

**Law Society of Scotland – Civil Procedure Committee**

**Comments on draft Responses to Questions in the Civil Courts Review**

**Questions for Discussion – Chapter 1**

---

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?**

It should of course be borne in mind that the question is not purely about professional negligence and personal injury.

The views of certain solicitors acting for pursuers are noted. These views do not necessarily accord with the views of the insurance industry. The general feeling is that protocols are working reasonably well.

Solicitors acting for insurers do not of course tend to become involved unless and until litigation ensues. There has been a recent trend towards insurers involving their solicitors at pre litigation stage and there is some possibility that this trend will continue.

Perhaps the wording of the protocols should be re-visited to encourage greater mutual disclosure of evidence.

There is certainly some evidence of pre litigation settlements of large cases where insurers involve their solicitors during the negotiation process.

I think that the key feature for early resolution of PI claims is a compulsory Pre Action Protocol.

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?**

It is important to keep in mind the terms of the Government's remit to the Review (see paragraph 1.2 of the Consultation Paper).

I think it is important to emphasise the key issues of proportionality, value for money, and access to justice.

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

It seems to me that the biggest single issue is one of access to justice. This whole issue needs to be looked at very seriously. What is the point of having a Rolls Royce court structure with fair and efficient procedures for the speedy disposal of cases if only a very small number of the people of Scotland can effectively gain access to it. On the one hand those who qualify for legal aid can access the court system and at the other end there is a small category of people who can afford to litigate. For most people who do not have the benefit of indemnity insurance or some other form of

legal expenses insurance they would not consider taking the risk of litigating in a civil case on grounds of cost.

I think very serious consideration should be given to the introduction of compulsory legal expenses insurance. This would provide parties with equality of arms.

I believe that research should be carried out to assess the feasibility of such a system. If society truly values access to justice for all then society has to be prepared to pay what is necessary in order to facilitate a fair and practical system.

## Questions for Discussion – Chapter 2

---

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

I think the need is to explain basic concepts such as the rule of law and separation of powers to all members of the public. The best way of educating people is during their formative years, ie primary and secondary education.

**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?**

I agree with the draft response here.

I would also highlight the need for equality of arms and the suggestion of achieving this via compulsory insurance.

In the second paragraph (second last line between “two” and “legal”) I would suggest the insertion of “independent”.

**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?**

I think it is desirable, and indeed feasible, to design such procedures for small claims, and in particular cases relating to social housing and consumer law.

**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?**

In addition to the draft response I think it is worth re-emphasising that the main areas for court based advice services ought to be within the small claims threshold.

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

At the risk of repeating myself I would like to re-emphasise the need for access to justice for all the people of Scotland. I would again refer to the need for some innovation here via the introduction of compulsory legal expenses cover. Those who

would qualify for legal aid would be exempt. The main requirements would be full time employment.

**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?**

I think the response to this question has to deal with the issue of proportionality. Part of the remit to the Review is to make recommendations for ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues involved. It is undoubtedly the case that high volume, low value personal injury cases in the sheriff court generate disproportionate high costs. Surely a better way of handling such cases must exist. The general feedback which I have from insurers is that the voluntary protocol for personal injury cases is working reasonably well. This clearly conflicts with the experiences highlighted in this month's Journal article.

As previously touched on I think there is a strong case for the introduction of a specialist "third tier" court whether within the sheriff court system or via a separate tribunal for dealing with the plethora of disputes which arise in social housing and consumer law.

In relation to the suggested system for centralising high volume uncontested sheriff court actions I think that what is being considered here is a centralised warranting arrangement. Anomalies could arise here. If the centralised warranting office is based in say Falkirk would the initial writ to be issued in the name of the court having jurisdiction, eg Glasgow? The centralised warranting office would presumably require to issue the extract decree in the name of the sheriff court/sheriffdom in which the action purports to be raised.

Questions for Discussion – Chapter 3

---

**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?**

I would have thought that in personal injury cases at least two thirds of agent and client expenses are recovered by way of party/party awards. Perhaps this proportion is less in commercial actions.

I think we need to be careful about commenting on expenses in England in personal injury cases. As we are all aware the whole CFA regime which applies in that system is entirely different to our system in Scotland.

I do not agree with the view expressed that it is not necessarily cheaper to litigate in the sheriff court. I would welcome some examples here. In my experience expense in the Court of Session is significantly greater than in the sheriff court, mainly due to the involvement of Counsel. In the field of personal injury claims I can think of very few pre trial meetings at which Counsel has not attended.

I think this whole question deals with the fundamental issue of proportionality. There is no doubt that in relatively low value personal injury cases in the sheriff court raised under ordinary procedure high legal expense is generated relative to the value of the case.

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

It seems to me that this goes to the heart of the issue of meaningful access to justice. Equality of arms is necessary. Again I feel the need to highlight innovation via compulsory legal expenses insurers.

I would suggest that the cost of litigating, and the risk of being found liable to the opponent in expenses, is a massive deterrent for the majority of the people of Scotland from pursuing/defending their rights in the courts.

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

I would be inclined to agree that the current system of levying court fees *per se* is not a deterrent to a would be litigant. However, when added to the cost of solicitors' fees and those of Counsel where appropriate, and indeed experts, they become part of the overall expense which undoubtedly deters would be litigants who do not have access to legal aid, legal expenses insurance or other sources of funding.

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

Overall I think the system for recovery of judicial expenses in Scotland via the transparent tables of fees in Court of Session and sheriff court cases is fair.

In relation to the comments in higher recovery of costs in England and Wales I think we need to bear in mind the very different system which applies in that jurisdiction in personal injury cases via the CFA arrangements.

It should also be borne in mind that the court retains an overall discretion *quoad* expenses and it is still open to the court to make an award of solicitor/client expenses against the opponent on a third party paying basis.

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

The only other additional comment I would make here is the arrangement whereby an auditor (and in particular the Auditor of the Court of Session) has a stake or vested interest in the outcome of the taxation to the extent that the audit fee payable to him is a percentage of the taxed fee. In other words the higher the taxed fee the higher the auditor's fee. There is therefore a perceived conflict of interest. It can be argued that in that situation an auditor is not transparently independent.

Perhaps consideration should be given to introducing a tender procedure in taxations.

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

Clearly there is an equality of arms point. If an assisted person raises the action the reality is that he is unlikely to have an actual award of expenses made against him given the court's discretion to modify these to nil. In that situation an assisted person has an advantage over the non-assisted litigant.

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

I generally agree with the comments made. I would however make the point that this question again raises the fundamental issue of access to justice and the need for equality of arms through compulsory legal expenses insurance. Perhaps Scotland could be seen to be taking the lead here. The feasibility of introducing compulsory legal expenses cover is, it is submitted, at least worth meaningful research.

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

In the absence of legal aid or other sources of funding speculative fee agreements have partially transferred the risk of litigating to the firm of solicitors taking on the case on a "spec" basis. To that extent it can be said that clients who have entered into such an agreement have greater access to justice. The other side of the coin is of course that a client is still exposed to the risk of losing his case with a finding of expenses against him unless he can obtain after the event insurance and pay the premium therefor. Such premiums can be very expensive and frequently disproportionate to the value of the case.

The problem with speculative fee agreements is that on any view such agreements cut across the notion that a solicitor should not have a vested interest in the subject matter of the cause. To that extent speculative fee agreements dilute the independence of the solicitor's role.

Compulsory legal expenses insurance would, it is submitted, remove the need for speculative fee charging arrangements. Consequently solicitors would have no vested interest in the outcome of the case.

**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?**

Undoubtedly. Greater awareness of the wide availability of such cover is required. The difficulty with voluntary legal expenses cover which is provided as an "add on" to a buildings policy for example, is that there are a variety of terms and conditions depending on the insurer. There are many and varied exceptions to the cover.

Compulsory insurance cover ought to have some basic criteria and exceptions. There is a need for thorough research on the feasibility of the introduction of compulsory legal expenses cover and the standard restrictions which ought to be placed upon such cover so as to strike a balance between providing reasonable access to justice for pursuing/defending of fundamental rights and the creation of unnecessary litigation. For example, it might be considered that financial settlements

in divorce/separation cases should be excluded from cover where assets exist out of which legal expense can be paid. It may be that compulsory legal expenses insurance would only be required for those in full time employment. Those who would qualify for legal aid without a contribution could be exempt from paying. There would also be some discretion on the part of the insurer in deciding whether to allow cover under the policy. A *probabilis causa* test would inevitably be required.

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

I entirely endorse the Law Society’s view on this.

I would simply make the point that when comparing and contrasting the position in England we need to bear in mind that the whole CFA regime in that jurisdiction is entirely different from the situation in Scotland. Legal aid was pretty well abolished for personal injury cases in the late 1990’s (other than in cases of medical negligence).

Questions for Discussion – Chapter 4

---

**1. Do you agree that the conduct of civil business of the courts is adversely affected by the pressure of criminal business?**

I would simply make the point that this is one of the major issues in the whole review process. As Lord Gill emphasises in his foreword to the Consultation Paper it is clear that the ever increasing flood of criminal business is taking up more and more of the overall resources of both the criminal and civil courts in Scotland.

There is consistent anecdotal evidence that the conduct of civil cases is adversely affected by the pressure of criminal business. There is no doubt that the legitimate need for giving priority to criminal business causes a tremendous amount of delay, disruption and inconvenience to lawyers, parties and witnesses, particularly expert witnesses. The problem is compounded in remote courts when civil business cannot even begin to get under way on account of prior criminal business. All of this leads to a tremendous amount of wastefulness.

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

I entirely agree with the general response here.

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

Again I agree with the thrust of the response here.

**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?**

I entirely agree with the view that we require much greater specialisation within the sheriff courts. I think the case for specialisation in these courts is overwhelming. As practitioners have had to specialise so should sheriffs.

It seems to me that the main broad areas of specialisation ought to be in the fields of reparation (particularly personal injury), commercial (including contractual disputes and personal/corporate insolvency, intellectual property and competition law), and family law.

It seems to me that the Court of Session should focus on appeals and that its first instance jurisdiction should cover major public law issues (eg devolution, major judicial reviews, planning appeals etc.) and private law cases involving large sums of money, eg catastrophic personal injury cases.

A fundamental issue for the Review is to reach a conclusion as to the level at which the privative jurisdiction of the sheriff court ought to be raised. My personal view is that this level needs to be increased dramatically to allow specialist sheriff courts to dispose of most cases fairly and cost effectively. Value for money is of course one of the core elements of the remit to the Review.

In my view it is entirely inappropriate for Senators to the College of Justice to spend time on low value personal injury cases. I appreciate that by far the majority of PI cases in the Court of Session dealt with under Chapter 43 procedure settle. Judges' time is still taken up with those cases that proceed to Proof and also with incidental motions. Furthermore, a massive amount of administrative time of the Supreme Court is taken up with such cases.

There should be power to remit cases from the sheriff court to the Court of Session and vice versa.

It seems to me that there is perhaps a lesser need for senators to specialise in civil cases in the event of a significant reduction in first instance cases, particularly those involving personal injury and personal insolvency.

**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?**

I have some difficulty with the first point made in the response *quoad* equality of arms. As I see it the point which is emphasised in answer 8 (at page 9) is that most pursuers' personal injury work has gravitated to a handful of firms who have specialist knowledge and skill in these cases. That being so there is no need to have access to specialist pleaders. If such skills already exist within the solicitor branch of the profession they ought to be used in running PI cases in the sheriff courts before specialist sheriffs.

In my view the key influencing factors which currently apply are:-

- (i) The perception that in many sheriff courts there is a distinct prospect that the sheriff may not have detailed knowledge and experience of the subject matter of the cause.

It seems to me that in consequence a great many low value personal injury cases (which generate higher and disproportionate expense) are raised in the Court of Session. In my view such cases ought to be capable of being efficiently handled at specialist sheriff court level.

- (ii) The value or complexity of the subject matter of the case. In my view complex cases of high value, eg tetraplegia or contractual disputes involving hundreds of thousands/millions of pounds ought to be raised in the Court of Session. If Court of Session judges focus on fewer and more complex cases they will be able to scrutinise and develop the law for the benefit of the lower courts.
- (iii) The entitlement to a jury trial in the Court of Session is in my view a significant factor. It will perhaps not be surprising to learn that my view is that civil jury trials ought to be abolished (see my response to question 17 of Chapter 6).

In considering the main factor which ought to influence the decision to choose either the Court of Session or sheriff court it seems to me that this must be the cost of litigating relative to the value/importance of the case. That being so it seems to me that most litigation (as distinct from high value/complex cases) ought to be conducted and disposed of in specialist sheriff courts. The location of such courts should depend on the volume of business and available resources.

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

I suggest the following:-

- (i) Court of Session –
- *Nobile officium*
  - Public law issues (eg devolution issues under the Scotland Act 1998, declarators of incompatibility under Human Rights Act 1998)
  - Judicial review
  - Election petitions
  - Exchequer cases
  - Defamation
  - Actions of reduction
  - Petitions dealing with company law where the paid up capital exceeds, say, £250,000.

There may be an argument that complex disease cases (I am thinking of those involving asbestos exposure) which frequently involve multi defenders, and complex medical causation issues, ought to be handled at Court of Session level with power to remit as necessary.

- (ii) Sheriff Court –

- Actions where the sum sued for does not exceed the privative level (I appreciate there can be discussions at what the level should be – perhaps initially £100,000 and after a transitional period to enable specialisation to make an impact this could be raised to £250,000 – unless the subject matter falls within the exclusive jurisdiction of the Court of Session as above, eg defamation).

In my view the sheriff court and the Court of Session ought to have concurrent jurisdiction in actions where the sum sued for exceeds the privative level of the sheriff court (subject of course to those types of action in which the Court of Session has exclusive jurisdiction).

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

I agree with the response here. My feeling is that the hierarchy of the lower and Supreme Court structure provides the necessary balance and flexibility to achieve a fair and efficient disposal of cases at proportionate cost.

**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 actions and why?**

I would refer to my comments in answers 4, 5 and 6.

I believe that the Court of Session should retain its first instance jurisdiction across most areas of public and private law but that the volume of cases should be reduced immensely to enable senators to spend more time on fewer cases so as to scrutinise and develop the law for the benefit of specialist sheriff courts. It seems to me that such an approach is entirely consistent with the concept of proportionality as set out in the remit of the review. It is beyond doubt that conducting litigation in the Court of Session is more expensive than in the sheriff court given the use of counsel. That is entirely justified for major public law/private law cases.

There should of course be power to remit appropriate cases between the sheriff courts and the Court of Session.

The Court of Session should also of course spend a significant proportion of its time in dealing with appeals from the Outer House, sheriff principal and sheriffs. (See further my comments on the response to question 20).

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

It seems to me that this is one of the most important issues in the whole debate on court structure. In my view a privative limit of £5,000 is far too low. If we are going to have specialist judges at sheriff court level it seems to me to defeat the whole point of reducing the unnecessary cost of litigation by effectively permitting low value PI work to continue in the Court of Session. As previously indicated in my view the privative jurisdiction of the sheriff court must be dramatically raised. It seems to me that this sum should be at least £100,000 and I feel it could be justified at more than double that limit once the impact of specialist sheriff courts kicks in.

I would wish to make it abundantly clear that I am a great supporter of a specialist independent Faculty of Advocates. Equally I do not believe that it is a good use of resources for members of the Bar to be regularly involved in low value road traffic PI cases. It seems to me that such a situation is what the remit to the Review is trying to avoid.

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

In general terms it seems to me that current powers/procedures are probably not flexible enough to enable inter sheriff court transfers to be carried out within sheriffdoms so as to allow a greater use of resources to facilitate speedier disposal of cases (I would refer to paragraph 4.54 – at page 38 of the Review’s Consultation Paper).

**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?**

I am not clear as to the reasoning in the response as to why heritable cases should be referred to a stand alone tribunal rather than a third tier of the existing court structure. In any event I think the whole question revolves around the issue of specialisation. I would agree that a third tier/specialist court dealing with issues under social housing and consumer law could be overseen by the sheriff principal within the sheriff court structure. Cases involving social housing and consumer law invariably include all small claims (now up to a value of £3,000). The third tier could be analogous to the district court (soon to be JP court) in criminal cases presided over by a stipendiary magistrate.

A third tier could/would enable:-

- (i) judicial expertise in these areas of the law;
- (ii) a more inquisitorial approach; and
- (iii) points (i) and (ii) would facilitate speedy and fair disposal of cases.

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

I would refer to my comments in response to question 11.

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

It seems to me that the fundamental difficulty here is again one of lack of specialisation. Frequently the presiding sheriff may not have the necessary specialist knowledge to properly deal with the case in question. This can be compounded by delays and disruptions in remote courts, highlighted in the response to question 1.

In the medical profession hospitals require to specialise. People living on many Scottish islands who require significant surgical procedures require to attend specialist hospitals to have the necessary surgery carried out. In the same way if they wish access to specialist sheriff courts it is not unreasonable that these courts

are located close to where the majority of its cases emanate from. The specialist court could therefore be within say a radius of 30 miles of the major cities.

It seems to me there is a very strong case for regional civil justice centres to enable civil business to be separated from the ever increasing volume of criminal work. These centres should be located within regions (perhaps as per the existing sheriffdoms). The specialist courts should be located after careful scrutiny of volumes, types of cases and available accommodation.

No matter where a court is located it will not be convenient for everyone but it should be convenient for the greatest number of people using it.

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

I note the response here. Having spoken with colleagues I am not aware of any difficulties. It seems to me to make sense for the court in which the action is raised to issue the extract decree (whether the Court of Session or relative sheriff court).

I note the suggestion for centralised warranting of court actions. I wonder if this could create anomalies. For example, if the centralised warranting office is based in say Falkirk, would the initial writ purport to be issued by the court having jurisdiction, eg Glasgow. Presumably the centralised warranting office would issue the extract decree in the name of the sheriff court/sheriffdom in which the action purports to be raised. There could be scope for confusion with reponing notes, eg should the reponing note be sent to the warranting office or the actual court. There may be scope for unnecessary jurisdictional issues being raised under the Civil Jurisdiction & Judgements Act 1982 in the event of central warranting.

I am not convinced that central warranting is necessary and would lead to greater overall efficiency.

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

From my limited experience of judicial review procedure in the Court of Session I am not aware of any dissatisfaction in the procedural or other aspects of such cases. However, it seems to me that the Court of Session should be able to remit cases involving the judicial review of administrative decisions of small clubs, eg golf clubs, tennis clubs etc., to the sheriff court.

**16. Are there types of business in the sheriff court which could more efficiently, or appropriately, be dealt with an administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?**

I would agree that commissary business ought to be capable of being handled administratively. In practical terms it seems to me that this is exactly what happens. It seems to me that the legal issues involved with petitions for the appointment of executors dative are essentially judicial matters. There is no real difference between such petitions and petitions for the appointment of a trustee in a personal insolvency or a liquidator, receiver, administrator etc. in a corporate insolvency.

Other procedures are perhaps not essentially judicial in nature, eg consideration of inventories/applications for confirmation. Such procedures may be more appropriate for handling by HM Revenue & Customs/Capital Taxes Office etc.

**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?**

I can see that there is a certain logic for having an all Scotland sheriff court so as to obtain benefits of economies of scale, administration savings and uniformity in the operation of sheriff clerk procedures. A national sheriff court might also be able to better harness information technology and utilise overall resources in a more efficient fashion than at present. Such an approach seems attractive given that *ex facie* it appears to answer that part of the remit to the Review which seeks to identify changes to facilitate the best use of resources.

Having thought about this issue I would be concerned with a national sheriff court model. While Scotland is a relatively small country (population around 5,000,000) it is rich and varied in its geography, its people, its cultures and its economic activities. As I have tried to highlight elsewhere in this paper it seems to me that at the heart of the remit to the Review is the issue of access to justice. In general terms my feeling is that the overall boundaries of the six sheriffdoms in Scotland probably reflect the diversity of geography, culture and economic activity to which I have referred. Sheriffs principal are able to gain an understanding of regional needs for the efficient access to justice in these areas. Total centralisation of procedures and resources could well dilute the quality of access to justice, at least in the eyes of the local people concerned.

I can see the counter argument that given that there is only one Court of Session which in theory is accessible to all the people of Scotland, Court of Session judges do not have the "local knowledge" of all regions of Scotland as would be available to the various sheriffs principal. However for the reasons which I have already put forward it seems to me that the essential function of the Court of Session should be (a) as an appeal court, and (b) with a first instance jurisdiction being restricted to major public law issues and private law cases involving complexity and high value. (Power to remit suitable cases to/from the Court of Session/sheriff courts should always be available to cover exceptional cases).

Retaining regional rights of appeal to sheriffs principal also maintains the idea of local access to justice. It is appreciated that an "all Scotland" sheriff court system could no doubt provide various appeal judges at the level of sheriff principal but such judges could well appear remote in the eyes of people within the local sheriffdom/region. In conclusion I would be disinclined to support the case for a national sheriff court.

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

I am not clear as to why this question is answered in the negative

My feeling is that it ought to be answered in the affirmative. Given my comments in the immediately preceding answer it may be thought appropriate for a sheriff's commission to be restricted to a region or sheriffdom. However, as I understand it

floating sheriffs and part time sheriffs can sit in any sheriff court in Scotland at present. Conferring sheriffs with an “all Scotland” jurisdiction ought to provide greater flexibility when suitable circumstances arise than a restricted commission system.

I have heard it said that an “all Scotland” commission system might deter suitable candidates from seeking judicial appointment, given the prospect of regular travel and overnight stays. I am not persuaded that an “all Scotland” commission would deter suitable candidates from seeking appointment to the shrieval bench.

**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?**

On the hypothesis that the sheriff court becomes the primary court at first instances (which I would favour) then the question of remitting from the Court of Session to the sheriff court would presumably only arise in concurrent jurisdiction cases.

If the privative jurisdiction of the sheriff court is raised to say £100,000/£250,000 the number of cases remitted by the Court of Session to the sheriff court is likely to be relatively small. In personal injury cases, for example, it is unlikely that a case where the sum sued for is say £500,000 the Court of Session would remit to the sheriff court. Of course if it became clear that the sum sued for was grossly excessive and that a realistic value of the case was well below the privative jurisdiction level of the sheriff court then the Court of Session ought to be entitled to remit to the sheriff court (no doubt with a suitable finding of expenses!).

Another example might be in a judicial review involving a golf club where the Court of Session would have discretion to determine that the issues were capable of determination by a sheriff.

In terms of remit by the Court of Session to the sheriff court it seems to me that the main factors are essentially complexity and value.

In relation to a situation involving a remit by the sheriff court to the Court of Session, in addition to complexity and value it seems to me that the novelty of the point of law involved should be a factor. A case could have a very low value well within the sheriff court’s privative jurisdiction level but raise a novel point of law. In that situation it seems to me that it would be perfectly proper for such a case to be remitted to the Court of Session. This could be done by empowering the sheriff either on the motion of a party or *ex proprio motu* to seek leave of the Court of Session to have the issue heard in that court.

It seems to me that the Court of Session ought to give continuing guidance on the factors to be taken into account in remitting to/from that court.

**20. Are the existing appeal arrangements satisfactory?**

Having thought about this it seems to me that in seeking to achieve the balance between fairness and expediency there needs to be some restriction in the present appeals process.

In the context of a model of sheriffdoms it seems to me that a party litigating in the sheriff court ought to be entitled to choose to appeal either to the sheriff principal or directly to the Inner House of the Court of Session. In reaching a decision no doubt the appellant will be advised on expense implications.

It seems to me that if the volume of cases in the Court of Session is reduced there ought to be greater capacity for dealing with appeals either directly from the sheriff court or from the sheriff principal. It seems to me however that where there is scope for restricting appeals to the Court of Session is in circumstances where the appellant is unsuccessful before the sheriff principal. In that scenario he will have had two judges find against him. Accordingly it seems to me that such an appellant ought not to have an automatic right of appeal to the Court of Session and ought to require the leave of the sheriff principal to proceed with a second appeal.

In circumstances where an appeal to the sheriff principal is upheld it seems to me that the respondent ought to have an automatic right to appeal to the Court of Session since in that scenario there will have been a finding by a judge in favour of each party.

So far as the House of Lords is concerned my feeling is that where there is a unanimous finding by the Inner House, leave of that house ought to be a prerequisite for appealing to the House of Lords (or the new case Supreme Court to be set up under the Constitutional Reform Act 2005). Where there is a majority decision then it seems to me that fairness dictates that there should be an automatic right of appeal to the Lords/new case Supreme Court.

**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?**

Given my answers to questions 17 and 20 I believe that the office of sheriff principal should be retained and that the office should incorporate both judicial and administrative roles.

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

In the time available I have only been able to carry out a pretty superficial review of some of the statutory appeals procedures currently available. It will be appreciated that there is a plethora of appeals procedures. Some legislation provides to appeal directly to the Court of Session whereas other legislation confers right of appeal to the sheriff court.

Having thought about this it seems to me that in general terms where the appeal relates to a "local" public issue, eg a liquor licensing matter, it is entirely appropriate that the appeals procedure should be confined within the region or sheriffdom concerned. Thus, if an appeal is made against the decision of the local licensing board that ought in the first instance to be made to the sheriff and thereafter to the sheriff principal. I can see the argument that a licensing applicant ought to be able to continue to appeal from the sheriff principal to the Court of Session. This presumably would be on the basis that only one "court" (as opposed to the court and the "board") had found against him.

In circumstances where the initial appeal is from a decision of a sheriff it seems to me that there ought to be a right of appeal to the sheriff principal, with a further right of appeal to the Court of Session on the restricted basis outlined in my comments to question 20.

Where the statutory appeal is directly “to the Court of Session” from my reading of matters there appears to be a tradition in the Court of Session that such appeals go directly to the Inner House rather than to a Lord Ordinary. Perhaps this tradition ought to be reviewed.

Where the appeal relates to a wider public issue, for example, an appeal from the Inland Revenue Commissioners, it seems to me that it is entirely appropriate that the appeal should be directly to the Court of Session (whether that be the Inner or Outer House!).

The whole area of statutory appeals is one which requires detailed scrutiny, review and reform. There would be merit in the Scottish Law Commission being asked by the Scottish Government to carry out an exhaustive review of statutory appeals procedure and to make recommendations for rationalisation in the various appeal pathways which ought to apply.

- 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?**

Please refer to my comments in response to questions 20, 21 and 22.

In relation to exceptional cases it seems to me to be difficult to define precisely what these might be. Phrases such as “compelling reason” are essentially meaningless in isolation. The inherent power of the Court of Session under its *nobile officium* is available. The exercise of this power can be sought by a party in circumstances where no other remedy exists.

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

One fundamental advantage is that temporary judges and part time sheriffs can be used to supplement capacity at particularly busy/intense periods for the courts.

The danger is of course of over reliance on such arrangements in circumstances where permanent appointments are justified.

The system of temporary judges probably works well in the Court of Session where experienced members of the Bar are well qualified to handle a variety of cases. In the same way suitable experienced members of the Bar can adequately provide temporary cover at sheriff court level.

A further advantage of the use of part time/temporary judges and sheriffs is that it provides an opportunity for practitioners to experience the bench. This can be a useful transition to permanent judicial office.

As I see it the main disadvantage is at sheriff court level. This is again related to the ongoing common theme of specialisation. If solicitors or part time sheriffs are able to handle cases within their speciality it follows that the system is likely to work well with cases being disposed of fairly and expeditiously. The converse does of course apply.

There is anecdotal evidence of part time/temporary sheriffs having difficulty with “grasping the nettle” in cases outwith their speciality. This is perfectly understandable, and indeed can apply equally to permanent sheriffs handling cases in which they have little experience. For example, a sheriff whose experience as a practitioner has focused on family law will have difficulty in dealing with a complex personal injury case and vice versa.

The problem appears to be exacerbated in situations where part-time/temporary sheriffs require to handle cases involving social housing and consumer law. There is anecdotal evidence to the effect that such sheriffs (perhaps understandably due to lack of knowledge) allow these cases to drift. The heritable court appears to be a particular example here. This of course is related to the question of the creation of a specialist/third tier court to handle such cases. Whatever the level of such a court it seems to me that it is essential that it is presided over by a judge who has sound knowledge of the relevant law involved.

#### Questions for Discussion – Chapter 5

---

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?**

It seems to me that it is entirely appropriate to endeavour to articulate some form of statement which incorporates the key objectives of the rules of civil court procedures in a free democratic society.

It seems to me that the rules of civil procedure ought to aim to facilitate the fair and just expeditious progress of cases through the early focusing of the issues in dispute and the early and candid disclosure of the evidence which is to be relied upon by the parties to the dispute.

In essence the rules ought to seek to balance fairness with expediency.

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?**

It seems to me that court proceedings ought to be a last rather than first resort for the resolution of disputes. In order to avoid unnecessary litigiousity it seems to me that courts should encourage the use of mediation or other forms of alternative dispute resolution in cases in which such form of resolution seems appropriate, eg family law. To that extent therefore it seems entirely fair and reasonable that the relative court rules of procedure should require parties to consider mediation/ADR prior to commencement of court proceedings.

I do not believe that it is proper for the court to require parties to mediate or pursue some other form of ADR. In a free society a party ought to be able to access the court to seek a judicial remedy as of right.

If potential litigants have access to justice through being able to obtain advice from specialist lawyers it ought to be possible for by far the majority of disputes to be resolved extra judicially.

Mediation ought to be voluntary.

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

See comments in response to question 2.

**4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.**

In seeking to answer this question it seems that the starting point is to look at those types of disputes which perhaps lend themselves to mediation/ADR. I have already touched on family law. As I understand it there are many and varied forms of mediation to facilitate the many and varied disputes arising in family law.

Where commercial entities have enjoyed an ongoing business relationship and a dispute arises there must be merit in such disputes being resolved through a mechanism that can achieve this quickly thereby enabling the parties to resume their business relationship. I would have thought that mediation/ADR would have benefits to the parties in that situation.

Where the dispute arises out of a "one off" relationship/incident such as personal injuries arising out of an accident mediation would not appear to be appropriate. There is some anecdotal evidence to the effect that where mediation has been resorted to in such cases it has proved more expensive than resorting to the courts. Both sides' advisers require to be paid as does the mediator. It is probably fair to say that in personal injury cases by far the majority of these settle extra judicially without the need for proceedings to be initiated. This is done either through specialist solicitors for pursuers negotiating with specialist insurance personnel or pursuers' solicitors negotiating with specialist solicitors appointed by insurers. To that extent it can be said that ADR has operated very successfully over the decades in personal injury claims.

Clearly where disputes involve questions of status or declaratory determinations such disputes can only be determined by the court.

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

Courts are in general public fora. A party chooses to pursue his remedy via the public judicial system. Where parties agree to submit their dispute to mediation it seems to me that the mediation process should be conducted in private.

In terms of funding if a party is able to obtain legal aid to pursue a remedy in court but is prepared to agree to mediation for the resolution of his case then he ought not to be denied the benefit of legal aid.

In general terms it seems to me that funding arrangements for mediation should be no different than the arrangements which currently apply in litigation. I would refer to my various comments on the need for equality of arms and better access to legal expenses insurance cover perhaps through the introduction of compulsory cover.

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

The Scottish Courts website is easily accessible and enables the public to be educated and generally better informed about the structure, procedures and business of the civil courts.

Communication by e-mail is simple, instant and reliable. Communication between the courts and parties' solicitors by e-mail avoids unnecessary paper. Scanning of documents achieves the same aim. This reduces time and is generally more efficient.

Telephone case conferences with judges save time and are effective in maintaining a focus of the issues and the general progress of the cause. Commercial court procedure and the personal injury pilot in Glasgow Sheriff Court are good examples of modern communication and IT being harnessed for better efficiency. This in turn saves resources which must improve overall access to the civil courts.

There may be scope for IT being used for initiating court actions through a centralised booking system although I would again highlight potential problems which might arise (see my comments in response to question 14 in Chapter 4 of the Consultation Paper).

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

It seems to me that if the Review is to find solutions for promoting the early resolution of disputes and for making better use of existing resources (these issues are of course a significant part of the remit to the Review) then the early focusing of issues in litigation is essential.

Unlike good wine the cost of cases does not improve with the passage of time. It seems to me that parties ought to litigate at a fair and reasonable pace dictated by the court. Against a background of cases being dealt with by specialist practitioners in specialist courts it seems to me that the adoption of both case flow and case management by the court should ensure early focusing of the factual and legal issues in dispute. This should avoid "drifting" of cases. This might be described as the court taking a more inquisitorial approach than has been the case hitherto but I would suggest that in the sheriff court since the early 1990's the court has essentially been bound to take such an approach through it being required to ensure the expeditious progress of the case.

The option of case flow and case management will mean greater "front end loading" of cases. This in turn will probably mean that practitioners have to handle fewer

cases and spend more time on each case in order to comply with the court's timetable.

Case management by sheriffs has certainly proved successful in the commercial court in Glasgow and anecdotal evidence would point to general satisfaction and speedier disposal of cases under the ongoing Glasgow pilot for certain personal injury cases.

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

It seems to me that case management and case flow need not necessarily be mutually exclusive. Judicial case management ought to ensure meaningful compliance of case flow management. Where a realistic court timetable is issued at an early stage in the litigation by means of case flow management then occasional judicial case management can be used to ensure meaningful compliance. For example, under Chapter 43 procedure for dealing with personal injury cases in the Court of Session it might be beneficial for judicial intervention to check that statements of value are produced in compliance with the rules/practice notes and that full supporting documentation is lodged. In the case of a pursuer's statement of value full disclosure and compliance is likely to encourage defenders to come up with realistic settlement proposals.

Against a background of specialist sheriff courts in the fields of personal injury, commercial and family law I would be inclined towards the incorporation of both case management and case flow management in such cases.

Similarly, if the Court of Session is relieved from dealing with a very large number of what might be regarded as straightforward cases (through a very substantial increase in the privative jurisdiction of the sheriff court) then a combination of both case management and case flow management could be adopted by the court.

Questions for Discussion – Chapter 6

---

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

The fundamental advantage of a pre action protocol cast in suitable terms and which incorporates transparent mutuality (particularly relative to disclosure of documents) is essentially that it ought to achieve a focusing of the factual and legal issues in dispute so as to enable a meaningful assessment of the merits and value of the claim to be made in advance of litigation.

Furthermore, in the event of litigation the court should be able to determine which party caused the litigation which in turn should assist the court in making awards of expenses.

It is contended that the existing voluntary protocol in personal injury cases ought to be re-visited to encourage greater mutual disclosure of evidence and documents. This would be consistent with the trend of the courts taking a more inquisitorial approach in litigation procedures.

Provided the terms and conditions of protocols are fair to both/all sides there ought to be no disadvantage.

The key to the efficient use of pre action protocols is their content. The adoption of a compulsory protocol in prescribed form reflecting principles of fairness and mutuality would be of considerable advantage.

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

It seems to me that greater use of pre action protocols can only be advantageous. There is no obvious reason why if such protocols are to be used then it should not matter whether the ensuing litigation is in the Court of Session or the sheriff court.

Pre action protocols have proved successful in England and Wales in avoiding unnecessary litigation in the area of personal injury claims. There would appear to be no good reason why they should not apply in Scotland in such claims, including claims concerned with medical negligence and disease.

There is clearly a question mark surrounding such protocols in commercial cases, and in particular the cost of compliance.

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

Compliance ought to be compulsory. If protocols are to be used there is little point in making that use voluntary.

The key to the effective use of pre action protocols lies in the terms of the protocol. I would refer to my comments in response to question 1.

**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?**

Party litigants in the sheriff court ought to require the leave of the court to initiate proceedings in the same way that they require to do so in the Court of Session. Perhaps consideration should also be given to the introduction of a preliminary hearing in party litigant cases shortly after the lodging of defences. This would allow the court to assess the party litigant's case with a view to focusing the relevant issues. This might prevent lengthy proofs arising and time spent on a party litigant seeking to cover a wide variety of issues, many of which are irrelevant to the issues in the case, or at best marginally relevant.

Perhaps consideration ought to be given to introducing procedures into the sheriff court similar to these in the Court of Session for filtering out incompetent reclaiming motions.

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

The draft Law Society response appears to me to contain a very strong defence of the current system. I question whether this defence stands up to scrutiny. As

highlighted in the Discussion Paper we currently have 4 major sets of rules at sheriff court level, together with a separate set of (extremely detailed and varied) rules for the Court of Session. The plethora of rules does not assist access to justice.

It seems to me that every effort should be made to simplify matters by having a single rules council covering both courts with a remit to review and provide essentially similar procedural rules for both courts.

In my view it is wholly unjustified to have different rules and different language for each court in cases in which the subject matter is the same. For example, why should the procedural rules governing a personal injury action be different simply because the case is raised in one court rather than the other.

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

It follows from my response to question 5 that in my view there ought to be a single set of rules for both the Court of Session and the sheriff court. In the same way there ought to be a single rules council.

**7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of court structure? If so, what format should that document take?**

In respect of all ordinary actions, ie over £5,000, in both the Court of Session and sheriff court the same initiating document should be used for the same type of action. In my view there must be relevant averments in the document backed up by basic legal propositions justifying the remedy sought.

If a standard initiating document is used for all types of cases then information relevant to a particular type of action may be omitted. This in turn could lead to time consuming "sisting" procedures to identify the documents which contain insufficient information.

Perhaps the initiating document for both summary causes and small claims in actions for payment of money could be in a less formal but more succinct format than that required for ordinary actions. A brief outline of what the court is being requested to do ought to be sufficient.

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

I believe that if our system of pleading is heavily watered down we may run the risk of "throwing the baby out with the bath water".

I would accept that in general terms Chapter 43 abbreviated pleadings in the Court of Session for personal injury actions are adequate provided that basic requirements set out in the rules are complied with. As previously touched on the initiating summons must contain a clear statement of facts with essential pleas-in-law. In my view defences ought to contain succinct admissions and denials with pleas-in-law. In that way the abbreviated pleadings can adequately focus the factual and legal issues in dispute. Where fair notice is not provided, eg by failing to specify the medical mechanism by which the pursuer suffered the injury complained of, the case should

not proceed to proof until the necessary fair notice is introduced into the pleadings. If a pursuer's abbreviated pleadings become so brief so as to (a) fail to give fair notice, and (b) fail to pass a basic test on relevancy then the defender ought to be able to avoid being taken into a "blind" proof. What is required is a basic and balanced approach to pleading which incorporates brevity while preserving the principle of fair notice and relevancy. Any fundamental defect in abbreviated pleadings could be highlighted and remedied via a case management conference call.

**9. Are the current arrangements for summary disposal satisfactory?**

I believe that the current rules governing the granting of summary decree (against a defender) are satisfactory.

**10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?**

If there is evidence of routine procedural business (eg unopposed motions) taking up substantial periods of judicial time then consideration could be given to the creation of "junior judges" at both Court of Session and sheriff court level.

I am not aware of undue judicial time being taken up with checking and signing the relative interlocutors. In reality I suspect that experienced staff in the General Department and sheriff clerk's office deal with routine unopposed motions and other similar business, carry out the necessary checks and prepare the relative interlocutors for signature with the Lord Ordinary or sheriff.

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

Generally yes.

It may be that greater efficiency could be achieved by the use of electronic communication and scanning of documents.

**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?**

I am in general agreement with the tenor of the response. I have some reservations about a liberal use of affidavits. There is really no substitute for the evidence of a witness given under oath in open court. Affidavits cannot be cross examined. I do not favour "trial by affidavits". It is in everyone's interests for as much evidence as possible to be agreed in advance of the proof.

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

I agree with the response to this question.

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

In my view and in keeping with a trend away from a purely adversarial approach there ought to be a requirement for disclosure of documents relied upon much earlier than 28 days before a proof (in the Court of Session), or 14 days before a proof (in the sheriff court).

There are many examples from the defenders' perspective of large bundles of documents being lodged on behalf of pursuers on the last prescribed date for lodging which could have been disclosed at a much earlier date. Such disclosure is likely to narrow the issues and thereby reduce expense and encourage settlement. Surely documents which are available ought to be disclosed to the opponent at the earliest opportunity. This is in keeping with candidness and fair notice.

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

In my view in personal injury cases where the value does not exceed £10,000, and in keeping with the need for proportionate expense, perhaps there is merit in adopting the instruction of an independent single joint expert whose overriding duty is to the court. There would need to be a mechanism for appointing such an expert in the absence of the agreement of the parties.

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

There would appear to be no logical reason why in principle a system of pursuers' offers ought not to be introduced. This would in effect be the equivalent to the defenders' tactical weapon of a tender. Perhaps the safest approach here is to structure matters so as to entitle a pursuer who formally offers to settle at a fixed sum to an additional fee. This appears to have been the approach taken by the court in *Cameron v. Kvaenar Govan Ltd. 1999 SLT 638*.

**17. Should civil jury trials be retained?**

In my view civil jury trials ought to be abolished.

My reasoning is that in a civilised legal system there ought to be predictability and consistency in awards of damages in personal injury actions. This would enable lawyers (whether for pursuer or defender) to provide clients with a reasonably reliable assessment of *quantum* based on previous awards by judges. Such awards do follow a reasonably consistent pattern and take account of the value of money. While the assessment of *solatium* is not an exact science, since no two injuries are the same, I would contend that practitioners can reasonably assess *quantum* by reviewing recent awards by judges. Awards by juries vary dramatically. Defenders are prejudiced by not being able to gauge by reference to judges' awards at what level to pitch a tender.

It is also somewhat anomalous that civil jury trial is only available in the Court of Session. In the one and only jury trial in which I was involved and which ran the jury made a very conservative award.

Some views have been expressed that powers should be given to the presiding judge in directing the jury to provide a range of figures within which the jury could

exercise its discretion. This seems to fly in the face of the rule that the assessment of damages is a jury question. That being so the only proper direction which a judge should be able to give to a jury is to emphasise that it is entirely a matter for the jury members. This in turn creates undesirable unpredictability and inconsistency. I would respectfully refer the Review to Lord Abernethy's dissenting opinion in *Girvan v. Inverness Dairy Farmers*.

**18. Should written judgements be required in all cases?**

In my view, and for all the reasons set out in paragraphs 6.65 to 6.69 of the Consultation Paper, written judgements should be required in all cases which proceed to proof or debate.

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

It seems to me that the powers presently available to the courts through making awards of expenses are considerable. I am not convinced that any greater powers are necessary. Where a party makes an unreasonable request to the court, such as by proceeding with a minute of amendment late on in the case making substantial changes to the basis of the case, then the essential penalty is the refusal of the Minute and an award of expenses in favour of the opponent. From discussing this matter with colleagues there is a perception that there is a reluctance on the part of the courts to refuse very late minutes of amendment. Such refusal would be a much greater penalty than the somewhat meek and mild award of the expenses occasioned by the amendment procedure.

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

As stated in my response to question 4 in this chapter the requirement for a party litigant seeking to initiate court proceedings in the Court of Session to obtain leave should be extended to cover such a party seeking to litigate in the sheriff court.

In the same vein it is suggested that the sheriff court should be given powers to filter out incompetent appeals.

From anecdotal evidence there appears to be a need for the court not to be over tolerant of party litigants who "go off" at irrelevant tangents in the conduct of proofs/debates/submissions.

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

Yes. By reference to paragraph 6.87 of the Consultation Paper the 1898 Act ought to be amended to make it clear that the vexatious continuation of proceedings and repeated vexatious motions/applications in the course of proceedings would justify an application to the Inner House of the Court of Session to have the litigant in question declared vexatious. In that scenario perhaps power could be given to the presiding judge in the action which is the subject of the vexatiousness to refer the matter to the Lord Advocate.

It is also suggested that the legislation be amended to require that a list of vexatious litigants be publicly available.

**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?**

I would agree with the Law Society's response to this question.

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

On balance, yes.

I can see benefits in having rules of procedure for multi-party litigation which reduce overall expense through the avoidance of individual separate actions by claimants.

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

I agree with the tenor of the Law Society response. This does raise the question of whether it is apposite for the Court of Session to review the decision of a private club such as a golf club or tennis club. Perhaps power should be given to remit such cases to the sheriff court with the consequent saving on expense.