGEMENTS FOR MAKING THE RULES OF CIVIL PROCEDURE SATISFACTORY ? PLEASE GIVE REASONS FOR YOUR VIEWS.

We would like to see one Rules Council as this would streamline the approach taken when for the civil courts are being considered.

Q6 : SHOULD THERE BE A SINGLE SET OF RULES FOR CIVIL PROCEDURE IN BOTH THE COURT OF SESSION AND IN THE SHERIFF COURT ?

This Association would welcome a single set of rules of civil procedure.

Q7 : SHOULD THERE BE A SINGLE INITIATING DOCUMENT FOR ALL TYPES OF ACTION AND / OR AT ALL LEVELS OF THE COURT STRUCTURE? IF SO WHAT FORMAT SHOULD THAT DOCUMENT TAKE ?

Yes. The Association does not see why all actions could not be commenced on something more akin to the existing Small Claims form. This would allow for a more structured statement of the claim using simple language.

Q8 : TO WHAT EXTENT SHOULD A SYSTEM OF ABBREVIATED PLEADINGS BE INTRODUCED ?

The Association would welcome a system of abbreviated pleadings in all areas, particularly at the commencement of actions. Perhaps a system where only detail required to be added where the matter was to be defended would be appropriate.

Q9 : ARE THE CURRENT ARRANGEMENTS FOR SUMMARY DISPOSAL SATISFACTORY ?

The Association would welcome a procedure for either party to apply for summary disposal of an action or defence which has no reasonable prospect of success.

Q10 : SHOULD ROUTINE PROCEDURAL MATTERS IN BOTH THE COURT OF SESSION AND THE SHERIFF COURT BE DEALT WITH BY JUDGES (PERHAPS THE MORE JUNIOR LEVELS) DESIGNATED FOR THAT PURPOSE.

The Association would welcome routine procedural matters being dealt with at a more junior level or in a different court.

Q11 : ARE THE CURRENT ARRANGEMENTS FOR DEALING WITH ROUTINE PROCEDURAL BUSINESS SATISFACTORY ?

No. The Association feels that there could be a procedure whereby matters such as Diet Roll callings, Motions which are calling but are now unopposed and so on could be dealt with more expeditiously, perhaps by an exchange of e-mail correspondence in advance and perhaps being granted by a Sheriff Clerk at a senior level.

Q12 : SHOULD THE COURT HAVE A GREATER DEGREE OF INPUT INTO 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 ?

Yes we believe that the court should have a greater degree of input in allocating the length of time to be set aside and that hearings should be conducted by reference to a timetable determined by the court.

Q13 : IN THE CONDUCT OF SUBSTANTIVE HEARINGS SHOULD THERE BE GREATER USE OF WRITTEN RATHER THAN ORAL ARGUMENTS ?

No. The Association believes that it is unlikely that the greater use of written arguments would proportionally reduce the amount of court time that would require to be spent so as to make them worthwhile.

Q14 : TO WHAT EXTENT SHOULD THERE BE AN EARLIER AND / OR WIDER DISCLOSURE OF EVIDENCE ?

The Association believes that most agents will seek to have substantive evidence before raising an action and will often have disclosed this to the other side where possible. We do not feel that it is possible to set definite parameters for this area.

Q15 : TO WHAT EXTENT SHOULD THE COURT HAVE CONTROL OVER THE USE OF EXPERT AND OTHER EVIDENCE ?

The Association favours the current arrangements.

Q16 : SHOULD A SYSTEM OF PURSUER'S OFFER BE INTRODUCED INTO THE CIVIL COURTS PROCEDURE ? IF SO, WHAT FEATURES SHOULD SUCH A SYSTEM HAVE ?

The Association favours a system where any party could make an offer to settle at any stage and that there would be consequences to the party refusing the offer in the area of expenses.

Q17 : SHOULD CIVIL JURY TRIALS BE RETAINED ?

The Association does not favour the retention of Civil Jury Trials. The Association feels that the complex legal matters involved, the volume of documents and the time makes such cases best suited to Judiciary.

Q18 : SHOULD WRITTEN JUDGMENTS BE REQUIRED IN ALL CASES ?

Yes. However, the Association feels that many Judgments are longer than they require to be and have taken too long to produce. The Association would like to see a fixed timescale for the production of a written Judgment, which judges require to adhere to or to account to the parties as to why they cannot. Judges are public servants and it is not helpful for expensive and important litigation to conclude and for solicitors to then be unable to give an indication as to when a judgement will be forthcoming. The Association is aware of cases, even some involving children, where it has taken more than six months for judgements to be available. In our view this is unacceptable.

Q19 : 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 ?

The Association is content with the powers already available.

Q20 : WHAT MEASURES SHOULD BE AVAILABLE TO THE COURT TO IDENTIFY AND MANAGE UNMERITORIOUS CAUSES OR APPEALS BROUGHT BY PARTY-LITIGANTS ?

As stated previously, the Association would like to see a sifting system where the court is being asked to deal with a matter involving a party-litigant. The Association accepts that these individuals can utilise a disproportionate amount of court time.

Q21 : IS THE CURRENT LEGISLATION ON VEXATIOUS LITIGANTS IN NEED OF REFORM AND, IF SO, WHEN SHOULD THAT BE DONE ?

Yes. The Association would like to see a list of such persons being maintained, as in England and Wales, and some ability to bring sanctions against such individuals if they wish to continue behaving in such a way.

Q22 : 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.

Q23 : WOULD IT BE DESIRABLE TO INTRODUCE SEPARATE PROCEDURES FOR MULTI-PARTY LITIGATION ?

Yes. This Association accepts the views of the Scottish Law Commission on this matter.

Q24 : IS THE RULE GOVERNING THE PROCEDURE TO BE FOLLOWED FOR JUDICIAL REVIEW SATISFACTORY ?

The Association would like to see much swifter procedure for dealing with such matters. This Association would like to see time limits within which an application can be brought and a sifting mechanism in relation to such actions.