

## RESPONSE TO THE CIVIL JUSTICE REVIEW CONSULTATION PAPER

### **Introduction**

This response does not attempt to deal with every issue and every question raised in the Consultation Paper. Rather a response is made if and when it is thought that useful comment can be made on a matter within the knowledge and experience of the judges. Much of the paper relates to the sheriff court, but the main focus of this response is the Court of Session. Further, given the fairly general terms of the Consultation Paper, this response is in similar vein. It is assumed that there will be an opportunity to make detailed comments on any specific proposals which emerge from the process.

### **Chapter 1**

“Proportionality” and “value for money” are important factors which fully deserve their place alongside others. However the key principles and objectives underlying the current review should be to recommend change which will promote the ability of the courts to safeguard the rights and liberties of Scotland’s citizens; improve access to justice; enhance the development of the civil law; and lead to the fairer, faster and more efficient administration of civil justice. The review should be mindful of the dangers of dismantling tried and tested structures and procedures. In the past wholesale reform proposals have foundered because they have overreached themselves, and risked the creation of a new set of problems and uncertainties. There is much to be said for well-targeted, achievable, and, where appropriate, incremental reform. While of course prudent allocation of scarce resources is vital, financial stringency should not be the sole touchstone

as to the merit of reform proposals. As the Consultation Paper itself says, a good civil justice system must be adequately resourced (paragraph 1.14).

## **Chapter 2**

Much of this chapter falls outwith the experience and responsibility of the judges and it raises some issues which are dealt with elsewhere in this response. The focus on the importance of increasing general public knowledge about the law and civil justice is entirely justified. Improved public education, which should start in our schools, has the potential to increase access to justice. Ignorance and mistake will often prevent people from understanding when and how they should seek redress through the legal system. In any event, this is a desirable objective in itself, given the importance of the law, the courts, and the legal profession in any modern liberal society. It is hoped that the current review will push these ideas higher up the agenda in the profession, government, media, etc.

Whether to set up civil tribunals for debt, consumer, housing and similar disputes is a policy matter, which will no doubt depend, at least to an extent, on resource implications. Properly organised research on the need for and potential benefits of such reform may be required. Comments are made below on the issue of a “third tier” within or beneath the sheriff court.

## **Chapter 3**

The high cost of litigation is a major concern. The setting of court fees is currently the subject of a SCS consultation paper and the Judges’ Council intends submitting a response to the SCS proposals. With reference to the discussion on the current approach to the recovery of legal expenses, the law and practice of expenses, including taxation and recovery of expenses, is a large and overly complex subject, which is deserving of separate study and

review in itself. While the current system does provide for recovery of expenses from an unsuccessful litigant, it can be noted that some systems discourage litigation at another's expense by making each side liable for their own costs, whatever the outcome. It can at least be argued that this is more likely to keep costs down and discourage unnecessary litigation. (At present, at least until a late stage, many litigants assume that the running up of large costs does not matter, since they will win and the other side will have to pay them.) It may require more resources devoted to legal aid, allied to a robust system for identifying both deserving and undeserving cases for the receipt of legal aid.

There is evidence supporting the concern as to the length and cost of certain types of hearings, for example, referrals from children's hearings, adoption cases, etc. While many such cases are conducted with the expedition which is required, there are others which often seem to be never ending. In addition, while it is understood that there are concerns as to the current system for taxation of accounts, this is not a subject on which the judges have any direct knowledge and experience.

As a generality, the provision of resources for legal aid is again a policy/political matter. However it is difficult to see how increased access to justice can march hand in hand with greater financial stringency. The identified possibility for oppression of non-legally aided litigants faced by legally aided opponents might be addressed by greater scope for recovery of their expenses from the legal aid fund. This in turn would emphasise the importance of focussing on whether a case is or is not sufficiently deserving of publicly funded support in the first place.

## Chapter 4

We find it convenient to discuss the issues in the various questions posed at the end of this chapter under some broader headings.

### **A The impact of criminal business and related matters**

The general, if not universal, view among the Supreme Court judges is that the volume of High Court business, and the priority which has to be accorded to first instance criminal business by reason of the statutory time limits, is having a deleterious effect on civil business, particularly the business of the Outer House. In the allocation of judicial resources the Outer House effectively receives the lowest priority and the dearth of resources at that level means that the quality of service offered is inevitably diminished. On occasion the court is unable to supply a judge to hear a proof or debate fixed for many months. Practitioners are aware of the situation and the risk that that may happen. The existence of that risk is a negative factor no doubt in deciding whether to commence proceedings in the Court of Session (or indeed the sheriff court, which is beset, perhaps even to a greater extent, by a similar problem). But that risk is only one of the negative factors. The predominance of criminal business means that resources are not available to ensure the speedy dispatch in general terms of civil business. Waiting periods for any form of substantive diet are necessarily extended. The absence of sufficient writing time delays the issue of civil judgments. The possibilities for effective case management are also diminished.

Identifying the existence of this problem is relatively easy. Identifying a solution – other than the obvious one of an increase in the general judicial complement – is much more difficult. Given the statutory time limits on prosecution of crime, it is impossible not to recognise the ultimate statutory responsibility on the State, *via* the Court, of providing the courts to enable the

Crown to meet its obligations. A particular problem is presented when the Crown requires, sometimes at short notice, the provision of an additional trial court, or courts, in order to deal with urgent cases or “long trials”. We understand that in recent times there has been a better degree of co-operation between the Crown Office and the Judiciary Office in identifying in advance the needs of the Crown for “long trials”, additional to the regular sittings. It has also to be said that for a variety of reasons “long trials” are perhaps more prevalent than in former decades and that even ordinary trials are taking somewhat longer than was the case formerly.

The Review has also asked for views on the degree to which there would be support for a greater degree of specialisation between civil and criminal work. If by specialisation is meant an official organisational division of the judges of the supreme courts involving the assignment of a judge for a substantial term to either the Court of Session or to the High Court of Judiciary exclusively, such a proposal would not be supported. First, for many judges in the supreme courts the variety of the mix of crime and civil work is one of the positive features of the office. The prospect of being assigned for a significant term to either the Court of Session or the High Court of Judiciary is thought to be a disincentive to senior members of the practising profession in applying for judicial office. So the quality of the supreme courts as a whole would eventually be diminished. Further, even if one assumes transfer from the criminal court to the civil court and *vice versa* at the end of the period of assignment, there is the obvious problem of the loss of familiarity with the requisite procedures and practices in each court respectively. There is the further issue that a formal organisational separation of the judiciary of the Court of Session and the High Court of Judiciary would deprive the ability of the one court to call upon the services of a judge in the other court as needs may be and would therefore lead to a loss of flexibility. Thus, at present, if a

trial on the High Court “goes down” the presiding judge is available for such civil business as may be assigned to him pending the resumption of criminal business in his court. *Quaere* whether that would be so if there were a formal allocation of members of the Supreme Court to one or other of the Court of Session or the High Court of Justiciary.

A further matter arising in respect of the pressure of criminal business is the suggestion of a mid-level judicial officer, equivalent say to an English circuit judge.

It has been observed by some judges that in some respects the way in which the use of sheriffs as temporary judges in the High Court of Justiciary has developed has resulted *de facto* in a sort of mid-level judicial officer and that accordingly it would not be an enormous step to accord more formal recognition of their existence.

However, that said, there are concerns as to whether such an office, confined entirely to the carrying out of first instance criminal business, would be attractive to candidates of the requisite calibre. More importantly, there are concerns that the proposal may not take proper account of the level of difficulty to be found in many of the trials involving charges of the yet serious level (in excess of 5 years’ imprisonment given recent changes to the shrieval jurisdiction) encompassed by the proposal and the need for a competent resolution of the unexpected arising mid-trial (as it often does). We would also observe that the difficulties likely to be experienced in “high profile” trials are similar in nature to those experienced in the “low profile” trials with the difference perhaps that the “high profile” trial is the subject of greater public attention from the press. Experience of the more ordinary High Court trial work is important in enabling the judge presiding in the “high profile”

trial to deal competently and efficiently with the matters likely to arise during the course of the trial. In these circumstances, while views among the judiciary as a whole on this topic may not be unanimous, the Council believes that on balance the suggestion does not receive widespread support.

## **B The Outer House of the Court of Session**

One option canvassed in the Consultation Paper is the removal of first instance business from the Court of Session, which would then function only as an appellate court. That option is not supported. It is important that the Supreme Court continues to have a first instance jurisdiction to handle significant litigation, including judicial review, complex commercial disputes and other difficult or important cases. It is very much in the public interest that those engaged in such litigation should have access to the experience and expertise of the Supreme Court and the experience and expertise of its practitioners at first instance. Further, experience of hearing and deciding such cases at first instance is an essential preparation for later work as an appellate judge.

A further suggestion is that the Court of Session and the civil jurisdiction of the sheriff courts should be fused into a single, unified civil court. It is assumed that it is envisaged within this suggestion that within that unified court there will be different levels of judge, including the equivalent of the Outer House senator. This proposal is also not supported. It is difficult to identify any real practical advantage in such a formal unification which could not be achieved by the possibly greater use of the power to remit cases between the sheriff court and the Court of Session and *vice versa*.

### *The level of the sheriff courts privative jurisdiction*

The privative jurisdiction of the sheriff courts has of course recently been increased to £5,000. While it is widely believed amongst the judges of the Court of Session that this figure is still too low, not surprisingly, there are differing views as to what the appropriate amount should be. Some would favour £100,000, others a much lower figure. One approach, about which views vary but in which there may, on balance, be merit, would be the setting of a relatively high figure but with a procedure whereby in exceptional cases leave might be given to proceed in the Court of Session notwithstanding that the sum in issue in the dispute is less than the privative jurisdiction figure.

### *Supervisory jurisdiction*

With regard to question 19 and paragraph 4.46 of the Consultation Paper, it is not thought that there is any sound case for giving the sheriff court a general supervisory jurisdiction. In principle the supervisory or superintendent jurisdiction of reviewing inferior tribunals' decisions should lie with the Supreme Court. Further, since judicial review jurisdiction is an exclusive jurisdiction, the Court of Session judges acquire experience of this area of law and there is much to be said for not diluting or dispersing this expertise. While there are no doubt some petitions for judicial review which may appear relatively unimportant – such as that instanced in paragraph 4.46 of the Consultation Paper – they are not frequent and in our view do not justify departing from the clearly identifiable principle underlying the exclusive nature of this jurisdiction.

### *Personal Injury cases*

An increase in the privative jurisdiction of the sheriff courts would remove some of the very low value claims currently pursued before the Court of Session. However, in many respects the arrangements for personal injury

claims in the Court of Session result in these claims being handled efficiently, with a very high settlement rate. The effectiveness with which the Court of Session is able to process personal injury claims should not be underestimated. While the particular personal injury claim rules introduced in the Court of Session no doubt play a part in achieving this, the rôle also played by the existence in the Court of Session of experienced and specialised practitioners in the field should likewise not be underestimated. The administrative efficiencies for the principal firms of solicitors engaged on behalf of pursuers and the firms of solicitors engaged on behalf of defenders are also very relevant considerations. It is important that these advantages should not be lost.

### *Remit*

The powers to remit from the Court of Session to the Sheriff Court and *vice versa* are not frequently employed. In light of what was said by the court in *McIntosh v British Railways Board* this is particularly so in the case of applications to remit a case from the Court of Session to the Sheriff Court. However that decision is about to be reviewed. There may be scope for making greater use of these powers, including use of them by the judge *ex proprio motu*, as part of an expanding role for case management. For example, in all cases in which the sum sued for is less than a particular figure, there might be an obligation on the court to consider remit from the Court of Session to the sheriff court and *vice versa* in the Sheriff Court, in the case of actions where the sum claimed exceeds a particular figure.

## **C The sheriff courts**

Among the questions asked respecting the sheriff courts, the principal or most fundamental one appears to be the suggestion that there be a “national” sheriff court with a single central office administering civil business for the

whole country. The rationale for this proposal would seem to be that there may now be no real need for a structure of independent local courts and that savings in the overall costs of court administration might be achieved by centralising the court administration. It is recognised that with the advent of modern electronic communications much can be centralised on a single database, and so from the point of view of the mere lodging of documents the necessity of maintaining a local administration may no longer be of any relevance in the operation of any solicitor's practice. All can be done "on line", provided of course that the necessary regulatory amendments and provision of IT facilities are made. The further development of electronic communications in the administration of the court system is supported. That said, the judges are not able to comment on whether significant savings in court administration would result from a centralised administration of all the sheriff courts in Scotland. However, it is obvious that the continuance of the local criminal jurisdiction of the sheriff courts will require some local administration and the maintenance of the local sheriff court estate; that savings to the court administrative costs may be achieved at the expense of additional financial burdens on the litigants; that court administrators in a central agency may often be not well placed to judge the additional cost to the litigant in deciding on the location of the local court to which they are to allocate a particular case, or a particular stage in the hearing of that case; and that such administrators may be less able to develop a good working relationship with practitioners than those based locally.

Further, at least in the past, the existence of the local sheriff court has been seen as important for solicitors practising in the locality in question.

Centralisation or nationalisation of the sheriff courts may thus have access to justice implications.

From a juridical point of view nothing supportive of the suggestions has been identified. On the contrary, given the importance from the point of view of jurisdiction of the domicile of the defending party in the primary legislation and the international, particularly EEC, instruments such as EEC Regulation 44/2000, which that legislation reflects, there is a potential tension in some hybrid concept of a centralised administration for local courts, which can nonetheless override the principle of that ground of jurisdiction in its geographical allocation of cases.

Given the continuing existence of a local territorial jurisdiction for the sheriff courts, there is no difficulty in principle with the concept that the territorial boundaries may be updated or reviewed, to reflect changes in the distribution of population or industry. But the convenience of linking the territorial jurisdiction of the sheriff court to the local government areas is obviously practical and convenient.

#### **D Third Tier**

The judges do not have sufficient experience of the day to day business of the work of the sheriff court in small claims and summary cause cases to make any detailed comment on this suggestion, which in itself lacks detail.

Historically, justices of the peace did have a civil jurisdiction to deal with small debts (cf Small Debts Act 1795; Small Debts (Scotland) Act 1800) but the jurisdiction fell into desuetude by reason of the upper limit remaining at £5 and the advent of the small debt court in the sheriff court in virtue of the Small Debt (Scotland) Act 1837. It may be that a similar sort of jurisdiction could usefully be recreated, despite the history of its lack of success, but in that event, careful consideration would require to be given to the extent to which decisions would be open to appeal. It will be recollected that the small debt jurisdiction of the sheriff court was appealable to the High Court of

Justiciary only on grounds of corruption or malice or oppression on the part of the sheriff (cf *Paterson & Sons v Robinson* (1895) 22 R (J) 45). No review, other than reduction, was available in the case of the justices of the peace small debt court.

## **E Appellate Arrangements**

### *Leave to appeal to the House of Lords*

Although no specific question is posed, paragraph 4.60 *in fine* invites views on whether appeal from the Court of Session to the House of Lords should always be subject to the grant of leave to appeal. The unrestricted right of appeal to the House of Lords in Scottish cases goes back to the Claim of Right of 1680, which settled the ongoing dispute whether the judicial power was final or whether it should be subject to review by the non-judicial, political body of the parliament for “remeid of law”. In any event, this appears to us to be a “reserved matter” in terms of the Scotland Act 1998.

### *Sheriff Court Appeals*

On the assumption that other proposals, if implemented, did not materially affect the office of sheriff principal, it is not considered that the present arrangements for civil appeals suffer from any major structural deficiency. Under the existing legislative structure a large number of matters are appealable only to the sheriff principal. Others are appealable to him by way of choice. The statistics do not disclose the proportion of cases in which further appeal to the Court of Session would have been available but parties were content to abide by the decision of the sheriff principal. But of the cases which come to the Inner House directly, without having passed through the sheriff principal, it is not our impression that there is a substantial proportion of such cases which, had they gone to the sheriff principal, would have rested at that appellate level.

With reference to the suggestion that appeal to the sheriff principal might be enhanced by the creation of a triumvirate Bench of sheriffs principal, this would reduce the *ad hominem* reluctance which we understand may from time to time arise respecting appeal to a particular sheriff principal. While, of course, criminal matters are outwith the remit of this review, there may be scope for such a triumvirate Bench relieving the High Court of Justiciary of some summary appeals (perhaps with a provision for referral to the High Court of Justiciary on a point of general importance). On the civil side, enhancement of the status of appeal to the sheriff principal level may be important if the privative jurisdiction of the sheriff court is substantially increased. With such an enhanced appellate tribunal, appeal directly from the sheriff at first instance to the Court of Session could more acceptably be made subject to a requirement to obtain leave to “leap-frog”.

#### *Statutory appeals from Tribunals*

The current Rules of Court of the Court of Session give a fairly wide power to remit a statutory appeal to the Outer House. The exceptions are mainly instances in which the primary legislation specifies appeal to the Inner House. Whether a particular statutory appeal should go to the Outer House should depend on both the tribunal system from which it emanates and the circumstances of the case and the issue which it raises. If before arriving in the Court of Session the case has passed through a succession of appellate tribunal hearings, the interposition of proceedings before an Outer House judge will usually involve an undesirable additional stage. Likewise where the statutory appeal involves an important point, which is likely to return to the Inner House, remit to the Outer House will often be inappropriate. On balance it is not thought that any major legislative innovation is necessary in this field.

## **F Temporary judges and part-time sheriffs**

The employment of temporary judges in the Court of Session presents considerable difficulties. First, as we understand it, there is now reluctance among members of the senior Bar to accept office as a temporary judge on the view that it has, or may have, a deleterious effect on their practice. It has also to be said that there can be personal professional difficulties for members of the Bar in acting as a judge one week and an advocate before the same court in the next week. The use of sheriffs as temporary judges in the Court of Session is also problematical. There are areas of work and procedure in the Court of Session with which a sheriff may have had no recent experience. But more importantly, the litigant will often have chosen the Court of Session in preference to the sheriff court as being the appropriate forum in view of the importance of the litigation and the desirability of the dispute being decided by a senator. Having made that choice, it is unacceptable to such litigants that their dispute be decided *de facto* by a sheriff. Overall, we believe that litigants whose case is dealt with by a temporary Lord Ordinary are likely to perceive that they are being provided with an inferior service.

We have of course no direct experience of the perception of the employment of part-time sheriffs. We would comment however that the particular difficulties which we have just mentioned in respect of the use of temporary judges in the Court of Session may not apply in the case of part-time sheriffs. Solicitor part-time sheriffs can avoid the problem of alternating between being a judge and a procurator before the same court by sitting only in sheriffdoms in which they do not normally practice; and they do not appear as judges temporarily drawn from an inferior court (as do sheriffs sitting as temporary judges in the Court of Session). That said, we suspect there may well be some feeling among some litigants that having their cases allocated to

a part-time sheriff involves receiving an inferior service, but we are unable to say with confidence that this is so.

## Chapter 5

### A Guiding principles/"overriding objective"

There can be little room for disagreement with the proposition (expressed in para.5.2 of the Consultation Paper) that cases should be dealt with "in ways which are proportionate to the value, importance and complexity of the issues raised". However, it is noted with concern that the test of proportionality set out at the end of that paragraph (taken from the Scottish Executive's Report on Civil Justice in Scotland, 2007) omits any reference to the requirement to do justice between the parties. If the rules of civil procedure were to contain an overriding objective or statement of philosophy, it is essential that this omission be rectified. Proportionality in terms of the allocation of judicial and other resources ought to be directed primarily to achieving the just and expeditious resolution of disputes between the parties rather than at a saving to the taxpayer. The definition of "justly" in the Civil Procedure Rules governing civil litigation in England and Wales (referred to in para.5.4) focuses the matter in this way. If a statement of overriding objective were to be included in the rules, a definition along these lines would be appropriate. It may be added that rule 3 of the Employment Tribunal rules (SI 2004/1861) states the overriding objective of those rules as enabling the Tribunal to deal with cases "justly".

Subject to the above, the incorporation of an overriding objective into the rules governing civil procedure in Scotland is supported. Whilst it may well be that the courts have an inherent power to regulate the conduct of proceedings and to ensure that the business of the court is conducted efficiently (see para.5.9 *et seq*) the development of such a power on a

necessarily intermittent case by case basis is apt to produce uncertainty. It is better that there should be a statement in the Rules making it clear that the court has both a power and a duty in this regard and what factors the court can and should take into account both in fulfilling that duty and in exercising those powers to achieve the stated end.

## **B Mediation and other methods of dispute resolution**

For convenience mediation and other forms of alternative dispute resolution are referred to compendiously as ADR.

As noted in the Consultation Paper, the question of how and to what extent the courts should recognise and encourage ADR has been the subject of recent consideration by the judiciary. In addition to the consideration given by the sheriffs referred to in the paper, a Working Group was set up from among the judges of the Court of Session to consider and formulate proposals concerning possible recognition of a role for ADR in civil litigation in Scotland. The Working Group, which was chaired by Lord Clarke, reported to the Lord President in May 2006. That report was considered by the judges as a whole and formed a basis for a draft Act of Sederunt. No doubt the report will be available to the Review. However, as a result of concerns expressed, it is understood that this matter is not being progressed at present.

Clearly ADR can be a valuable alternative to litigation as a means of dispute resolution. This is not only because it may in the right case be cheaper and more expeditious, but also (and perhaps principally) because in the right case it may lead to a more harmonious and less contentious resolution of the dispute. The qualification "in the right case" should be emphasised. Not every case is suitable for ADR and it would not be conducive to the general principles informing the Consultation Paper that parties should in all cases be

put under pressure to go down that route. This can readily lead to delay and wasted expense. For that reason, whatever else, ADR should not be compulsory in any class of case.

In summary, it is considered that the role of the court should be facilitative. The court has always, of course, had the power to suggest that parties may wish to consider ADR. Suggestions to that effect have from time to time been made from the bench and have sometimes been taken up by the parties. One of the difficulties, however, is in identifying an occasion within the process of any particular litigation when the court might suitably make such a recommendation. There is no equivalent in Outer House procedure to the English “summons for directions” when the future directions needed to bring the case to a hearing are discussed. This is the point sought to be addressed in para.3 of the summary of the Working Group’s recommendations. The difficulty does not present itself in cases on the Commercial Roll, where there is provision for active case management and parties appear before the court on preliminary and procedural hearings to discuss further procedure. In other cases in the Outer House, however, including personal injury cases where there is “case flow” management, there is no comparable opportunity. It is recommended that the rules be altered to provide such an opportunity in all cases. It may be that the appropriate time is when pleadings are finalised and a substantive hearing is being fixed. At present the motion for further procedure, when the court appoints the case to a proof, proof before answer or a discussion on the procedure roll, is usually unopposed and is granted “unstarred” without any appearance by the parties. If parties were always required to appear on such a motion, this would provide the opportunity for consideration of ADR and no doubt other matters. It might then be possible to encourage parties to use that occasion for the disposal of other motions (e.g. for recovery of documents) so as to avoid the multiplicity of separate

applications which seems to pertain at present. In a sense this proposal involves a reversion to something similar to the former By Order Adjustment Roll but with the important difference that it would be an opportunity for active case management. It would also be worth giving consideration to the abolition of the absolute right to a procedure roll hearing on relevancy etc., in such cases where it remains.

If the role of the court is merely facilitative, or at most one of providing encouragement in the appropriate case, the court should not become directly involved in questions concerning the quality or certification of ADR practitioners. The growth in numbers of suitably qualified ADR practitioners is obviously to be encouraged but it should be allowed to develop, whether by market forces or encouragement from the Government or local authorities, independently of the judicial system. There may be a role for the judiciary in helping to guide the formation of a regulatory body, and some judges have attended meetings of the Scottish Mediation Network, but we do not consider that judicial involvement should go further than this.

### **C Modern methods of communication**

Clearly any method of improving efficiency and accessibility via modern methods of communication is to be encouraged, though care should be taken to ensure that it does not reduce accessibility for some who, for whatever reason, do not find it easy to work in this way. As the Consultation Paper notes, much progress on this is already being made: for example, documents can already be lodged electronically in the Court of Session and video equipment is installed in one court for the taking of evidence. It is hoped that further progress can be made.

## **D Case management**

As the Consultation Paper notes, Inner House business has been the subject of a report by Lord Penrose and the Review will take note of his recommendations. This is to be welcomed. In these circumstances this response deals with the Outer House.

In the Outer House two models of case management are in operation. In the case of personal injury actions, the case-flow management technique in place under Chapter 43 of the Rules of the Court of Session has been successful in ensuring that, in the main, relatively straightforward personal injury actions are dealt with expeditiously. This is achieved by means of establishing the timetable at a very early stage and requiring the matter to come before the court when there is a need or a desire to vary that timetable. There is no element of “judicial case management” in such cases, although there may be occasions when the court is in a position to encourage parties down one route or another. The case management technique adopted in cases on the commercial roll under Chapter 47 of the Rules of Court (and applied by analogy where appropriate by commercial judges in dealing with company business, and to some extent by intellectual property judges under Rule 55.3) is very different. The court is seised of the case at an early stage; and, by discussion at preliminary and procedural hearings, attempts are made to focus the efforts of the parties on the issues that matter and to progress the action expeditiously (so far as is consistent with the interests of justice). Whilst there have been ups and down over the years, it is perceived that this form of case management can be successful in achieving those aims. Statistics compiled in respect of the cases coming to a substantive hearing after 1 January 2007 show that the vast majority of cases came to such a hearing within less than 15 months of the first preliminary hearing. There are no comparable statistics relating to ordinary actions in the Outer House but it is

clear that they take very considerably longer to come to a substantive hearing. There is, of course, a price to be paid, both by the parties (in terms of the front loading of expenses) and in terms of judicial resources. For this reason this type of case management should not be applied uncritically across the board. But consideration might usefully be given to whether a modified version of it should be used in all cases proceeding under ordinary procedure in the Outer House. Reference is made to the earlier suggestion that parties might be required to attend court on a motion to determine further procedure including discussion of the duration of any proposed proof or debate. Or a hearing might be fixed to come before the court at a slightly earlier stage, such as the end of the initial periods allowed for adjusting pleadings, so that any motion to extend the adjustment period could be considered in the context of a discussion about how best to progress the case. Of course any such proposal, if implemented, will require lengthier hearings and the allocation of more judicial time, the availability of which is dependent, in large part, on a solution being found to the criminal/ civil balance in the work of the judiciary.

The point is raised in paragraph 5.44 of the Consultation Paper that if complex personal injury actions are transferred out of the Chapter 43 regime, then there is no case management at all. These are actions which perhaps require more, rather than less, case management. There is a danger of drift. The court can deal with this problem on an *ad hoc* basis by putting the case out By Order for some weeks ahead at the time of granting the transfer out of Chapter 43, but this is rarely done, and it would be preferable that there be some specific Rule applying to such a case. It would be both possible and desirable for there to be a provision in the rules providing for a form of judicial case management for every personal injury case transferred out of the Chapter 43 regime. The intensity or otherwise of that case management would depend very much upon the peculiarities of the particular case, but

there is no need for cases which are transferred out of Chapter 43 to fall out of the case management system altogether.

## **Chapter 6**

Chapter 6 considers a variety of mechanisms which might broadly be described as aspects of case management and measures designed to achieve more efficient use of court time by the focussing of parties' minds on the key issues at an early stage. It is neither necessary nor appropriate to comment on each and every one of the 18 aspects covered by this Chapter. However, many of the mechanisms considered in the Consultation Paper are consistent with greater judicial control of procedures, with the aim of making civil litigation more efficient, more speedy and more accessible than it has been in the past. Provided that these mechanisms do not undermine the fairness of our procedures, nor result in an erosion of confidence in the quality of justice provided, these mechanisms have much to recommend them.

### **A Pre-action procedures**

Views are mixed as to the success of the limited pre-action protocols currently in use in Scotland. They may focus minds on the key issues at an early stage and encourage greater openness. However they may be over-prescriptive and compliance may be unnecessarily expensive. As ever, the devil is in the detail, and much depends on the manner in which they are supervised and enforced by the court.

### **B Gate keeping**

Although there is a superficial attraction to the suggestion that the permission of the court must be obtained before proceedings of a certain type are brought, or an appeal to a higher court is allowed, there is a risk that more court time would be spent on consideration of applications for leave than

would be saved by the avoidance of claims or appeals without merit. The example of the backlog caused by applications for leave to bring immigration and asylum appeals is a case in point. There is also a risk that any gate keeping measures will be perceived as resulting in a denial of justice. The suggestion is made in the Consultation Paper that a requirement for leave could be related to the question of where a case should commence within the court system, and to which level it should be allocated. Comment is made elsewhere on proposals for central allocation of cases. There are concerns that this may undermine the local quality of justice and result in an over-powerful centralised bureaucracy, with little benefit to the quality of justice (albeit with some possible saving in cost). On balance it is thought that there is no real need to introduce further gate keeping measures and that that applies particularly at first instance.

### **C How court rules are made**

There is no need for a centralised and uniform rule making body. The language of rules of court can be made more accessible and understandable (and few would argue against the desirability of this), but it is not apparent that this must be done by a single rule making body. The functions of the sheriff court are markedly different in important respects from the functions of the Court of Session. There is no intrinsic benefit in attempting to draft a set of rules which will have general application to all courts, when there are aspects of the functions of those courts which differ significantly one from another.

### **D Initiating documents**

There is much to be said for the use of IT for electronic filing, and as already observed there is scope for improvement in the language used in initiating documents and the information supplied to potential litigants. Again,

however, there are concerns about the suggestions made in this section of the chapter about having all actions initiated at the same level, and at a central entry point, which would then be allocated to the appropriate court.

### **E Written pleadings**

There are divergent views amongst the judiciary, as amongst practitioners, as to the benefits of simplified proceedings.

The general experience of “abbreviated” pleadings in personal injury actions has not been a satisfactory one. It may be observed first, that the Rules of Court applicable to such actions require the stating of the facts upon which the case is based. To state the facts of a case both concisely and comprehensively requires the expenditure of time and skill on the part of the pleader. It is therefore not surprising that in practice pleadings relating to the facts in a personal injury action are often extensive and discursive, since some practitioners are unable or unwilling to devote the necessary skill, time and effort in producing succinct pleadings. Where however the Rules of Court in personal injury actions do provide for particular abbreviation is the removal of any requirement to particularise the common law duties said to have been breached or to particularise the aspects in which it is said that liability arises under some statutory provision. In the experience of a number of judges, a consequence of this aspect of the rules relating to personal injury actions is that the pleadings in such actions often mask irrelevant cases or fail to serve to focus the mind of the pursuer’s advisers on the basis of liability.

In cases on the commercial roll, where brevity in pleadings is exhorted, a similar tendency towards prolixity is also encountered in practice, no doubt for the same reason. However, in suitable cases, it is possible through very active case management to direct the provision *ad hoc* of short statements of

issues and like innovations on standard written pleadings all to useful effect. We doubt however whether such *ad hoc* pleading arrangements can be introduced as a generality in a case flow management system. As already mentioned, in personal injury actions, which proceed in a case flow management system, our experience of abbreviated pleadings has in general been somewhat disappointing.

It may be added that, obviously, in most civil cases, if not essential, written pleadings are at least highly useful as a means of identifying the issues of fact and law in disputes in the case and as a means of keeping any subsequent inquiry within reasonable and proper bounds. There would not be support for substituting for the current system of pleading a form of very short pleadings which would not be likely to achieve those imperatives.

#### **F Summary disposal**

Two issues arise under this topic – (a) whether summary disposal should be open to either party, and (b) whether it should be available only on the basis that the opposite party’s position is unstateable, or whether it should be available on the lower test of having no reasonable prospect of success. In most cases, no doubt, it is correct that the relevancy of the pursuer’s case can only be tested at debate, but there are some examples of cases in which the pursuer’s case is wholly misconceived or without any merit. In such cases there is no reason to exclude the right of a defender to seek summary disposal at an early stage of the proceedings. However, the present high test – namely that the opposing party’s position is unstateable – is an important safeguard which should be retained.

## **G Procedural business**

The creation of a new judicial office, equivalent to that of the Master in the High Court in England or Wales, dealing with procedural matters is a subject upon which views vary. There are some procedural matters which take up a significant amount of judicial time; for example, in the Court of Session, a motion for the allowance of issues may take a day or more to explore whether a proof or a jury trial is appropriate. These cases are not always capable of being identified as lengthy or important prior to the hearing, yet they are not suitable for determination by a junior judge. On the other hand, there is some quasi-administrative work, such as the pre-hearing management of actions, listing decisions, including the prioritisation of allocation of cases which could be done by such a judge. That said, the amount of procedural business which is less important and can be dealt with in a short time by judges has reduced greatly in recent years, and is generally now not such as to cause a significant problem of timetabling for disposal by judges in the ordinary course of business.

There is no difficulty, in suitable cases, in the introduction of appropriate technology to reduce waiting time – e.g. by telephone or video conferencing. However, as the Consultation Paper observes, the success of such a scheme would depend on parties giving accurate time estimates for the disposal of such business. If a system of assigning dedicated time slots to particular cases were to be adopted, the court would require to be provided with suitable sanctions to assist enforcement.

## **H Substantive hearings**

Inaccurate estimates by parties as to the length of a hearing have been a longstanding problem at every level. It is agreed that the court should play a greater role in deciding how much time should be allocated to a hearing and

that parties should be required to adhere to the fixed timetable. This timetable should be sufficiently generous to enable the debate between “bench and bar” to take place. In addition there is scope for greater use of written submissions or outline arguments. Again, it may be appropriate to give the court appropriate sanctions in the event that a party fails to meet a fixed timetable – for example, by the ability to make findings of expenses against that party’s legal representatives.

### **I Expert evidence**

It would be an unnecessary and inappropriate infringement of the right of a party to decide how to conduct his litigation to impose the use of a single joint expert, where there is a conflict of opinion between experts. In any event it is relatively infrequently that the court is faced with unnecessary duplication of expert evidence, and where this occurs, it may be that the remedy will lie in an appropriate award of expenses. There is no need for innovation in this respect. Further, there is nothing at present to suggest that there is a need to emphasise that experts’ primary duty is to the court. An expert also has responsibilities to his client.

### **J Pursuers’ offers**

The problem which was identified in 1996 with regard to pursuers’ offers was one of competency. If there is to be a review of primary legislation, this is a matter which can be cured in that review. While views vary, some judges consider that there would be benefit, and little disbenefit, in adopting a system of pursuers’ offers similar to the Part 36 orders under the Civil Procedure Rules in England and Wales.

## **K Civil juries**

There are conflicting views amongst the judiciary as to the merits of civil jury trials. With the increasing complexity of quantification of claims for personal injuries, and the difficulties in the application of the Ogden tables in their most recent form, it is thought likely that a majority of judges would favour the abolition of right to trial by jury in the Court of Session. However, it should be recognised that this is not a view universally held by judges.

## **L Form of judgment**

There is a tradition in England and Wales of greater use of the practice of delivering judgments *ex tempore*. There are many cases in which the point at issue is one of importance to the parties to the action but of little wider relevance – for example, a road traffic accident where the decision turns largely on the credibility and reliability of witnesses. In such a situation, greater encouragement can be given to the giving of an *ex tempore* judgment in appropriate cases, if the judge feels comfortable in doing so. Parties will be spared the delay, which is inherent in the writing of an opinion, of some weeks or months before learning the outcome of their litigation, and a lengthy written opinion may not be necessary nor of interest to a wider audience.

## **M Sanctions for non-compliance**

Consideration should be given to the extension of powers to penalise non-compliance with court rules. There would be merit in making explicit the powers of the court to regulate the questions of expenses, and where appropriate to make an order finding parties or their legal representatives personally liable for the expenses of a case or a particular step in procedure or disallowing the expenses of a particular step from being charged to the client and/or to the Scottish Legal Aid Board.

## **N Party litigants**

Although some party litigants may present their own problems in terms of management of court time, it would be neither appropriate nor desirable to limit or dissuade members of the public from seeking to represent themselves. That having been said, a significant proportion of court time, both at first instance and at appeal, is taken up by party litigants, and in some cases there is no merit whatsoever in the arguments which they place before the court. There is force in the suggestion that there should be a requirement for a party litigant to obtain leave to institute proceedings, or to proceed with an appeal, in all cases, and for the court to be granted greater powers to regulate the conduct of proceedings, and the conduct of the party litigant, in those cases where a party litigant is involved.

A list of vexatious litigants should be available, at least to the court and its staff, and there may be merit in a reconsideration of the terms of the Vexatious Actions (Scotland) Act 1898. Party litigants should be given assistance in the preparation and presentation of their cases when they have a probable cause. However stricter controls should be placed on those litigants whose cases are wholly without merit.

## **O Judicial review**

It may be appropriate for the procedure to be amended to increase the court's case management powers at a relatively early stage of the procedure, so that consideration can be given to the lodging of answers or documents, notes of argument and lists of authorities in advance of the first hearing. At present there is a minority of cases in which the first hearing is continued to enable these steps to be carried out, with consequent waste of court time.