

## **RESPONSE**

for Civil Justice Review

### **CHAPTER 1: INTRODUCTION**

#### **Answers to Questions:**

1. We agree the Civil Justice System should be designed to encourage early resolution of disputes preferably without resort to the Courts. Thus, the principal function of the Civil Justice System would be to deal with disputes which require to be resolved with the assistance of the Court.
2. We agree that proportionality defined as resolving disputes within a reasonable time and at a reasonable cost to both parties involved and the public purse, is an important factor in considering the structure and rules within the Civil Justice System. We also agree with the definition 'value for money', that they should make reasonable public expectations and make the most efficient use of public resources invested in it.
3. We also agree with the five overriding principles set out by the Civil Justice Review. Our only qualification would be to draw attention to the fact that even in disputes of very small monetary value, legal issues which arise can often be exceedingly complex and these not necessarily being proportionate to monetary value. Whilst it has to be accepted that in many areas the principles of the civil law are reasonably fully developed and settled, there would have to remain the chance for the law to be developed through the jurisprudence of the courts.

## CHAPTER 2: ACCESS TO JUSTICE

### Answers to Questions:

- 1 Public legal education ought to be improved to foster a better understanding of the role of the courts in resolving disputes and alternatives available.
- 2 The financial constraints placed on funding available through legal aid, may lead and already have led, to very limited provision of advice in parts of the country.
- 3 The ability of litigants to take part in the legal process without representation, is a complicated question. Superficially, it is desirable that access to justice ought to be easy. However, 'justice', in terms of judicial resource, will always be a limited resource and best use of that resource may not be achieved if significantly easier access to it is possible.
- 4 'Self help ' and court based advice services may provide a partial answer to the concerns set out above.
- 5 The Review appears to be very comprehensive.
- 6 There is a case for introducing a very straightforward system for dealing with consumer disputes. How separate from the court structure this ought to be is a moot point. On balance , we tend to the view that where parties legal rights are at issue, the forum for resolving disputes has to remain with the broad court structure.

## CHAPTER 3: THE COST AND FUNDING OF LITIGATION

### Answers to Questions:

1. Our view is that expenses recovered, significantly undervalue the costs of undertaking litigation where this is prepared and undertaken in a proper and conscientious manner.
2. We consider that the cost of litigating does indeed deter individuals from pursuing or defending cases in the Court.
4. We do not consider the current rules for recovery in cases of expenses are satisfactory.
5. We consider that the current approach for taxation of judicial expenses by an independent person to be satisfactory. We do not have a consensus on whether indemnification of expenses on the English model is desirable. Superficially, it is unfair that a successful litigant can be considerably out of pocket. However, limited recovery of expenses (perhaps more generous than at present) does act as a constraint on frivolous litigation and is a sufficient risk to encourage early settlement and compromise.
6. Clearly, the extent and availability of Legal Aid Advice & Assistance does affect access to justice. In our practice we will generally not undertake Legal Advice & Assistance work, as the rates of remuneration coupled with significant regulatory requirements render this uneconomic.
8. We believe that speculative fee arrangements have allowed wider access to justice. We can quote examples in situations which we have been prepared to take cases forward on a speculative fee arrangement, where otherwise the individual may not be in a position to litigate.
9. It is clear that legal expenses insurance, including 'before the event' insurance is playing a much greater role in terms of the provision of legal assistance already. We do express concern as to the multiplicity and variety of policies which appear to be available and the considerable small print which can be applicable to such policies. This can have the effect that individuals are unaware of the nature and extent of cover provided to them and greater clarity in this area would be of considerable assistance.
10. We consider that the ability to recover the cost of after the event insurance would enable parties to have access to justice in situations where they might currently be unwilling to accept the risk of this irrecoverable expenses.

## CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

### Answers to Questions:

1. We agree that the conduct of civil business is adversely affected by the pressure of criminal business.
- 2/3&4. We agree that there would be merit in a greater degree of specialisation through the Civil Courts and a greater degree of specialisation in terms of particular Judges or Sheriffs dealing with civil or criminal business.
5. We consider that two key factors which influence the decision to raise an action in either the Sheriff Court or the Court of Session are expense, given the preferable levels of expenses which we may recover in the Court of Session. It is often practice to raise actions in the Court of Session, rather than the Sheriff Court for this reason. The other principal factor is for convenience of the firm instructed and therefore we will tend to raise actions in the Court of Session rather than the Sheriff Court, given our base in both Glasgow and Edinburgh.
6. We consider that cases of modest value should be excluded from the Court of Session.
7. We do not favour the unification of a single Sheriff Civil Court.
8. We do not believe that the Court of Session should become the Court of Appeal only.
9. We have had considerable internal debate on where the privative jurisdiction of the sheriff court should lie. In personal injury actions, we can see an argument for increasing the limit substantially (to £50,000-£100,000). In contractual disputes – where more legal issues may arise a lower limit (say £15,000) could apply. Perhaps there are a number of occasions where cases are remitted, demonstrates that in reality the provisions do not operate as they should.
11. We do not favour a Third Tier Court to the level of Sheriff Court.
13. We are not aware of any difficulties being caused by the current division of Sheriff Courts into distinct geographical jurisdictions as being a source of difficulty.
14. We believe that the current arrangements for dealing with undefended actions could be improved.
15. We do not believe that the current arrangements for the disposal of cases raising issues of public administrative law to be satisfactory. It is anomalous that there should be no time limit for the bringing of such actions and the Court arrangements for dealing with such actions do not at present allow them to be dealt with sufficiently expeditiously.

19. We would favour a power of transfer from the Court of Session to the Sheriff Court and the power for the Sheriff to seek leave to the Court of Session to transfer a case there, this on the basis of the legal complexity of the matters identified.
22. Yes.
23. Yes.
24. We consider that there are advantages of having the opportunity for cases to be dealt with by Temporary Judges and Part-Time Sheriffs that this allows greater flexibility and effects individuals with an opportunity to consider their own eligibility for a permanent judicial office and allow its practitioners to fulfil a public service role. Indeed our concern would be that given the current challenges on civil business that not more use is not made of Temporary Judges to deal with civil business within the Court of Session.

## **CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES**

### Answers to Questions:

1. We consider that there should be an overriding objective stated and that the main element of that overriding objective should be the proper resolution of disputes, within a reasonable time period and at proportionate cost.
2. We recognise that mediation and other alternative methods of dispute resolution can be advantageous, in particular circumstances. We do not consider that the Court can require that such means are used. However, we believe that the Court has a role to play to clarify to the parties to the dispute that alternative dispute resolution has been considered and to encourage parties to consider the use of mediation.
3. In our experience alternative dispute resolution may either be considered very early in an action and can often have a value again at the later stage in the development of an action once the issues are clarified and fuller investigations be undertaken.
4. Our experience demonstrates that in family matters, mediation can have its particular benefits.
5. It may be worth considering a mediation service for which there is no cost for small claim actions but for other levels of dispute a cost would be appropriate.
6. [blank]
7. We consider one of the major improvements which could be made to the process is for the Court to take greater control of the conduct and policing of litigation. It is clear that cases which are dealt with over a shorter timescale, generally result in lower costs.. Therefore speed of delivery of justice is clearly in the public interest.

## CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

### Answers to Questions:

1. We believe there are considerable advantages in the use of Pre-Action Protocols.
2. We therefore commend a greater use of Pre-Action Protocols.
3. We consider compliance with Pre-Action Protocols should be compulsory.
4. We can see merit in greater requirement for leave to bring or take steps in proceedings, especially if indemnification of the successful parties costs. is introduced. It would be helpful if the extent of investigation or enquiries were made by a party to litigation, received some scrutiny by the Court before being embarked upon.
5. The problems with the current process for making rules in civil procedure is that the process is too slow and there is an absence of satisfactory consultation in the approach of rules being developed.
6. We favour a single set of rules for civil procedure for both the Court of Session and the Sheriff Court.
- 7 No
- 8 Abbreviated pleadings in PI actions raised under chapter 43 have worked well. If more PI actions are to be brought in the Sheriff Court, Chapter 43 procedure ought to be introduced in that forum.
- 9 Yes
- 10 Yes
- 11 Broadly yes. Greater use of technology ought to be encouraged when dealing with motions and other routine matters.
- 12 A more realistic assessment of the duration of cases which are going to run ought to be encouraged
- 13 Yes
- 14 Early and wider disclosure ought to be encouraged to a greater extent than presently.
- 15 Ultimately, it is for parties to decide on how to present their cases and the court should have only limited control over that.
- 16 Yes. It should mirror the defenders tender, the principals of which are well understood.
- 17 The desirability of civil jury trials depends on whether one is acting for pursuer or defender. Rising above the fray, if that is possible, civil jury trials do provide a check on the quantum of damages (often referred to as a 'jury question') and for that reason

ought to be retained. Consideration should be given to providing better guidance to juries as to previous awards, to introduce a degree of consistency.

18 No

19 Yes. More swinging penalties in expenses –finding agents and counsel liable- would encourage greater adherence to court rules.

20 An early sifting of such cases-with the opportunity for a time limited appearance by the party litigant ought to be introduced. It is a fundamental human right that citizens have the right to bring their disputes before the court. However, in the case of the party litigant (who may just want his day in court) very often that day does not come until well into the procedure after much cost has been incurred. An early sifting hearing, where the broad merits of the claim could be looked at may provide that at an earlier stage than presently.

21 Yes See above

22 No

23 There is very little multi party litigation in Scotland. Elaborate rules are not required.

24 No.