



Response to the Scottish Civil Courts Review: A Consultation Paper

March 2008

The Civil Justice Committee of the Law Society of Scotland (the Committee) welcomes the opportunity of contributing to the Consultation on the Civil Courts Review. The Committee, which has consulted with a number of other Committees of the Council, including the Remuneration, Planning, Consumer, Criminal and Legal Aid Committees, wishes to preface its comments with these observations:

The Committee notes that a key issue for the Review will be whether, as a matter of public policy, the courts should be regarded as the last resort for the resolution of disputes after all other suitable methods of dispute resolution have been proved ineffective: or whether it is simply one of a “menu” of dispute resolution from which parties may choose.

The Committee submits that it is an essential element of the core values of any civilised Society that State sanctioned Courts will provide an independent and impartial forum for the resolution of disputes between people. The Courts are not and should not simply be regarded as a last resort after all other means of resolution have proved ineffective. The Courts are on a “menu” but parties should always be able to have their disputes resolved by the Courts and they should never be forced to use an alternative form of dispute resolution.

The process of initiating dispute resolution and ascertaining whether the parties can consider compromise or negotiation may be areas where new techniques should be considered provided the parties are fundamentally guaranteed that any final decision to be made on disputed issues will be made within an impartial judicial process.

The Committee has also noted the **Remit of the Review**, as stated by the then Minister of Justice and wishes to summarise some of the views which are expressed in this response in respect of that Remit.

- **the cost of litigation to parties and to the public purse**

The Committee believes that the State has a duty to produce a system for resolution of disputes and to assist people in achieving equality of arms. As such, a significant part of the cost of the provision of the courts should be borne by the state. It is in the interests of the wider public that there is a robust and respected system for resolving judicial disputes. There are numerous examples of cases which have shaped the development of Scots Law where the value of the actual subject matter of the dispute is low; however the impact of the decision has been great. *Donoghue v Stevenson* is the classic example but there are several others, including the recent House of Lords case of *Moncrieff v Jamieson*.

- **the role of mediation and other methods of dispute resolution in relation to court process;**

There are disputes in which the use of mediation or other methods of alternative dispute resolution is helpful however they must remain voluntary. The possibility of a judicial determination must always remain.

- **the development of modern methods of communication and case management;**

There should be a greater use of e-filing which would in particular be of benefit in the large number of actions raised in the Sheriff Court which are undefended. Case Management may be suitable in a small number of cases such as Commercial Actions but for the majority of actions rules for Case Flow Management would be preferable.

- **the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts;**

The Committee favours a split between Civil and Criminal business within the Sheriff Court. Also there should be specialist civil courts where appropriate within each Sheriffdom.

Turning to the key issues identified in the Review consultation papers and in particular the deployment of judges:

The Statistics which accompany the Review provide much useful information. Table 1 indicates that since 2002 between 5000 and 6900 cases have been raised annually in the Court of Session. This contrasts with Table 17 which records that since 2002 between 141 and 185 hearings have taken place annually in the Outer House. This suggests that, the predictability of outcome which is offered by raising actions in the Court of Session, has contributed to the vast majority of cases settling and only a very small proportion are resolved by the Court. In relation to Personal Injuries the Case Flow management which has been introduced since the reform of the Rules in terms of Lord Coulsfield's recommendations has resulted in a reduction of judicial time on procedural matters. Given the contribution of the Court of Session to resolving disputes the Committee submits that it must be retained as a court of first instance.

In the Sheriff Court between 115,000 and 136,000 cases have been raised annually since the turn of the century (Table 21). There have however only been between 1,500 and 2000 Ordinary Proofs and Debates. The relatively small number of cases which are resolved by a Sheriff are a result of the large number of cases which are raised and undefended along with the large number of cases which are resolved by successful negotiation between agents.

Notwithstanding the useful statistics in the consultation paper, the Committee notes that there is no reference in the consultation paper to any research having been undertaken as recommended by the Civil Justice Advisory group

chaired by Lord Coulsfield which reported in November 2005. The Committee feels that such research should be carried out and evaluated before radical changes are made to matters such as the privative jurisdiction limit.

The Scottish Courts along with the Court Rules and Voluntary Protocols currently provide a framework within which parties can negotiate to resolve disputes. The Committee considers that reform should be aimed at making the Courts better but that the option to use the Courts should always be available to parties.

Chapter 1 - Introduction

1. Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

The Committee acknowledges that early resolution may, in some cases, be attractive but it should not be considered a paradigm for all disputes. Society has a direct interest in fair and just resolutions which implies not only equality of arms but also a degree of predictability in the decision making process. Research and anecdotal evidence shows that it is the “shadow of the court” which provides a framework for successful and appropriate resolution processes. The citizen cannot, for example, be expected to rush into a settlement with an insurer after an accident until all the medical consequences have been reasonably investigated and without a clear understanding of why and how compensation for loss should be assessed.

The Law Society of Scotland and the insurance industry have introduced voluntary protocols for personal injury and professional negligence claims. A separate protocol for industrial disease claims will come into effect on 1st June 2008. The protocols are designed to encourage the early resolution of claims. In practice there have been some issues. (See articles on Colossus and on the Protocol from the Journal of the Society in January and February 2008).

<http://www.journalonline.co.uk/article/1004970.aspx>

<http://www.journalonline.co.uk/article/1004873.aspx>

These concerns have been discussed with insurers and the Committee believe that they will be resolved over time. Such Protocols could work well if their use is properly resourced and they could be extended to cover other areas of work. They could be incorporated into formal court procedures as has successfully been done in England where Protocols are supported by appropriate cost sanctions. The text and fee structure of the Protocols can be found on the Society’s website.

[http://www.lawscot.org.uk/Members Information/rules and guidance/guides/Rules/preaction protocol fees/PreActProfNeg.aspx](http://www.lawscot.org.uk/Members%20Information/rules%20and%20guidance/guides/Rules/preaction%20protocol%20fees/PreActProfNeg.aspx)

[http://www.lawscot.org.uk/Members Information/rules and guidance/guides/Rules/preaction protocol fees/Preactionprotocol.aspx](http://www.lawscot.org.uk/Members%20Information/rules%20and%20guidance/guides/Rules/preaction%20protocol%20fees/Preactionprotocol.aspx)

There will always be cases where immediate resort to the Court is necessary, such as interdict, but for other disputes some form of pre-action procedure is desirable. Early advice from experienced legal advisers can often result in a negotiated agreement without the need for litigation.

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 Committee agrees that the principles and assumptions discussed in paragraphs 1.11 and 1.14 are a sound basis for the development of the Review's recommendations. They should however be supplemented by other factors including the development of the common law (as articulated in the speech of Lord Rodger of Earlsferry in *Moncrieff v Jamieson House of Lords (2007) UKHL 42*

As stated in the opening remarks, the Committee strongly believes that the State must provide a system for the resolution of disputes however the Courts also have a role to play in the development of the common law. As such the value of the claim should not be used as the sole basis for determining the progress of the claim as even a low value case may end up as one of fundamental importance. There are a number of examples the most obvious being *Donoghue v. Stevenson [1932] All ER Rep 1; [1932] AC 562; House of Lords* where the House of Lords felt it desirable and appropriate in the general public interest that there should be a fundamental change in the law of negligence. As is well known the actual subject matter of the dispute would not have justified the expense of taking a claim to the House of Lords if the sole criterion was proportionality.

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

See general comments at the beginning of this response.

Chapter 2 – Access to Justice

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

The Committee welcomes public legal education. The Committee believes that public legal education helps overcome hurdles which may impede access to the legal system and accordingly access to justice. The Law Society of Scotland has a policy of encouraging legal education in both school and adult life. The Society's statutory duty under Section 1 of the Solicitors (Scotland) Act 1980 requires the Society to promote the interests of the public in relation to the legal profession. In furtherance of that obligation, the Society currently supports a number of initiatives. In association with the Citizenship Foundation, the Young Citizens Passport is published and issued throughout schools in Scotland. The Society, in conjunction with the Scottish Schools Law Project, organises visits to schools by Solicitors to answer pupils' questions about the law. The Committee welcomes all initiatives which support the development of public legal education which would include the development of teaching about the Scottish Legal System and legal rights and responsibilities in schools. The Committee recognises, however, that education in schools and adult life requires the enabled citizen to understand that participation in society incurs obligations as well as creating rights.

If people do have an increased knowledge of their rights and are better informed they will also have a greater awareness of the remedies available to them for perceived wrongs. An increase in legal education is likely to result in an increased number of claims and on further demands being made on the civil justice system.

- 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?**

The Committee considers that there are significant gaps in the provision of independent legal advice and representation in Scotland. Advice to the public, which is given by a party who has a financial interest in the outcome of the claim, cannot be regarded as independent.

In relation to the general provision of legal advice by Solicitors, the gradual erosion of the provision of legal advice and assistance has resulted in the absence of publicly funded legal advice in large areas of Scotland. The reason for the decline of the provision of legal help results from the poor funding available meaning that Solicitors are no longer able to fund the giving of legal advice out of their own resources. The current financial restrictions on legal advice will make matters worse, particularly in rural areas. The Committee believes that access to legal advice from qualified lawyers should be a desired objective of the Civil Justice System.

The Committee welcomes the current in-court advice projects and believes that the project initially started in Edinburgh Sheriff Court should be extended throughout all Sheriffdoms in Scotland. At present

unrepresented litigants, through the in-court advice schemes, can receive advice before their case calls in Court. These initiatives clearly improve access to justice but require to work in conjunction with a properly funded legal advice scheme giving access to advice by Solicitors. Although there are other in-court advisor schemes, the one in Edinburgh is free and should be the model for other such advisors.

Following the alteration of the Small Claims limits, the Committee is concerned at the removal of civil legal aid from claimants where the value of the claim is under £3,000. Many of these claims can be of significant importance for litigants and also can involve complex legal argument. The Committee considers that in appropriate circumstances, legal aid should be made available in these cases.

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?

The Committee consider that there is a danger in assuming that court procedures can be “designed” to enable litigants to participate without legal representation and that potential litigants should always have the opportunity of taking legal advice before entering the Court process. Any Court process, particularly in relation to lower value claims, should be designed to accommodate the party litigant. If greater use were to be made of protocols then there would be clear instructions for all on what requires to be produced within a timescale which would be clear and without discretion. When the current Small Claims Rules were framed by the Rules Council it had been the intention that this would allow party litigants to approach them on a user friendly basis. It is, however, clear that the drafters assumed that party litigants could not use diaries (hence fixed dates for callings etc); had no access to typewriters (hence oral submissions etc) and that they had unlimited free time (hence physical checks for returns at Sheriff Clerks offices, Return Days, Calling Days restrictive periods for continuation etc). The Committee would suggest that few parties have spare time these days but most will have computers with calendars, access to the internet via broadband etc which would indicate that present procedures were anything but user friendly. However, it must, also, be recognised that even smaller claims can involve complex legal matters which cannot readily be resolved by simplified forms and “user friendly” language. All litigants should have access to and be encouraged to take legal advice either through Solicitors, agencies providing advice such as the CAB or in-house Court schemes. The provision of appropriate advice prior to litigation can result in early settlement or avoidance of claims with the resulting saving in administrative and judicial time.

It is recognised that certain types of claim are not appropriate for self-representation such as personal injury. *Elaine Samuels’ Research (1998) on personal injury cases and Small Claims procedure* concluded

that personal injury actions were not suitable for Small Claims procedure due to the imbalance between Pursuer and Defender built into the procedure.

<http://openscotland.gov.uk/Publications/1999/01/59d47aeb-7b4a-4f82-ac03-7fb212c46801>

The Committee had previously supported the removal of personal injury cases from the Small Claim procedure and was pleased to see that implemented in January 2008. Equality of arms must be at the heart of the Civil Justice System and on that basis, certain areas of law, at whatever level of value, will require the involvement of a Solicitor. The experience of the Irish Personal Injuries Assessment Board (PIAB) is that a large body of claimants still opt for legal representation, although the costs are not recovered.

There is a trend to suggest that non qualified court users are intimidated and confused by current court processes and the formality of dress and language. There is a serious risk that such superficial issues mask the reality that disputes are complex because the law involves concepts which can rarely be reduced to single sentences. A trained lawyer representing a business against an unrepresented lay person will not be diminished in skill because he or she wears casual clothes. Dress codes in the USA are fairly lax by Scottish standards but party litigants fare no better in that regime when facing professional opponents. Written pleadings are also criticised but, again, it is the lay person who is more likely to suffer from ambush if they have little or no notice of the lines of argument and evidence to be led against them. The practitioner can anticipate issues likely to arise because of training and experience no matter how sparse the party litigant's written case or documentary evidence. This is witnessed by solicitors frequently in the present Summary Cause courts.

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

Reference is made to the response to Chapter 2 question 2. The scheme of in-court advisers has worked well and should be extended as soon as possible throughout Scotland. An unrepresented litigant in Edinburgh Sheriff Court can obtain advice and assistance in presenting both Small Claim and Summary Cause cases. The fact that there is no similar service in (for example) Kirkcaldy Sheriff Court is a matter of concern. The system should be expanded as soon as possible and it is essential that secure long term funding is made available. The provision of such services saves both judicial and administrative time in securing early settlement of actions.

The Committee welcomes the provision of an in-court mediation service. The scheme provided currently in certain Sheriff Courts with the in-court advice services is to be welcomed but such schemes are likely to work only if no charge is made for the service of the mediator. The Committee supports the use of mediation in appropriate cases but a cautionary note has to be sounded in relation to the costs of privately employing a mediator for a relatively low value case where the expenses of the mediation may add significantly to overall cost.

As discussed in the response to Chapter 5 Question 6 there are a number of IT solutions available which could provide assistance with “self help” services for party litigants.

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

The Committee believes that there should be secure long term public funding for parties who cannot afford a Solicitor. Currently Solicitors undertake a large amount of *pro bono* work which assists in the resolution of settled disputes. The Committee believes that in the long term proper public funding is required for legal advice to parties who cannot pay for legal help.

As discussed in Chapter 2 Answer 2 the current financial restrictions on legal advice mean that people can find it difficult to obtain advice particularly in rural areas.

To ensure that advice is both sufficiently widely available and affordable to the public purse consideration should be given to setting up legal advice centres where lawyers employed by the Scottish Legal Aid Board would give advice. These would operate as the civil equivalent of the Public Defender. Similar centres already operate in other jurisdictions including Finland.

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?

In relation to low value claims, the Committee considers that one appropriate method of dealing with these cases would be to employ the civil equivalent of the stipendiary Magistrate or the equivalent of the English Registrar. Decisions should always be taken by a legally qualified individual, who does not necessarily require to be a Sheriff. Such a judicial figure could work within the existing Sheriff Court system and there would not be significant cost implications if the new judicial figure worked within the existing Sheriff Court structure and buildings.

The Committee considers that landlord and tenant cases should not be dealt within the same Court as Summary and Ordinary civil cases. In larger Sheriffdoms the heritage roll is dealt with in a separate Court from Ordinary civil business and consideration should be given to ensuring that such a process was wide spread throughout Scotland, if necessary by the creation of a new housing Tribunal within the existing court structure. It has to be recognised, however, that where in-court advice projects exist, they offer valuable assistance to unrepresented litigants in housing cases and these services are clearly court based.

The Committee would welcome a system of centralising the warranting of at least simple payment actions, a high volume of which are uncontested, and referring only the minority of claims which are defended to the relevant local Court.

See Chapter 4 Answer 14.

The Consultation paper refers to the Republic of Ireland's Personal Injuries Assessment Board (PIAB). The Committee are concerned at the proposal in the paper that the scheme in Ireland should be considered within the scope of the Review. PIAB was set up in Ireland in relation to a specific problem which was the increase in the cost of insurance resulting from high legal costs. No similar concerns have arisen in Scotland and it has been widely recognised through the United Kingdom and Ireland that Scottish personal injury costs are lower than elsewhere. No public bodies or consumer organisations in Scotland have called for the establishment of a Personal Injuries Board and it is clear that the imposition of such a structure on potential claimants would be a significant and draconian restriction of their access to justice. The PIAB does not provide for the recovery of legal costs in the claims process. Widespread dissatisfaction has been reported in the Irish press about the State's personal injury agency. The Irish Independent published an article on 31st October 2006 "Thousands Flee State's Personal Injury Agency".

<http://www.independent.ie/national-news/thousands-flee-states-personal-injury-agency-75957.html>

The article reported the relatively few number of cases being assessed by the PIAB, the fact that 90% of the claims were now being lodged by Solicitors and that there was wide spread unhappiness about the level of award being handed down by the Board. It is clear that any saving in legal costs has not been passed on by insurers to the consumer. A further report in the Irish Times on 7th August 2007 referred to soaring insurance profits and a representative of the Irish Law Society was quoted saying that many claimants were being "duped" into believing PIAB awards were adequate.

<http://www.ireland.com/newspaper/ireland/2007/0809/1186424956372.html>

The PIAB employs a staff of over 80; the costs of setting up such a scheme in Scotland would be considerable and there is both no publicly expressed desire for such a scheme or any empirical evidence that such a scheme would benefit the claimant either in low or high value cases.

The Committee believes that the current schemes for dealing with personal injury claims benefit Scottish consumers and there can be no suggestion that excessive costs provide an unfair burden on insurers. Elaine Samuels, in her paper *Managing Procedure Evaluation of the New Court of Session Rules (para 11.69)* quotes Defenders as accepting “*pre-litigation extra judicial fees were a pittance*” in Scotland compared to England and Wales.

<http://www.scotland.gov.uk/Publications/2007/03/30091751/0>

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?

The Committee is not in a position to comment, in detail, on this question, but the following points are worth making:-

There is clear evidence that the judicial expenses recovered by a successful party by way of party and party expenses are likely to amount to approximately 60% of the agent and client expenses which the solicitor for the successful party would be entitled to charge his/her client and less in commercial actions in the Court of Session.

Legal expenses whether party and party, or agent and client, are considerably higher in England than in Scotland.

A key issue may be whether it is more or less expensive to litigate in the Sheriff Court than it is in the Court of Session, but the Committee's view is that it is not necessarily cheaper to litigate in the Sheriff Court. Any comparison of costs as between the Court of Session and the Sheriff Court is extremely difficult because of the fact that costs in the Court of Session will include Counsels' fees, whereas the probability is that costs in the Sheriff Court will not, other than in high value or complex cases where sanction for the employment of Counsel has been granted.

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

The Committee is not ideally placed to comment on this question. However, again the following points are worth making:-

There is a basic cost involved in any litigation, whatever its value, to cover investigation needed to raise or defend the claim and the time involved on progressing through the relevant procedural steps required.

A pursuer may be deterred from litigating on the basis of various factors:-

- 1. The fact that legal aid is not available;**
- 2. The fact that whether liability can be established may be marginal,**
- 3. That the pursuer's solicitors are not prepared to take the case on a speculative, no-win no fee, basis and**
- 4. That advice will be given as to the anticipated shortfall in recoverable expenses which must be budgeted even if successful.**

In the case of the defender, it is very often the case that the party who is actually litigating is the defender's insurer and therefore the cost involved in the litigation assumes a very high degree of importance. For a number of insurers, the whole question of the economics of defending the case on the merits is more important than the point at issue in the case itself. Accordingly, from a defender's insurers point of view, the potential cost of defending the case may be more important than the prospect of achieving a successful outcome. The same considerations apply to any business involved in litigation. Economics and potential cost do not feature quite so prominently in the consideration of government bodies, local authorities and health authorities.

Whether looked at through the eyes of the pursuer or defender, what either party's funder, insurer or agent will require to engage in is a risk benefit analysis which assesses the likelihood of success on the one-hand and the likely cost of failure on the other. To that extent, the cost of litigation will always be a deterrent.

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

Generally, the Committee's view is that the current court fees do not significantly affect access to justice. However, to a large extent that is because the solicitors for the pursuer are "bankrolling" the court fees involved in the case until its conclusion at which point if they have been successful they recover them from the unsuccessful defender. While that may appear to be unsatisfactory the commercial reality in the current environment requires pursuers' solicitors to bear most of the cost of the court fees until the point is reached where they can recover

from the defender or insurer. Given that court fees are a part of the overall costs of litigation, increased court fees will affect, but not prevent, access to justice. As referred to in the introductory paragraph the state has an interest in bearing the costs of running a civil court system.

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

Judicial expenses are necessary to assist in achieving equality of arms and to balance the pursuer against the defenders who may have greater resources available to them. The existence of the power in the court rules for the court to award an additional fee in complex cases certainly assists in achieving such equality. Consideration should be given to an uplift on expenses being awarded in the event that a complex case settles at an early stage.

As has already been observed, the extent of recovery of judicial expenses amounts to approximately 60% of the agent and client cost of the case. The existing system is generally satisfactory, but successful parties resent paying a significant contribution to costs in a situation where the court has upheld their position.

The principle that expenses should follow success should certainly be retained. However, what the system should strive to do is to bridge the gap between the level of cost recovered on a party and party basis, and the actual cost of the case on a reasonable agent and client basis. Anecdotal evidence indicates that litigants are choosing to litigate in England, rather than in Scotland, where that option is open to them, as the proportion of costs which can be recovered in England is far greater. It should be noted that the Remuneration Committee of the Society have put detailed proposals to the Lord President's Advisory Committee to increase expenses in Court of Session commercial actions.

The current system of recoverability of judicial expenses is fairer than, and is to be preferred to, the situation which exists in the USA, for example, where successful parties are generally not entitled to recover the cost of litigation from the unsuccessful party. However, the aim must be to increase the extent to which cost is recoverable, always subject to the guiding principle being that whatever is to be recovered should be reasonable. The Remuneration committee have commissioned detailed research into base costs, taxed expenses and agent/client costs with a view to submitting a more detailed paper on this aspect. That will not be available until after 31st March but will be submitted as soon as possible thereafter.

Whatever system of recoverability of expenses is adopted, judicial costs need to be the subject of independent assessment by an Auditor of Court or the equivalent.

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

The Committee's view is that the drawback with the current system for the taxation of judicial accounts is that it is too dependent upon the personality of the particular auditor. There is the impression that the current system may not necessarily be entirely objective and does not always prove transparent. Having said that the Committee recognises that there may be no better method of dealing with this than by entrusting it to an individual auditor and making it subject to the ability of the unsuccessful party to proceed by way of Note of Objection.

There should be the possibility of an Appeal from the Sheriff Court to the Auditor of the Court of Session.

The Committee's principal view is that the post of auditor should be a senior salaried one, rather than being one where remuneration is based upon a percentage of taxed expenses awarded. Ultimately, there may be no material difference in terms of the eventual cost to the unsuccessful party, but the Committee's view is that to proceed on such a basis would give the appearance of greater objectivity and transparency.

The Committee's view is that it is very important that the post of auditor should be filled by a practitioner rather than being filled from the ranks of civil servants or academics. It is fundamentally important that the person responsible for arbitrating on the level of judicial expenses to be awarded should understand, and have an intimate knowledge of, the litigation process from within. Many current Sheriff Court Auditors have little or no training before or after their appointment which is an undesirable situation.

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

As has been already stated in Chapter 2 Answer 5 the Committee believes that there should be long term public funding for parties who cannot afford a solicitor.

Access to legal advice and assistance and, importantly, legal aid, is of fundamental importance to enabling access to justice. It has been recognised as such in Scotland since 1424 when those admitted to the "Poor's Roll" could obtain free legal assistance:

"and gif there bee onie pure creature, for faulte of cunning, or expenses, that cannot, nor may not follow his cause, the King for the love of GOD, sall ordain the judge to purwey and get a leill and a wise Advocate, to follow sik pure creatures causes"

In 1587, the Scots Parliament passed an Act that gave "quhatsumever lieges of this Realme accused of treason, or for quatsumever crime... full libertie to provide himselfe of Advocates and Praeloquutores, in competent numbers to defend his life, honour and land, against quhatsumever accusation".

Legal aid allows those who would not otherwise be able to afford legal representation access to the court system. In the absence of legal aid some individuals would be at a serious disadvantage before the courts.

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

Those claimants who have the most difficulty in obtaining funding for litigation are those whose cases are assessed as having merits which are uncertain, or whether there is no more than an even chance of success; or in cases where the subject matter is something other than money which makes it difficult for the claimant to be able to rely on a "no win, no fee" arrangement. The current regime discourages solicitors from taking on complex cases, other than in circumstances where there is considered to be a virtually guaranteed prospect of success. There is a particular problem with Medical Negligence, where lawyers require to carry out a significant amount of work before they can assess whether or not the Pursuer has a stateable case. If the pursuer is ineligible for Legal Aid there is little prospect of this work being undertaken on a no win no fee basis as the solicitor's firm would be responsible for the outlays incurred in obtaining the necessary expert reports.

It should be noted that "third parties" in administrative appeals often have important points of principle which they may be reluctant to raise in expensive Court of Session proceedings. This suggests scope for a reconsideration of the exclusive jurisdiction of the Supreme Court, as is discussed in Chapter 4, question 4 in order to improve access to justice for those with restricted resources, if they are not eligible for legal aid.

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

Speculative fee arrangements have principally been used in Personal Injury claims. The Committee's view is that the impact on access to justice of speculative fee arrangements has been a positive one, at least in relation to cases where the risk benefit analysis identifies that the prospects of success are sufficiently high. It is recognised that the increased use of speculative fee arrangements has resulted in a situation where fewer pursuer's firms are doing more cases and that might be judged to reduce the extent to which the public has a choice of solicitor to use. This is because it is inevitable that firms who operate on the basis of speculative fee arrangements are able to run a sufficient volume of cases in order to effectively ensure that levels of successful

cases will subsidise the economic risk of those cases that are unsuccessful. The upshot is that the Committee recognises that there are now probably a reduced number of firms operating in the pursuer's market. In addition, it is recognised that insurers underwriting "After The Event" insurance policies for claimants will only allow certain firms to act on behalf of the claimants where they are funding that action for personal injury.

All of this means that the choice for the pursuer is reduced, but it also means, in reality, that the quality of representation of pursuers in this jurisdiction is considerably improved. There are fewer firms acting for pursuers, but they are identified as experts in acting for pursuers in personal injury litigation. It should be recognised that this merely reflects the position which operates on the other side of the divide whereby defenders' insurers operate through their own panels of solicitors which equally restricts the market.

Whilst it may be argued that the pursuer's choice of solicitor is restricted by the current situation, on the other side of the argument this has resulted in a much better quality of representation for the pursuer, and a quicker means of access to justice. Because specialist pursuers' firms are operating on the basis of speculative fee arrangements, in general, the pursuer is not limited by the restrictions which the legal aid system imposes.

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?

The practical position is that there is very little in the way of "after the event" insurance available in Scotland, partly because the jurisdiction is not big enough and partly because in the current system success fees and premiums are not recoverable. Consequently, the market is not an attractive one from the potential insurers' point of view.

"Before the event" insurance as a stand alone product is not something that has proved popular with the public in Scotland and the reality is that insurance companies will not make it available at what the public perceives to be a reasonable cost.

Much may depend on the public legal education referred to in Chapter 2 Answer 1.

The best way forward would be to widen the scope for legal expenses cover available through motor or house insurance.

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

The Committee's view is that there should be no such recoverability introduced. The practical experience has been that in England this led to significant satellite litigation, which should be avoided in this jurisdiction.

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?

It appears clear from the statistics that the high volume of criminal business has an adverse effect on civil business. The Committee accepts that it is in the public interest that criminal cases take priority; however in the higher Courts certain judges should be excused from dealing with criminal business.

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

The Committee agrees that Commercial Judges in the Court of Session should be excused from hearing criminal business. In a small jurisdiction such as Scotland the relatively small number of Senators does not allow other judges in the higher Courts to be designated as civil judges. The same does not apply in the Sheriff Court, as there are a large number of full time and part time Sheriffs. There would be a real benefit to the administration of civil justice in a formal split between civil and criminal business in the Sheriff Court.

3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

The Sheriff courts should be split into civil and criminal divisions as this would lead to speedier resolution of cases and an improved consistency of decisions. Such a split would also reflect how solicitors and advocates actually practice in the 21st century by specialising in either criminal or civil work. While criminal business should continue to be prosecuted in the relevant local Sheriff Court there should be greater flexibility in civil business within each Sheriffdom which would facilitate the specialisation referred in Chapter 4 question 4. Although one possible disadvantage of a formal split between civil and criminal cases might be that a judicial career path might be less attractive without the full range of cases, the great majority of candidates will already have practised almost exclusively as either civil or criminal practitioners and will lack relevant experience of the other area of practice.

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?

There should be greater specialisation in the Sheriff courts which should focus on the Sheriffdom rather than individual Sheriff courts. Cases which would benefit include family Cases, commercial cases and personal injury cases. The Court of Session and city Sheriff courts in Edinburgh and Glasgow have already developed in this way with great success.

The review should give further consideration to a specialist court or group of judges for administrative, environmental, and potentially – planning matters [see below at Chapter 4].

There is also an argument for retention of the existing administrative review function of the Sheriff Court. It already deals with sundry local matters, notably licensing, but also with such matters as nuisance, environmental appeals, appeals against remediation notices under the Part IIA of the Environmental Protection Act 1990 as well as other related matters such as burial grounds; common good land; adoption of roads. Determination of these issues requires familiarity with a wide range of often technical matters, or with the workings of national and local policy, and with some very complex networks of law and regulations. Efficient dispute resolution in these areas would be helped by cases being directed to judges or sheriffs with real familiarity and expertise in these areas.

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?**

Factors favouring the Court of Session are

1. **Equality of Arms – Raising proceedings in the Court of Session enables litigants to have access to the specialist pleaders both in the Faculty of Advocates and among Solicitor Advocates.**
2. **The possibility of a Civil Jury in the Court of Session. The opportunity to present a damages case to a Civil Jury is an essential corner stone of Civil Justice in Scotland and the awards given by Civil Juries reflect the views of society leading for example to an increase in the level of awards made for loss of society following a death.**
3. **Case flow management. The “Coulsfield Rules” in personal injury cases give an earlier indication of the time scale of the case and mean very few appearances before the Court leading to savings both in judicial time and in expense to parties. Similar rules are to be introduced into the Sheriff Court Ordinary Procedure but their impact is untested and they will not (at this time) be implemented by specialist Sheriffs (see Chapter 4 Answer 4).**

4. **Predictability of outcome.** With a small pool of Senators all of whom have substantial experience of civil litigation there is far less risk of an unpredictable decision than in the Sheriff Court with over 200 Sheriffs (including part time Sheriffs) from a wide variety of legal backgrounds. Legal advisors are able to give firmer advice on the prospects of success or otherwise in a case where the outcome can be reasonably predicted in advance.
5. **Centre of Excellence.** The Court of Session is the centre of excellence in the Scottish Judicial system for the reasons stated above and in a small jurisdiction like Scotland there is little scope for more than one such centre.

Factors favouring the Sheriff Court are

1. **Accessibility.** As part of the Law Society's obligation to consider the interests of the public the Committee consider that this might be best achieved if in the majority of cases litigants travelled to a local civil centre. This would not prevent a Sheriff choosing to sit in another Sheriff Court if this was appropriate for the case.
2. **Cost.** There is a potential for a pursuer to obtain the outcome being sought at a lower cost. In most civil cases brought in Scotland the law is straightforward and pursuers are seeking access to the diligence system to recover money due to them. In family cases where expenses are almost always not recoverable from the other party the cost of a Sheriff Court case will be substantially lower. In some personal injury cases where liability is admitted and the calculation of quantum is straight forward there is likely to be a cost saving in raising in the Sheriff Court. In contrast if the case is complex there will be merit in raising in the Court of Session where the greater cost could be justified by achieving access to potentially greater legal ability and greater experience.
3. **Local Knowledge.** The local knowledge of the Sheriff may be relevant in certain cases, but cannot be guaranteed as there is a strong possibility of the case being dealt with by a part time or floating Sheriff from a different part of the country.
6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

Judicial Review should remain in the Court of Session if against the State or its agencies.

However there is a case for increased jurisdiction in the Sheriff Court for judicial review of land use planning decisions of local authorities.

The Town and Country planning system in Scotland is currently being reformed in accordance with the White Paper "Modernising Planning"

and the Planning etc (Scotland) Act 2006. These entail major structural change to the existing system designed to achieve on the one hand much greater efficiency, and on the other much improved community and citizen engagement and involvement. It should be noted that these objectives accord exactly with the objectives of this review. The reforms will entail enhanced local decision making powers of a number of day to day planning decisions. An assessment should be made as to whether and to what extent the aims of both reviews would be met by enhancing the supervision administrative review jurisdiction of the Sheriff Court for some local matters, including enforcement.

Petition for Approval of a Cy Pres arrangement should remain in the Court of Session.

Actions of Proving the Tenor and Reduction do not need to be dealt with by the Court of Session and ought to be competent in the Sheriff Court.

Ejection should not be within the exclusive jurisdiction of the Sheriff Court, although the bulk of cases will continue to be dealt with in the lower court or Tribunal (see Chapter 2 question 6)

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

There would be no benefit in a single unified court. The separate Sheriffdoms should remain a significant part of the Scottish Justice System. They allow a degree of flexibility to deal with particular local circumstances which can vary greatly in different parts of the country.

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?

It is essential that the Courts of Session should be retained as a court of first instance for a number of reasons;-

1. **Scotland is a small country and the Court of Session is the centre of excellence which can be accessed by the whole population.**
2. **There is insufficient relevant experience in the Sheriff Court to deal with the whole spectrum of cases at first instance.**
3. **There would be a significant increase in the number of cases appealed taking up valuable judicial resources at an unacceptable cost to the public.**
4. **Having the Court of Session as a court of first instance allows the law to develop organically. Court of Session decisions are well reasoned and are regarded as authoritative throughout the United Kingdom.**

5. **The small number of Senators gives an important degree of predictability to judgments in the Outer House of the Court of Session which is not reflected in the Sheriff Court where there are more than two hundred Sheriffs, a significant proportion of whom are part-time.**
6. **The Inner House has the resources to deal with the low volume of appeals from Outer House judges. In contrast there are insufficient Sheriffs Principal to deal with the high number of appeals which would be made.**
7. **If the Court of Session became simply an appeal court in civil cases it would no longer be a viable Court .The career path would become very unattractive to prospective judges if they would be excluded from civil cases for a period of years.**
8. **Progression for a Senator from the Outer House to the Inner House would be problematic if they have only dealt with criminal cases since their initial appointment. They could lose touch with the development of the Civil law with the possibility of more appeals to the House of Lords (or Supreme Court as it will become) at great expense to parties many of whom will be public bodies or publicly funded.**
9. **If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?**

The current limit of £5,000 is the appropriate limit for the privative jurisdiction of the Sheriff Court and should remain so.

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

There should be a right to seek leave of the Court of Session for a remit to that court if a motion for remit is refused by the sheriff. It can be difficult to persuade a Sheriff to remit a case as that might imply a lack of trust in the Sheriff's ability to decide the case. The application to the Court of Session should be by way of a Minute seeking leave.

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?**

As mentioned in the answers to Chapter 2 landlord and tenant cases including heritage should be referred to a stand alone Tribunal rather than a third tier of the existing court structure.

Small Claims should be dealt with in a separate Small Claims Court where a decision will be taken by a legally qualified individual who is not a Sheriff with a right of appeal to a Sheriff. The Small Claims Court

should sit in a convenient location for the parties which need not be in a traditional court building.

For Small Claims there may be benefits in looking to England where there are detailed protocols with procedural directions to give guidance to party litigants and solicitors and which limit scope for straying outwith the rules of evidence and procedure.

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

See the Answer to the previous question.

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

The benefits considerably outweigh any difficulties particularly as regards Sherifffdoms. The principal advantages are; local knowledge; accessibility of Sherifffdoms; access to local Sheriff Courts; flexibility within Sherifffdoms to introduce specialist courts for specific types of case.

A difficulty may occur where individual Sheriffs Principal take different views on procedures in their Sherifffdoms which can cause some confusion. Also there can be unnecessary duplication of administrative work when all cases are dealt with at individual Sheriff Court level. See the Chapter 4 Answer 17.

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

The current arrangements are not satisfactory.

There should only be one point of entry for all cases to be raised in the Sheriff Court where decree may be granted without a proof. In the event that a case is defended it can be allocated to the relevant Sherifffdom by the centralised “gatekeeper”. For undefended cases the interlocutor granting decree can be prepared in the centralised Sheriff Court administration office which would issue an extract automatically unless a Reponing Note (which should be re-named so as to be more easily understood) has been lodged.

In the event that the action is defended the centralised “gate- keeper” will allocate the writ to an appropriate procedure e.g. Ordinary Cause, Summary Cause or Small Claim. The gate keeper will forward the case to a Sherifffdom for allocation to a Sheriff Court which is likely to be the court within the Sherifffdom which deals with the particular type of Civil business. See also Chapter 6 Answer 6.

Actions raised in the Court of Session should continue to be dealt with separately in the Court of Session whether defended or undefended.

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

The Committee is not aware that the current arrangements are unsatisfactory.

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?

Commissary business could be dealt with by a separate administrative process providing that any dispute could be resolved judicially.

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?

Apart from the administrative centre set out in Answer 14 there is no case for a national Sheriff court as defended Civil cases should continue to be dealt with by a court dealing with Civil business within a Sheriffdom.

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

There is no case for all Sheriffs to have an all Scotland jurisdiction although Sheriffs should have jurisdiction to hear cases in any court within their Sheriffdom.

As envisaged in the Judiciary and Courts (Scotland) Bill the Sheriff Principal should determine the allocation of resources within each Sheriffdom subject to the overview of the Management Board to be chaired by the Lord President.

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?

The initial decision, whether to raise in the Court of Session or the Sheriff Court, must continue to be taken by the Pursuer in terms of the criteria already identified. Thereafter the defender should be entitled to enroll/lodge a motion to remit from one court level to the other on the grounds that the case is more complex than originally anticipated or does not merit the attention of the Court of Session as the case may be.

If a Pursuer can demonstrate a material change of circumstances a similar motion should be available to them.

A motion to remit from the Court of Session to the Sheriff Court on the grounds that a case is more straight forward should require to be made in the Court of Session and appealable to the Inner House only with leave of the Outer House judge. The Sheriff should not have power to hear an application for remit from the Court of Session to the Sheriff Court.

20. Are the existing appeal arrangements satisfactory?

It should only be possible to appeal from a Sheriff directly to the Court of Session with leave of the Inner House. All other appeals from the Sheriff should be to the Sheriff Principal and only from there to the Court of Session on a point of law.

In relation to a reclaiming motion requiring leave to reclaim there should be a right to seek leave from the Inner House if the Outer House judge refuses leave to reclaim, apart from a remit to the Sheriff Court as described in Chapter 4 Answer 19 above.

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?

The office of Sheriff Principal is a cornerstone of civil justice in Scotland and should be retained. The office should be both judicial and administrative. The Sheriffdom should be the focal point of that tier of civil justice. Sheriff court business should be dealt with according to the facilities in each Sheriffdom not the individual Sheriff Court. The Sheriff Principal will have an enhanced role in the system of civil justice.

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

There should be a full review by the Scottish Government of all statutory rights of appeal. This should consider whether cases should be dealt with in the Sheriff Court or the Court of Session with a view to most appeals going to the sheriff court in the first instance. If a statutory appeal is to be made to the Court of Session it should be dealt with in the Outer House except on cause shown. For example appeals under sections 16; 19; 24D; 24G; 39A; and 40 of the Solicitors (Scotland) Act 1980 should go to the Outer House not the Inner House.

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?

The current system allows for appeals to Sheriff Principal, Inner House and House of Lords. The present three levels are satisfactory.

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

This question should be looked at as part of a broader review. The Committee is not aware of particular concerns with temporary judges in the Court of Session. Such appointments will be made through the Judicial Appointments Board when the Judiciary and Courts (Scotland) Bill is enacted. It is clear that temporary judges and part-time Sheriffs are now an established part of the fabric of the administration of Justice. They should have an acknowledged role and not be regarded as simply providing cover for illness, holidays etc. They allow a necessary flexibility in the administrative arrangements of the courts.

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?
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?
3. If so, how should this be done and at what point or points in the progress of a dispute?
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.
5. What form should mediation or other methods of dispute resolution take and how should this be funded?

The first five questions in this chapter are interdependent and so must be their answers.

The difficulty with an overriding objective or statement of philosophy is that it could become effectively constitutional and used as an element of substantive law. Such a statement would have limited usefulness and potentially would carry dangers in that it may restrict the flexibility of the Court process for the parties. Such a statement, if it were limited to a requirement that the Court should facilitate mediation or other forms of alternative dispute resolution could help to address issues of public funding of such procedures and, if properly used, could be used to counter the potentially damaging effects of a too-strict interpretation of other procedural rules.

It is essential to bear in mind that mediation and other forms of dispute resolution should be voluntary. The experience of the English family courts has made it plain that any compulsory mediation tends to be counterproductive rather than beneficial. If the Court were to facilitate mediation then that facilitation may have to be financial as well as procedural. That facilitation be at the invitation of the Court but with the consent of the parties and should be a matter of constant review throughout the course of the case.

There are disputes in which the use of mediation or other methods of alternative dispute resolution are not appropriate. The most obvious example is any action involving status such as divorce or nullity. It is not possible to resolve the issue without Court intervention and a judicial determination is always eventually required. However even within the range of cases which could potentially be resolved without judicial determination, it is important that the parties should be able to seek determination by the Court in order to give justice to the party whose opponent is not prepared to mediate reasonably. It is likely too that mediation will proceed much more successfully if the parties are aware of the readily available alternative mediation in the form of judicial determination.

The form of mediation must be almost infinitely variable because of the wide variety of disputes which can come before the Court. There is no "one size fits all" solution to dispute resolution and the mediation template which is suitable to a child contact case may well be unsuitable to a case involving the sharing of a pension interest. Similarly, a case which has begun with an emergency interdict to prevent the commencement of building works is unlikely to be suitable for the form of ADR which will work best in a multi-party commercial law dispute.

There is also scope for mediation in situations governed by administrative law, such as planning, enforcement (e.g. planning interdicts, miscellaneous abatement notices.) Delegation to the appropriate offices of statutory function could allow the voluntary principle of mediation to operate.

There are standard forms of mediation in place already but these are and must remain flexible. Certainly, the Court should have no interest in the forms of dispute resolution in cases before them provided always that the relevant timetables are reasonable and can be kept under review.

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

I.T. is acknowledged by the EU Commission as a powerful weapon in its march towards ready access to justice throughout the Union and in consequence there are dozens of studies and pilot schemes which can

help Scotland find the e-solution best suited for our system. If sufficient resources can be deployed there are a number of areas where the use of the latest communications technology and computerised systems can dramatically improve access both by practitioners and the public. The simplest example is the basic telephone conference used in Glasgow Sheriff Commercial Court, whilst at the other end of the spectrum is the total paperless “e-filing” solution of the New York State Bankruptcy Court. <http://www.nysb.uscourts.gov>

There are a number of commercial e-filing products available and Scottish Courts Administration have participated with the Society in presentations of such e-solutions in the past. E-filing could also facilitate the creation of central unified document handling such as a payment action processing unit which only allocates cases to individual courts if the claim is disputed. The English Courts operate MoneyClaimOnline and a sophisticated computerised system has been working in Austria for a number of years.

The public can be assisted by computerised access to “smart systems”, available online but perhaps also from terminals in the foyer of the court which can be interrogated like “twenty questions” to direct and inform the user. This is used in some US Courts to help enquirers seeking advice on land registry or probate to help them obtain the correct forms or find the appropriate office of the court.

Rural communities could benefit from access to Sheriffs and Judges via video links set up either in local courts or other public locations. This may be one way in which certain specialised aspects of the justice system could be centralised in larger regional courts without parties and agents traveling long distances for every hearing or application.

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

The Court has a duty to properly manage the time and resources available within the Justice system. This is made clear by the recently published Judiciary and Courts (Scotland) Bill. The public must however not be left with the impression that the court does not care about their individual predicament and for this reason the Committee favours control of pace and conduct through the creation of pre-action protocols and timetable based procedures, applicable to all actions of the same class. All current time table based procedures provide a judicial “over ride” to protect the interests of justice so that, ultimately through the proper exercise of discretion the courts will control conduct and pace.

Direct or bespoke case management by Judges and Sheriffs may only be viable (or indeed desirable) in specialised areas where the parties have elected to use the procedure such as the Commercial Court.

Pre-action protocols can not only direct parties to alternative forms of dispute resolution: arbitration schemes, mediation; industry ombudsmen but may also assist litigants to be better prepared before court action is fully engaged. In England there are a number of disputes including personal injury; disease or illness; professional negligence; defamation; housing disrepair or construction and engineering, where court rules tell potential litigants about what practical steps e.g. obtaining experts reports, that they should take before you issue proceedings. www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm

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

See Chapter 5 answer 7 above. In general, case flow management (with judicial “over ride”) suits most types of case. Judicial case management, in the sense that the judge dictates the timetable etc, should be restricted to specialised areas where either the parties have elected for it (and perhaps are prepared to pay a premium by way of court charges to fund it) or where the dispute between the parties may not be the primary concern of the court e.g. in child welfare matters.

Chapter 6 – Working Methods of the Civil Courts

1. What are the advantages and disadvantages of pre-action protocols?

The obvious advantage of pre-action protocols is that they compel litigants and their advisors to at least consider alternative forms of dispute resolution: negotiation; arbitration; mediation or ombudsmen schemes etc. In addition some types of protocol can act as a check list or guide to sources of evidence and the like to help the litigant be better prepared before seeking to engage with the justice system. This can save the court time as well as improving the litigants’ experience of accessing the system. This is also touched on in the Answers to Chapter 5 .6 – 5.8. There are a series of such protocols in England which seem to work. They can be accessed on-line using the link in the previous Answer.

Disadvantages may be increased cost if the litigant is encouraged to spend more on preparation of what transpires to be an undefended cause or if defenders can use a protocol to protract a dispute with a view to wearing down the opponent without the honest intention of negotiating a fair settlement.

2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?

Yes. Any type of action where scope for a negotiated financial settlement exists and/or where evidential requirements are reasonably predictable including personal injury; disease or illness; professional

negligence; defamation; housing disrepair or construction and engineering contracts. They are also a useful mechanism to focus on administrative law dispute between the parties.

3. Should compliance with pre-action protocols be voluntary or compulsory?

Protocols may be both voluntary and compulsory. Protocols requiring disclosure and negotiation etc should be voluntary. Parties must be encouraged to be open and engage fully with such a protocol but to compel this may well be counterproductive. There may still, however, be a case for some residual power of the court to exercise a sanction by way of costs for unreasonable refusal to comply with a voluntary protocol. Protocols of an “evidence assembly” nature could be made compulsory provided the burden on the litigant was fair and proportionate.

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?

No. Access to the courts is a fundamental right and the cornerstone of any democracy. The existing rules limiting first instance access through conventional or statutory time limits, restraining vexatious litigants and controlling certain appeals are still fit for purpose.

5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.

The existing Rules Councils are a unique resource. They combine and draw on the experience and skills of all civil justice professionals: Judges; Sheriffs Principal and Sheriffs; Solicitors and the Faculty of Advocates; civil servants and other members including the Legal Officer to the Scottish Consumer Council. This experience and knowledge is essential to the production of rules which are intellectually sound, efficient and practical. The division into two councils reflects the existence of not only two principal court systems but also a certain cultural divide between those Courts. The Court of Session is based in one location and has a well established collegiate structure through the College of Justice itself (Senators, Faculty, WS and SSC). The WS and SSC maintain their administration and Libraries within the precincts of the Court. This facilitates discussion and consultation (and the swift promulgation of Practice Notes) when procedural problems emerge. This cannot be said of the Sheriff Courts which are divided by the physical length and breadth of the country. The needs of each council are different. A unified Council (as opposed to a unified support structure via a common secretariat which is now being achieved) is impracticable and a poor use of resources. However the existing resources available to the Rules Councils should be increased. In particular the Sheriff Court rules Council is seriously under resourced. A

unified council would have to have specialised sub-committees and working parties which would be little different to the present arrangement. More might perhaps be achieved by cross council working parties on specialised subjects such as IT, which will impact on both court systems.

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

No, for the reasons given above in answer 5, it is difficult to envisage the present structure functioning under a common set of rules. There is, however, a strong argument for harmonisation between the two sets of rules to ensure reasonable consistency. An example is the proposed introduction of new Ordinary Cause Personal Injury Rules which will mirror the Court of Session “Coulsfield” rules with only a few alterations to reflect the different conditions within the Sheriff Court structure e.g. to the timetable.

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?

There are strong arguments in favour of a single initiating document if any form of IT or “e-filing” solution is contemplated. Reference is made to Chapter 4 Answer 14. E-filing is dependent upon the creation of an on-line form filling process with standard fields etc. The same arguments, with less force, can be applied to a paper based system but probably restricted to those areas where the vast majority of cases are undefended. e.g. payment actions. There may be little practical advantage in trying to shoehorn a complex commercial cause or certain actions of status (divorce etc) into a single standard format when the variants on such causes are legion. There is no logical reason for limiting a standard initiating process to a particular court. The advantages and disadvantages relate to the type of case and not the forum.

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

The present system seems satisfactory. Fair notice and disclosure through pleadings has deep roots in our system. Disclosure through documents and witness statements etc has its critics and there is no reason to prefer that system to ours save in those areas already identified as appropriate. Abbreviated pleadings exist in the Summary Cause and Small Claim with an upper limit recently increased to all cases up to £5000.00. Personal Injury actions also have a system of abbreviated pleadings. All other procedures benefit from the rigour of pleadings. A greater reliance on case flow management by timetables is a more appropriate response to any perceived delays etc caused by undue or overly surgical criticism of opponents pleadings

9. Are the current arrangements for summary disposal satisfactory?

Yes. There is always room, however, for innovation e.g. early neutral evaluation. In the Netherlands civil disputes can be referred for the preliminary opinion of a single judge in a summary fashion (called “referre”) The parties can accept the opinion (and thereby resolve the dispute) or they can continue to full procedure. The referre judge is then recused from the action.

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?

There is no inherent reason why routine procedural matters need be dealt with by presiding judges or sheriffs at all. More effective use of modern communication systems and case flow management can reduce judicial time spend on such matters. Procedural matters are, however, important and careful consideration must be given to divorcing the judiciary (at whatever level) from direct involvement simply because something is said to be routine and procedural. This is particularly so in the Court of Session. In the event, however, that for other reasons (say the introduction of specialised landlord and tenant dispute procedures or a consumer rights court etc) it was deemed appropriate to introduce a second tier of judiciary in the Sheriff Court then it might be a reasonable deployment of resources to utilise those individuals for other procedural work within the mainstream sheriff court process

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

In the main, yes but greater use of use of modern communication systems and case flow management could improve the way in which the present system works. Equally e-filing and “smart systems” can remove the need for hands on involvement in many procedural matters. In one system presented to a joint session of the Society and SCA, if an online filed motion was accepted by the system as conform to its system protocols, draft orders were generated directly by the computer and “delivered” to the clerk who forwarded these to the judges terminal. The judge had online access to the case history and could simply accept the draft order, at the touch of a button, which was then “issued” to the parties or reject and call for more information etc; again all online.

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?

The court has a legitimate interest in the allocation of its resources to ensure appropriate and proportionate dispute resolution. The parties are, however, entitled to state their case and any perception that they were individually “against the clock” might diminish respect for the

courts impartiality. General rules restricting time, in the first instance, applicable to all cases are more likely to command public approval rather than the judge deciding on a case by case basis. In any event a greater reliance on written submissions of legal arguments, more rigorous requirements to agree matters by Joint Minute of Admissions and a facilitative approach to Affidavit evidence may reduce time demands

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

There is a case to be made for requiring legal arguments or submissions to be in writing (akin to the US “brief”) with oral argument restricted to articulation of the most salient points or rebuttal of counter arguments. This merely reflects and develops a growing practice within the profession for written submissions at the conclusion of debates etc. There is no evidence that, aside from a liberal interpretation of the existing rules on affidavits, a greater use of written witness statements is called for or desirable.

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

The present system seems satisfactory with early or wider disclosure restricted to special rules such as personal injury. There is a significant cost factor in the “front loading” of preparation and such a burden must be laid on the litigant in a fair and proportionate manner. This is achieved by the present system.

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

In general, the court should not control the use of expert and other evidence. There is an argument, based on expediency and proportionality, that in low value cases there is a case for court appointed single experts etc but in an adversarial system the parties must remain in control of their own evidential needs. Any other stance nudges into a grey overlap between the judge as arbiter and the judge as inquisitor. The latter requires an overt policy shift in our entire court system, enshrined in appropriate legislation, for which little appetite or public demand has ever been demonstrated

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

Yes. There would require to be a satisfactory way of dealing with the consequences of a refusal to accept the offer. The benefit of failing “to beat the Tender”, such as recoverability of a success fee, should be payable to the Pursuer directly rather than the Pursuer’s agents.

17. Should civil jury trials be retained?

Yes. Reference is made to Chapter 4 Answer 5,

18. Should written judgments be required in all cases?

No, only in cases where reasons must be given for the decision reached.

19. Should the courts have greater powers to impose sanctions for noncompliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?

Yes. The present situation exemplified by the recent Opinion of the Inner House in *Billig v Law Society of Scotland* is not satisfactory. Reliance on judicial activism based on “inherent” powers of the court is too uncertain. Specific rules or regulations should be promulgated on sanctions for such failures or other unacceptable conduct issues with express penalties and enforcement procedures. In this way all stakeholders will know where they stand and the system will be properly transparent. There must, however, be reciprocity: an official procedure for making claims against the Courts Administration for costs incurred by administrative negligence should also be promulgated. The current *ex gratia* procedure lacks transparency and rigour.

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

The Committee believes that reform is desirable but this is a constitutional and human rights issue of access to justice and it reserves its opinion unless specific proposals are advanced by the Government.

In all actions, irrespective of whether or not the parties are represented by a lawyer, a procedure should be available to the Defenders to seek Summary Dismissal similar to Summary Decree.

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

This is again a constitutional and human rights issue of access to justice and the Committee reserves its opinion unless specific proposals are advanced by the Government.

22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

The existence of rights of audience does not seek to unduly restrict persons who may speak for and represent parties but rather to ensure proper standards of ethics, integrity and ability. The court has the right to rely upon and indeed, demand such standards. The existing rules

which permit limited access for lay representatives and the current legislation allowing access to organisations to obtain rights of audience for their members strikes the correct balance.

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

No. This is a major constitutional issue beyond the scope of a review of this nature. The class action has been the subject of almost constant controversy in the USA where it is lionised in some quarters and demonised in others. It has been hailed as the champion of the individual against big business in an increasingly unaffordable court system but condemned as legalised blackmail benefiting few but the lawyers operating the class. There would be significant consequences both for Scottish commerce and the court system should class actions be contemplated. This should be the subject of separate consultation by the Government against a fully researched and costed set of policy proposals and may emerge from the current EU consultation on Collective Redress which sought responses by 3rd March 2008.

<http://international.lawsociety.org.uk/node/1966>.

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

Yes, but the Committee would support the introduction of stricter time limits to bring review and a preliminary sift system to improve the efficiency of the current system.