

Scottish Civil Courts Review



Response by Govan Law Centre

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Govan Law Centre (GLC) is a community controlled law centre with charitable status (SCO 30193) based in Glasgow. We employ seven solicitors, five of whom undertake a large volume of defended eviction and mortgage repossession casework, with around 700 sheriff court appearances per annum. Clients contact us directly, or through referrals from social work, money advice, CABx, Shelter, and other agencies. We work to address unmet legal need including defending evictions and mortgage repossessions, housing disputes, homelessness, personal injury, debt, employment, sequestrations and consumer disputes.

We disseminate a large amount of free Scottish housing and debt law advice online at www.govanlc.com, www.bankcharges.info, www.counciltaxdebt.info and www.additionalsupportneeds.org.uk. We undertake prevention of homelessness casework across Glasgow, but mostly within the South West. Our work is funded by the Glasgow Homelessness Partnership, Glasgow City Council and the law centre's own generated income. East Dunbartonshire and East Renfrewshire Councils fund GLC to defend mortgage repossession actions within their local government areas. In the South West of Glasgow we manage a pilot section 11 Prevention of Homelessness project in partnership with Glasgow City Council Social Work Department (South West) and Govan Money Matters. We employ a project worker and co-ordinator, with social care qualifications.

Govan Law Centre's Education Law Unit (ELU) is Scotland's expert legal resource in the field of school education, with a particular focus on the rights of disabled pupils and pupils with additional support needs. The ELU run a national telephone advice line and represent clients at tribunals and at court. The Education Law Unit employs two solicitors and disseminates a wide range of information through its website www.edlaw.org.uk.

GLC has won various national legal awards including Solicitor of the Year 2007 (Mike Dailly), Project Team of the Year 2008 (Prevention of Homelessness Project) and Legal Website of the Year 2008 (www.bankcharges.info). Over one million letters have now been downloaded from this site.

Introduction

Before making comments on the contents of the Review document, we wish to express our concern over the way the consultation has been conducted thus far. Firstly, it does not appear that the work carried out in this Review so far has been well balanced. There has been a lack of engagement and with many major stakeholders involved in civil justice such as trade unions, and voluntary sector organisations.

Secondly, we wish to express our concern about the makeup of and appointments to the Review Team. Why is a pressure group, namely the Scottish Consumer Council, a member of the team while no other stakeholder has been invited to take part? Why have parties with a commercial interest in the use of mediation been invited onto the team? To have legitimacy, the Review Team must be extended to include members from a more representative group of stakeholders in the civil court system.

Thirdly, why is the Review Team so heavily constituted by judges? Many of the issues being discussed and debated and determined by the review are political, commercial and involve issues of social and economic policy. Judges serve a very important role within our society but determining and advising on economic and social political policy is not their core strength.

We feel that the consultation document overstates a narrow viewpoint regarding the court and does not have regard to the very real barriers to justice experienced by the majority of Scottish citizens.

We have not responded to every question posed in the Review. This response is intended to concentrate only on those aspects of the Review of particular concern to GLC.

Chapter 1:

Principles underpinning the Review

Questions

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?

When section 11 of the Homelessness etc. (Scotland) Act 2003 comes into force (understood to be later this year), all landlords and mortgage providers will be required to notify the relevant local authority before commencing eviction or repossession proceedings.

In anticipation of section 11, Govan Law Centre currently runs a pilot Prevention of Homelessness Project for the Southwest of Glasgow, in conjunction with Govan Money Matters and part funded by the Glasgow Homelessness Partnership. Housing Associations have entered into a voluntary referral protocol, so that tenants are referred to Govan Law Centre when eviction proceedings are raised. This project has been running for two and a half years and has helped hundreds of tenants and owner occupiers save their homes. We would suggest that these types of projects should be implemented and funded throughout Scotland to prevent homelessness and help tenants and housing providers resolve disputes early on without the need for court action or court judgment.

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?

The starting point for the Review paper is that the basic function which the Review must serve is to address issues of costs and the proportionality of costs associated with civil justice. It assumes that the only "value" that can be placed on a civil court action is the financial value of the claims sought and obtained.

We believe this is an incorrect starting point for a meaningful review of the civil justice system. The Review should proceed with the most fundamental aspect of civil justice; examining people's rights and considering which rights ought to be protected, advanced and exercised through the civil courts. To this end, the starting point for the analysis should be our modern day constitution and the European Convention on Human Rights.

It can properly be said that in Scotland, as throughout the whole of Europe, our "bill of rights" or modern day constitution is found in the European Convention on Human Rights and the various articles which make up the convention. The Scotland Act requires that all Scottish legislation be ECHR compliant. More than that, our political leaders must act in a way that ensures that we not only comply with our duties under ECHR, but positively promote our peoples rights as enshrine in the Convention.

Accordingly, while reviewing our civil justice system and deciding what changes require to be made to it we must ensure that our civil justice system not only complies with ECHR but that it is specifically designed to promote and allow individuals to fully exercise each right enshrined in the convention.

Particular articles should be considered of paramount importance in carrying out this Review, namely the right to life, the right to a fair trial, right to respect for private and family life and the right of peaceful enjoyment of property. Given that GLC deals with mostly housing cases, we shall address with the right to private and family life at more length.

Article 2 – the right to life

The Convention is organised in a hierarchical way and this is the most important right of all. Accordingly, all matters and legal issues which impact upon this article ought to be handled in our Supreme Court, The Court of Session. All investigations into workplace deaths, including FAIs, should be heard in the Court of Session.

It is recognised by the European Courts and is, in any event, entirely logical that the article does more than serves to provide the right to life. Article 2 also serves to protect the right to life, which in turn means that all issues of workplace health and safety, which

fall firmly within protecting the right to life, ought to be given the highest priority in our civil justice system.

Article 6 The right to a fair Trial

This, of course, goes beyond a criminal trial and is more properly called the right to access to justice. Access to justice is, of course, at the heart of any civil justice system and is the principal that far outweighs any notion of cost or a perceived financial value for a court case. Access to justice means being able to exercise your rights in an appropriate legal forum of your choosing, with the assistance of appropriate legal assistance and representation irrespective of the financial resources.

For example, trade unions have always used every personal injury case they advance on behalf of their members, not only a means of obtaining just recompense for that member but just as importantly as a means for improving health and safety either in an individual workplace or on a more broad and widespread manner. This ought to be recognised by the Review as a cornerstone of civil justice.

There are problems which presently exist within the civil justice system which prevent people accessing justice. The Review paper has not picked up on, or sought to improve, these problems. In addition, the paper itself makes proposals which will reduce access to justice.

Article 8 – right to respect for private and family life

Eviction can constitute a breach of the right to respect for the home under Article 8(1) of the Convention. Article 8(2) holds that any restriction to this right, such as eviction from a residential tenancy, must meet the requirements of Article 8(2), which include proportionality.

The state must refrain from action impinging on Article 8 rights, and may also have 'a positive obligation to ensure that such rights can be effectively enforced through provision of legal representation' (*A guide to Human Rights Law in Scotland*, Reed and Murdoch 2nd ed. pp. 601.) Moreover, the European Court of Human Rights ruled in *Airey v. Ireland* (A 3 2 EHRR 305) that the state was under an obligation to ensure that a party be allowed to enforce their legal rights, and this right must be "effectively

accessible” through ensuring proper access to court provision via a legal aid system.

At the moment, a sheriff must be satisfied that an eviction is reasonable before granting decree (Housing (Scotland) Act 2001 s. 16). This requires an enquiry into the tenant's personal circumstances, family composition, the impact of eviction, proposals for repayments and so on. This enquiry must be central to the sheriff's decision making - losing a home is extremely traumatic for all members of a household, including children.

In order to be compliant with the requirements of proportionality in the ECHR, it is essential that a tenant's representative is able to obtain funding to defend their client effectively. For example, it may be necessary to pay for a GP to attend court and confirm the tenant has mental health difficulties. Alternatively, it may be necessary to call an architect as a witness to confirm the tenancy is untenable and uninhabitable due to dampness or disrepair. In the circumstances, it would be possible to argue the tenant's arrears should be reduced to nil as the landlord had breached their common law or statutory duties by failing to carry out essential repairs.

In short, in order to comply with the ECHR, a tenant must have access to legal advice and representation, not only at procedural callings, but also at evidential hearings. Preparing a thorough defence will require many hours of work and will include obtaining supporting evidence, statements, applying for benefits backdates etc. This work must be properly funded so the tenant has the best chance of saving their home.

In addition to legal representation, it is more than likely a tenant in arrears will require benefits advice and money advice. These are specialist subjects in themselves. This entails the proper funding and placement of Welfare Rights Officers, Money Advisors and Benefits Advisors.

Protocol 1 Article 1 of ECHR – the right of peaceful enjoyment of property

There has been a huge rise in the numbers of tenants living in the private sector in recent years. Despite the high volume of eviction hearings at Glasgow Sheriff Court, they are almost exclusively housing association or council cases. Very few private evictions action are raised at court. This raises the question - how are private tenants evicted?

An increasing number of clients are seeking advice from GLC regarding illegal evictions and harassment and intimidation by private landlords. GLC have obtained interdicts against landlords, preventing the removal of personal property from tenancies. We also pursue compensation actions against landlords who have carried out illegal evictions. This type of work can only be carried out by solicitor due to its complex nature. It is essential tenants have access to a solicitor to pursue these matters on their behalf to enforce their right to peaceful enjoyment of their property.

One of the questions in this consultation relates to legal education. This is perhaps one area where public legal education would be extremely helpful. (See chapter 2 answer 1).

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

- Privatisation of the Courts – it is now necessary for a party wishing to pursue a civil case to pay for the court and the judicial system on a “pay as you go basis”. This has turned the Court into a commercial commodity where one is required to pay for and consume rather than being a public service funded by our taxes. This goes against the principal of access to justice for all and must be reversed.
- Consumer Agenda - There would appear to be clear underlying agenda on the part of the authors of the Civil Justice Review to promote a so called “consumer agenda” to promote individuals advancing Court actions on their on behalf, without legal representation but without the fear of having to pay legal costs to the other side in the event of their case being unsuccessful. If there is such an agenda it should of course be noted that it only serves confident, articulate and intelligent people generally of a middle class background and by no means serves the benefit of all “consumers”.

- Commercial Court Bias - There would appear to be a clear underlying agenda on the part of the authors of the Civil Justice Review to remould the civil justice system principally to benefit users of the commercial court procedure at the Court of Session.
- ADR Bias - There would appear to be a clear underlying agenda on the part of the authors of the Civil Justice Review to promote alternative forms of dispute resolution and make those mechanisms compulsory to Court users to the exclusion of access to the civil courts and access to civil justice.

We would ask to what extent the Civil Justice Review was concluded before the issue even went to Consultation and the extent to which these agenda will be followed irrespective of the Consultation response.

CHAPTER 2: ACCESS TO JUSTICE

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

Public legal education could have a dramatic effect in certain areas, such as illegal evictions. If a high public education campaign was introduced to inform tenants of their rights and clearly explain private landlord duties, this may reduce incidences of illegal evictions.

It is important to remember that where individuals are not well informed as to their legal rights, then public legal education - far from replacing a need for legal representation - may in fact create or stimulate an increased demand for legal representation. This occurs as people are made aware of legal rights and remedies which exist and which they may be able to access.

Beyond that initial level, public legal education may assist a confident and articulate individual to access legal remedies without legal representation. This has been our experience of the www.bankcharges.info website and, to a lesser extent, www.additionalneeds.org.uk. However, our experience also indicates that there are many for whom this type of public legal education still leads to more questions than answers and for whom legal representation is still necessary at some level in order that their rights be realised.

Finally, there are legal processes and procedures which will continue to require legal representation, no matter how widespread or effective a public legal education campaign may be. Even a user-friendly process like the Additional Support Needs Tribunal struggles to ensure fairness when some education authorities are routinely represented by counsel and no legal aid is available for parents. Of course, the convener in such circumstances has an important role to play and some level of public legal education may have played a part in assisting a parent to bring an appeal in the first place. However, for an appellant to a party to the action in a true and participative sense, rather

than just part of a process involving Tribunal and respondent, some form of legal representation will be required.

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 would like to echo the comments made by SCOLAG, namely that the work of law centres around Glasgow shows that communities served by law centres have a legal need which is not met readily by normal private sector law practices. It follows that the same unmet legal needs are likely to exist throughout the country. GLC receives hundreds of phone calls every week from people outwith the Southwest of Glasgow seeking advice and representation. Often these callers cannot find a local solicitor to represent them in relation to housing and debt matters.

(See also comments regarding repossession accounts not being paid by the Scottish Legal Aid Board at Chapter 3 Answer 6).

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?

Court procedures should be as clear as possible so members of the public, advisors, lay representatives, court staff and solicitors can understand them. (See also Chapter 2 Answer 4).

4. What contribution, if any, can (a) “self-help” services for party litigants (b) court based advice services make to improving access to justice?

In-court advice service may provide a good service for clients involved in straightforward matters where basic legal advice and advocacy required. However, the vast majority of our clients being evicted or facing repossession proceedings have complex needs,

including multiple debt and benefits problems, and require more long term assistance over and above court representation.

By way of illustration, the following list details just some of the work ordinarily undertaken by GLC to successfully prevent an eviction:

1. Meet client, take a statement, give legal advice and take client's instructions.
2. Write to landlord, obtain rent statement and check all entries are correct.
3. Obtain copy NPRP (Notice of Intention to Raise Recovery Proceedings) and court papers to check the legal action is competent.
4. Write to Housing Benefit office to ascertain current Housing Benefit status, obtain copy overpayment decisions etc.
5. Assist client to resolve HB problems, i.e. writing to previous employer for P45 or copy wage slips, asking for HB overpayment deductions to be reduced to the minimum.
6. Assisting client to apply for backdated Housing Benefit, writing letters to HB office in support.
7. Refer client to local money advice agency to apply for additional benefits, i.e. Disability Living Allowance, Carers Allowance, sorting out Child Tax Credits problems. Also to submit HB overpayment appeals. Project Worker liaises with the local money advice agency to ensure client attends appointments.
8. Obtaining architectural evidence if client's home is damp (common in Southwest Glasgow). Using this evidence to defend the eviction action (if the landlord has failed to carry out essential repairs, the tenant is entitled to ask for their rent arrears to be abated). If the rent arrears are not abated and repairs not carried out, GLC will raise a court action for compensation and/ or specific implement to ensure that client lives in wind and watertight home.
9. Referring client to appropriate support organisation so they can manage to pay their rent in the long term, for example the Scottish Association for Mental Health (SAMH) can provide support workers who physically take clients to their local housing office every fortnight to make their repayment arrangement.
10. If client fails to turn up for appointments or fails to engage with services they have been referred to, the Project Worker will go round to client's home, will offer to give client a lift to appointments etc.

A 'simple' eviction case takes around six months to resolve. A more complex matter can take up to a year. A solicitor is often required to attend court and make complex legal arguments to obtain court continuations and represent client at an evidential hearing.

Without this joined up approach, many clients would have lost their homes. Clients often have mental health difficulties and / or literacy problems and simply do not have the skills to fill out numerous forms, deal with the bureaucracy of the benefits system and advocate for themselves in court. Anyone who has tried to apply for Housing Benefit recently can attest to these problems.

Finally, lots of matters dealt with by law centres and housing solicitors never go to court, for example reviews of homeless decisions, factoring disputes, complaints about bad workmanship by landlords, obtaining rehousing for clients with damp homes. These matters can involve protracted negotiation and complex law.

Although an in-court advice service may be appropriate in certain circumstances, it is simply not placed to address difficulties that are unlikely to go to court, nor are they geared up to provide long term assistance. Community Based Law Centres and high street solicitors are perfectly placed to provide this essential service.

5. Are there any other issues which impact on access to justice in Scotland which the Review should consider?

Please see Chapter 3 Answer 6.

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 “value” of a case is not the financial compensation obtained but the role that the case plays in a wider context. The value of the personal injury case is that it can make one workplace safer for all of its employees or, in certain circumstances, every workplace safer for every Scottish worker. This value within personal injury cases is not recognised in the Civil Justice Review. Similarly, the sum sued for in an eviction case may be only a few hundred pounds, but the case deserves the highest judicial consideration as it may result in a family becoming homeless.

Other costs to the public purse must also be taken into account in any consideration of “value”. The most recent evaluation and investigation into the financial costs of eviction from the Dundee Families Project report (*Scottish Executive Publications 2006*) showed those costs to be estimated at around £10,700 per household. This figure includes the cost to housing provider, cost to homelessness services, cost to social work services and legal costs. The Housing Corporation, the national Government agency that funds new affordable housing and regulates housing associations in England, puts the cost of one eviction being in the range from about £3000 to £10000, or more in difficult cases. (www.housingcorp.gov.uk).

If it becomes easier to evict, more people become homeless. This incurs additional costs for the local authority and causes problems at a planning level, given the severe shortage of local authority and housing association stock. These pecuniary and policy problems need to be addressed at this stage in the Review process.

There have been suggestions in other Responses that eviction actions should not be raised if rent arrears are less than £1,000. In our view, this would be disastrous for a number of reasons.

Current rent arrears policies do not allow tenants to run up huge levels of arrears, so preventing landlords from raising proceedings until arrears were large could make it harder to unravel the problem. Significantly, for private sector tenancies the policy could result in many landlords not being able to pay their mortgage, and tenants could be evicted by a secured creditor via the landlords’ mortgage default.

A tenant can submit Housing Benefit backdate application for up to 12 months and an application will be granted if the local authority are satisfied there is “good cause”(ref needed). If arrears are allowed to climb to over £1000, it is more likely that the arrears will be from more than a year ago. A tenant would then loss the opportunity to apply for a backdate and would have to repay the full rent arrears owed out of their own pocket.

Ultimately, in our experience the best way to tackle eviction cases is on a sustainable basis. There is no quick fix, rather we need a holistic solution to tackle the underlying socio-economic factors which result in people not paying their rent- for example, tacking the consequences of relationship breakdown, domestic violence, mental health problems, welfare benefits, multiple debt, an addiction problems and so on. It's only when you address those causal factors that you can prevent eviction.

Without this additional support, many tenants will find themselves in the 'revolving door' of homelessness.

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 compare with sums awarded by the court or settlement figures?

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

From our experience, very few clients have expressed any desire to represent themselves in court. Most clients are apprehensive about the prospect of having to appear in court and give evidence, never mind raising a claim.

If a client is not entitled to legal aid and GLC agree to represent them *pro bono*, most clients do not take this option due to the risk of legal expenses being awarded against them. In this situation, claims can be limited to small claims and therefore the full sum owed is not pursued.

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

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

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

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

Govan Law Centre carries out a substantial volume of legal aid work, and all our solicitors are engaged in filling out legal aid forms or replying to SLAB correspondence every single day. In our experience, the legal aid system is one of the main barriers to justice in Scotland.

Here are some examples:

- **Low financial eligibility rates for Legal Aid** - at current rates, a client in receipt of Incapacity Benefit of £72.55 per week, is deemed to have too high a 'disposable income' to receive full Legal Aid. Typically, the client will be entitled partial housing benefit and will have to pay around £10 to their rent every week (this sum likely to be higher if they rent privately). When you add gas, electricity, TV licence, a modest sum for food and a contribution to arrears, your client will be lucky to have a couple of pounds left at the end of the week. Does anyone really think this client can afford to make contribution of around £250 to SLAB, given they already have rent arrears?
- **Complex and Bureaucratic system**- if there is any doubt the Legal Aid system is complex and bureaucratic, just look at Financial Eligibility Form 2. The page is around 40 pages long, and requires the client to obtain lots of financial documentation including wage slips, employers statement (often not returned by employer), council tax liability letter (perhaps dating from 10 months ago), child tax credits letter (same), proof of total debt owed (proof of Provident payment books are not sufficient). And if your client has a partner, then the amount of documentation is doubled. Legal aid bureaucracy has grown exponentially over the last few years.

Often a client simply does not have the information now required and we have to write to local authority, previous employers, etc. Increasing amount of time and effort required to obtain legal aid.

GLC represent a large number of clients in receipt of Incapacity Benefit, many of whom have mental health difficulties. They are often visibly daunted when the Legal Aid checklist is handed over. Many clients fail to bring the information to their next appointment, or advise that their bank will charge £5 a page for duplicate statements, or state they have requested duplicate information from the Inland Revenue over the phone to be told it cannot be provided. A significant minority of clients never return to GLC with their financial information.

GLC usually provide a *pro bono* representation service if the client is refused full Legal Aid, obtaining partial payment through the Legal Aid Advice and Assistance Scheme. There can be no doubt that private firms would be forced to withdraw in that circumstance. The Legal Aid system therefore exacerbates problems accessing justice for many clients with mental health problems, coping difficulties or literacy problems.

Why not save money by making the Legal Aid procedure less time consuming and bureaucratic? Why not reduce the evidential burden on the solicitor and SLAB carry out audits of random applications instead? Could SLAB allow recipients of Incapacity Benefit to fill in Form 1 instead of Form 2?

- **Fewer Accounts paid**- GLC have found that in the last year, an increasing number of legal aid accounts are being refused or abated without warning. One of the worst examples of this is in relation to mortgage repossession cases.

Example

Client A has received a writ from their mortgage provider seeking to repossess her home due to increasing arrears. Client A is in receipt of Income Support. Full Legal Aid is granted, and the solicitor proceeds to defend the action and appear in court on several occasions. After period of time, Client A enters into a repayment arrangement and ultimately saves their home. The case is dismissed at court and you submit your Legal Aid Account. The account, likely to be between £600 and £1000 including outlays, will then be refused because Client A has made a preservation of property. This is despite the fact the client has not preserved property; they have preserved their position in terms of the standard security.

Perversely, has Client A lost their home, your account would be paid in full.

If this situation is not changed, there will be no access to justice for home owners because no solicitor will be able to afford to take on mortgage repossession cases. With the Council of Mortgage Lenders predicting a 50% rise in repossessions in 2008, this is extremely concerning.

- **Dampness claims under £3,000**

Since the increase in the small claims limit on 14 January 2008, legal aid is no longer available for dampness compensation claims under £3,000. Solatium is normally no more than £1,000 per year in such cases, depending on the circumstances. Even taking into account damaged and destroyed goods; in practice it will be impossible for a tenant to raise a claim unless they have lived in the property for over two years. This gives landlords the green light to continue letting damp houses, knowing the tenant would be unable to finance a court action against them.

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

See previous answer regarding mortgage repossession cases.

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

9. 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?

10. What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?

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?

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

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 would like to echo SCOLAG's comments that any specialisation would lead to all parties having to travel greater distances. In family, housing, personal debt and sequestration cases, this should be avoided.

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?

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

The civil justice system should serve to ensure that matters of health and safety, which serve to protect life, are open to being pursued without restriction or barrier in the Court of Session as recognition of their importance to both society and the terms of the convention.

The Trade Union movement have of course always used every personal injury case which they advance in behalf of their member has not only a means of obtaining just recompense for that member but just as importantly as a means for improving health

and safety either in an individual workplace or on a more broad and wide spread manner and this ought to be recognised by the review as a cornerstone of civil justice.

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

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?

See answer 6 in this section.

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

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

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?

One submission notes that a large proportion of eviction cases involve negotiation with landlords and continuation of the case for payment and/or processing of Housing Benefit claims rather than complex legal arguments, and that it may be appropriate to have a specialist housing forum to deal with these, as well as mortgage repossession cases. We believe this may not be necessary.

Many hundreds of eviction cases are continued repeatedly due to the landlord (pursuer) asking for unnecessary continuations, and, in our opinion, wasting court time. If, for example, a landlord agreed to continue *sine die* an eviction case for 4 months to allow benefits applications to be submitted, and repayment arrangements to be entered into and monitored, the case would only have to be recalled if the tenant did not comply. In practice, landlords will obtain three continuations over a period of around four months, requiring the time and expenses of court appearance and representation.

Even if arrears are decreasing, a landlord will often ask for multiple continuations to monitor payments.

At Glasgow Sheriff Court, a system has recently commenced where agreed eviction cases are disposed of prior to the court calling. This system is in its early stages and appears to save a lot of time. Many more cases could be dealt with in this way could if pursuers were less inclined to seek unnecessary continuations.

In respect of ordinary actions in Glasgow, a recent Sheriff Principal Practice note stated that if the matter was agreed prior to proof, and both parties email the court seeking for the proof to be discharged, the sheriff would make no further order, which has the same effect as sisting the action. As a result, fewer mortgage repossession cases call repeatedly on the miscellaneous procedure roll.

In terms of the cost of setting up a further tier to the court system, is there any evidence that it would be cheaper or more effective to start up a new system from scratch in relation to housing?

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

We are concerned that housing cases will fall within this category. If a client is threatened with losing the roof over their head, the highest judicial scrutiny is required, for example to check landlord has served all documents correctly and to make enquiries regarding reasonableness of eviction. This type of important decision should not be dealt with by a lower court.

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

See Chapter 4 Answer 4.

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

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

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?

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 would like to echo sentiments of SCOLAG here in that “every care should be taken not to slide into the call centre mentality where the court user is forced to deal with some distant, centralised and impersonal administration because of some misplaced perception of value for money”.

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

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 the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?

20. Are the existing appeal arrangements satisfactory?

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?

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

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?

How could any limit to the number of appeals satisfy legal requirements of the ECHR and natural justice? Does not seem possible.

24. What are the advantages and disadvantages of reliance on temporary judges and 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?*

See answer to Chapter 1 answer 2.

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 would echo other responses which state that mediation can only be used where both parties come to it willingly.

In our experience, clients are extremely reluctant to go to court and have tried other forms of negotiation first.

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

In Southwest Glasgow, landlords must follow a voluntary protocol, set out by Glasgow City Council, before the matter can be taken to court. For example, if rent arrears are increasing and the household includes children, then a Joint Discussion meeting must be scheduled, with the tenant, the landlord and a local Welfare Rights Officer present.

GLC is involved in developing planning strategies with South West Community Health and Care Partnership through Housing Planning Reference Group and other groups, which aim to promote prevention of homelessness. These groups bring together all the housing associations in the Greater Govan and Greater Pollok areas to discuss and implement protocols regarding eviction processes and homelessness prevention and wider housing issues. Good early intervention protocols, partnership working and

access to good quality local representation are much more effective than mediation, in the tenants interest and that of the wider community.

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.

In its response to this consultation, the Scottish Mediation Network state that mediation may be less suitable where “there is an overwhelming power imbalance” between parties. We would agree that mediation is not suitable in the majority of cases of housing association evictions, factoring disputes, bank and building society repossession or payment actions simply due to the inequality of arms.

The conduct and debt recovery policies of businesses are determined by the financial markets. Banks adhere to the statutory requirements to repossess a home because they legally have no choice. If monies are owed and this is not disputed, and the lender accepts that the debtor has difficult personal circumstances, how can mediation resolve the dispute? The mediator would have to refer the client on to other agencies for the matter to be resolved.

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

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

Following the recent Sheriff Principal Practice Note in Glasgow, the procedure for emailing the court to discharge and dismiss agreed matters is working well in our experience. However, expediency should never be at the expense of justice being seen to be done.

We have had some experience of conference calls used in commercial actions at Glasgow Sheriff Court. While these may be appropriate for procedural commercial actions between business, we do not feel they are appropriate in other situations as they

are not public. We are opposed to the use of conference calls where matters of reasonableness are being considered.

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

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

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

- 1. What are the advantages and disadvantages of pre-action protocols?***
- 2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?***
- 3. Should compliance with pre-action protocols be voluntary or compulsory?***
- 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?***
- 5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.***
- 6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?***
- 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?***
- 8. To what extent should a system of abbreviated pleadings be introduced?***
- 9. Are the current arrangements for summary disposal satisfactory?***
- 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?***

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

See Chapter 5 Answer 6.

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?

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

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

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

16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?

17. Should civil jury trials be retained?

18. Should written judgments be required in all cases?

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?

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

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

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?

23. Would it be desirable to introduce separate procedures for multi-party litigation?

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