



**RESPONSE**

by

**THE ROYAL FACULTY OF PROCURATORS IN GLASGOW**

to

**CONSULTATION PAPER**

by

**THE SCOTTISH CIVIL COURTS REVIEW**

**March 2008**

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**GENERAL**

Since the publication of the Consultation Paper at the end of November, 2007 the Royal Faculty of Procurators in Glasgow has sought to obtain views from individual members, from member firms and from others attending seminars run by the Faculty. In addition a number of our members have participated in informal discussions with members of the Review Team on some of the issues raised in the Paper. A sub-group of the Royal Faculty has also met to discuss a number of issues. The Royal Faculty's Dean has had the benefit of sitting on other working groups which have considered the Paper in detail, namely, the Law Society of Scotland and the Forum of Insurance Lawyers.

At the heart of the civil justice system is of course the question of access to justice, and in particular access to the civil courts. The Royal Faculty believes that at the same time as changes are made to improve the structures, jurisdictions, locations and procedures in the civil courts in Scotland there is a need for research into the feasibility of introducing a system of compulsory legal expenses insurance cover. This point is covered in a number of answers within the response.

Inevitably, given the number and breadth of issues raised in the Consultation Document a variety of views have been expressed on a number of issues. We have sought to highlight these views in the response. It is fair to say that there is broad consensus on some fundamental issues, namely, a need for greater specialisation in the sheriff court (including the separation of criminal and court business), the need for increasing the privative jurisdiction of the sheriff court (there are differing views as to the extent of the increase) and the related need for reducing the volume of cases going through the Court of Session.

The Royal Faculty will of course be pleased to cooperate with the Review in any other consultations which are considered appropriate.

GLASGOW  
28<sup>th</sup> March, 2008

**Responses to questions posed at the end of the various Chapters in the consultation document.**

## **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?**

Yes. In general terms the view of the Royal Faculty of Procurators in Glasgow is that litigation ought to be a last resort rather than first resort. We would support the view set out in Webster's book on Professional Ethics and Practice for Scottish Solicitors (4<sup>th</sup> Edition, para. 2.16 at page 28) to the effect that a solicitor ought to take any available opportunity in the client's interest to reach a solution by a fair settlement out of court rather than engaging in legal proceedings.

With a view to encouraging litigation as a last resort solution the court should be able to deal with unnecessary litigation by exercising its discretion in awarding expenses consistently against the party who in the view of the court has caused unnecessary litigation.

The difficulty is of course that each case turns on its own facts and circumstances. We feel that the introduction of compulsory pre action protocols is likely to make it easier for the court to identify which party has unnecessarily brought about the litigation. Such protocols ought to require mutual pre-litigation disclosure of evidence which in turn should enable each side to focus the issues and narrow down those in dispute.

There is strong anecdotal evidence of many court actions being raised, particularly in low value personal injury cases, which ought to have been capable of settlement.

A compulsory pre-action protocol ought to highlight the potential for expenses awards against a party causing unnecessary litigation.

- 2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 – 1.14 are a sound basis for the development of the reviews recommendations? Should they be supplemented by other factors?**

The Royal Faculty agrees that the key issues are proportionality (both in terms of time and money), value for money and access to justice. In our view it is of vital importance that in reaching conclusions for a recommended model for a suitable civil court structure in relation to locations, jurisdictions of courts and the procedures to be applied therein, at the forefront of the model is the issue of access to justice. There is no point in having the most fair and efficient court system possible if only those on the fringes of society, ie the poor (via state assistance) and the super rich, can reasonably afford to pursue or defend their rights. Access to justice for all the people of Scotland seems to us to be a critically important issue. We seek to address this aspect in our response to questions 2 and 9 of Chapter 3.

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

In our view the issues addressed in the Consultation Paper are very wide ranging and we feel that they touch on all the key areas. At the risk of repeating ourselves we do believe that the most important issue is meaningful access to justice. For most people who do not have the benefit of legal aid, indemnity insurance or some other form of legal expenses insurance, the risk of the cost of litigation and the risk of being found liable for not only their own legal expenses but also the judicial expenses of the opponent is such that many people feel that in practical terms they are denied access to justice.

It seems to us that very serious consideration should be given to the introduction of compulsory legal expenses insurance which would provide parties with equality of arms. There must be scope for meaningful research being 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.

We comment further on this issue in our answer to questions 2 and 9 of Chapter 3.

## CHAPTER 2 - ACCESS TO JUSTICE

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

In our view educating the public on our legal system is of fundamental importance in improving access to justice. The earlier basic education can be provided the more likely people will come to understand the basic workings of our legal system. In our view there would be merit in information being provided in schools on basic concepts of our constitution and the role of the courts. A basic/broad understanding of such matters would enable the public to have an understanding of the importance of an independent legal profession and court system in a free democratic society. Heightened awareness of the legal system and of the rights, duties and remedies available to legal persons is in our view the starting point for improving access to justice. If society as a whole has an appreciation of the critically important role carried out by an independent legal profession and judiciary in a free democratic society then the public are more likely to be prepared to support the allocation of necessary resources to provide meaningful access to justice for all.

There is no doubt that information technology has an important role to play in educating the public. Those who have access to the internet can learn a great deal about our court structure via, for example, the Scottish Courts website.

### 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 increasing dilution of an effective legal aid scheme for legal advice and assistance seems to us to be restricting access to justice for many people who have need for advice in what might be described as social welfare/consumer law. As will be appreciated there are many and varied disputes which can arise in these areas in the cities of Scotland. Law centres do a terrific job in seeking to represent clients requiring advice in these areas. Greater public funding of law centres is necessary in our view. Perhaps a combination of such funding and a specialist "third tier" court would significantly improve access to justice in these areas.

We would also refer to our comments in our answer to question 11 of Chapter 4.

### 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?

Our feeling is that it is desirable, and indeed feasible, to design such procedures for small claims, and in particular cases relating to social housing and consumer law. In such cases a specialist "third tier" court presided over by a specialist judge should be able to ensure that such cases are dealt with in an effective and just manner.

It should also of course be borne in mind that occasionally a low value matter may raise a novel point of law and court procedure should also always be designed with adequate flexibility to enable such cases to be remitted to a more formal procedure.

For low value disputes in the foregoing categories perhaps there would be scope for unqualified advisers, such as staff from Citizens Advice Bureau, to represent those litigants who feel incapable of representing themselves.

There is a consistent view from our membership that the nature of personal injury cases is such that even in low value cases, ie at summary cause level, representation by lawyers is essential given that such cases will always raise difficulties, either in relation to the merits or *quantum*, or occasionally in both these aspects.

**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?**

We would refer to our comments in our answers to questions 2 and 3 supra.

In the areas of social housing/consumer law it seems to us that there would be merit in allocating resources for the provision of guidance to litigants through information packs on how to go about pursuing/defending small claims. Streamlining/simplification of court documents is likely to be of considerable assistance in these cases.

We understand that advice and assistance is available to unrepresented litigants in Edinburgh Sheriff Court for low value cases and perhaps similar services could be extended to Glasgow.

As previously touched on we believe that a specialist third tier court would provide all round improvement in the efficient and fair disposal of small claims cases in the fields of social housing/consumer law.

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

We would again re-emphasise the need for meaningful access to justice for all the people of Scotland and that in order to secure equality of arms research should be carried out into the feasibility of introducing compulsory legal expenses cover. See also our previous comments on this issue and our answer to question 9 of this Chapter.

**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?**

This question does of course deal with the issue of proportionality and it also touches on the issue of the introduction of a specialist “third tier” court.

We would refer to our answers to questions 2, 3 and 4. A “third tier” court presided over by a specialist judge ought to be able to effectively handle the plethora of disputes which arise in social housing and consumer law.

In cases of low value personal injury perhaps these could be dealt with on a “fast track” basis with simplified pleadings and a single joint medical expert.

We note the reference in the Consultation Paper to the Republic of Ireland, and in particular the establishment of the Personal Injuries Assessment Board and the Private Residential Tenancies Board. During our consultation exercise we have not had one suggestion that would favour the introduction of such boards in Scotland. In a free democratic society we believe that all people should be able to seek access to justice via the courts. We have no direct experience of the operation of the Personal Injuries Assessment Board in Ireland. We are not aware of any demand for a similar model to be introduced in Scotland by any public body or consumer organisation. We do not believe there is any basis or benefit for the introduction of such a board in Scotland. Our general feeling is that such a board denies access to proper justice. There is some anecdotal evidence to the effect that the PIAB is not operating satisfactorily in that only a small proportion of applicants to the Board have been able to reach settlements within the rules and framework of the Board.

We are not aware of the full ramifications of the Private Residential Tenancies Board in the Republic of Ireland. This appears to have been set up in conjunction with a specialist code for handling landlord and tenant disputes in the private sector. Such disputes in Scotland could be handled within a specialist “third tier” court within the structure of the sheriff court.

### 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 the sums awarded by the court or settlement figures?**

In a case worth £10,000 (whether a personal injury action or a commercial dispute) and which runs to proof the combined legal costs inclusive of solicitor/client fees, VAT and outlays could easily exceed the value of the subject matter in dispute. The higher the value of the case then obviously legal expense becomes proportionately less.

In terms of recoveries the feedback which we have would tend to suggest that in personal injury cases a successful litigant might recover perhaps 70/75% of his total legal costs. In commercial cases around 60/65% of costs tend to be recovered.

In general terms it is more expensive to litigate in the Court of Session than in the sheriff court. This is essentially due to the employment of counsel in such cases. Our feedback is that while solicitor advocates may become involved in certain drafting of pleadings and procedural matters very few conduct proofs or procedure roll debates.

Many members of the Royal Faculty have anecdotal evidence that the cost of litigating in Scotland is very much less than in England and Wales. The introduction of conditional fee agreements in England and Wales in personal injury cases incorporating success fees being added to compensation has dramatically increased costs in that jurisdiction.

In summary, the cost of litigation in relatively low value cases up to say £10,000 is disproportionately high to the sum in dispute. This disproportionately high expense is compounded when such cases are litigated in the Court of Session.

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

It seems to us that this question in many ways goes to the heart of the issue of meaningful access to justice.

As already touched on it seems to us that for the vast majority of people litigation cost must be a massive deterrent to those who wish to pursue or defend rights in circumstances where they do not have the benefit of legal aid or insurance indemnity.

Many house buildings and contents insurance policies contain certain legal expenses cover and indemnity against public liability claims. Invariably in personal injury actions the defender will be insured to cover the risk of being found liable in damages and/or expenses. Employers liability and motor insurance are the classic examples here. If the pursuer in such an action does not have legal aid or the benefit of legal expenses insurance then he is at an unfair disadvantage. On the other hand where a pursuer has legal aid defenders, if successful in the litigation, are unlikely to have a meaningful entitlement to recovery of legal expenses given the court's discretion to modify the liability for expenses of an assisted person to nil. In either situation there is clearly not equality of arms.

Speculative fee charging agreements are of course an option to assist a potential litigant to gain access to the courts. While such an arrangement may avoid the pursuer in having to meet his own solicitor's fee in the event that he is unsuccessful in the litigation, if he does not have the benefit of an after the event legal expenses policy (the cost of which could be disproportionately high relative to the value of the case) then he is likely to have a personal liability to the successful opponent for judicial expenses.

In the absence of suitable insurance arrangements being in place, or an award of a legal aid certificate, the risk of being found liable for the opponent's judicial expenses is in our view a massive deterrent for the majority of the people of Scotland from pursuing/defending their rights in the courts.

A fair and practical system of compulsory legal expense insurance cover would go a long way to removing the deterrent which we have described. Clearly a great deal of thought would be required for the establishment of a suitable scheme of compulsory legal expenses insurance. A balance would need to be struck between fair and just access to the courts on the one hand and a vast increase in frivolous litigation on the other. There would need to be a clear demonstration of *probabilis causa* and perhaps there would need to be exceptions to funding cases involving the financial arrangements to apply in divorce or other similar arrangements where parties voluntarily choose to terminate their arrangements in circumstances where there are assets to meet the legal expenses involved. It seems to us that there would be merit in appropriate research being commissioned into the feasibility and viability of a compulsory legal expenses scheme.

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

Our general view is 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.

Certain views have been expressed from our membership to the effect that perhaps in a third tier court system it would be inappropriate for court fees to be charged. It is probably fair to say that there is a general acceptance in our membership that those who use the public court system should make some contribution to the cost of running the system.

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

In general terms yes.

Overall feedback is that the systems for recovery of judicial expenses in Scotland via the Court of Session and sheriff court prescribed tables is fair. The tables are transparent and an unsuccessful litigant ought to have some idea from these tables as to the likely cost to him in the event that he is unsuccessful.

We think the distinction between solicitor/client and party/party expenses is fair and reasonable. An unsuccessful litigant should not in our view require to be liable for the successful litigant's full legal fees to his solicitor. Such fees could be charged at a much higher rate than is allowable in the party/party tables. The court does of course have a discretion to award solicitor/client expenses on a third party paying basis to reflect a party's conduct in the running of the case.

We have had some feedback that recovery of party/party expenses in commercial cases is less than in personal injury actions. This may be due to higher hourly charge-out rates for solicitor/client fees. We do not believe that recovery of expenses on a full indemnity basis is fair for the reasons outlined. Indeed, it seems to us that the so called "indemnity principle" applicable in England and Wales has led to the introduction of Conditional Fee Agreements (CFA's) in personal injury cases which in turn has led to immense difficulties in that jurisdiction with a great deal of judicial time being taken up on costs issues. CFA's were of course introduced when legal aid was withdrawn for personal injury cases in England and Wales (except those relating to medical negligence). We would oppose the withdrawal of legal aid for personal injury cases in Scotland.

**5. Are the current arrangements for the taxation of judicial Accounts of Expenses satisfactory?**

In general terms our feeling is that arrangements for taxation of judicial accounts in sheriff court litigation are satisfactory.

We would question 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. An auditor who has the task of applying a percentage uplift is open to the criticism that he is not transparently independent in that by receiving a percentage of part of the overall taxed fee he has a vested interest and thereby a conflict of interest.

The audit process in the Court of Session is expensive.

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?**

This question does of course raise the issue of equality of arms. If an assisted person raises an 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?**

Probably the most difficult cases to obtain funding for litigation are those where the prospects for success are less than good. In the field of personal injury a solicitor is unlikely to take a case on a speculative fee arrangement where the prospects are less than 50%. Any legal expenses insurance policy is unlikely to provide funding in such a situation. Where prospects are less than 50% it is probably not unreasonable that such cases should not proceed. In our view cases which do not have reasonable prospects for success should not take up the time of the courts.

**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 arrangements 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 solicitors' 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 have a greater role to play in the funding of litigation in Scotland?**

Undoubtedly. In our view 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. After the event (ATE) cover can be very expensive relative to the value of the subject matter.

Compulsory before the event (BTE) 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 (BTE) 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 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 expenses can be paid. Perhaps compulsory legal expenses insurance ought only to be required for those in full time employment. Those who would qualify for legal aid without a contribution might be exempt from paying. There would also be a requirement for 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?**

The feedback which we have received on this is to the effect that the impact of the ability to recover ATE insurance premiums would be a very negative one. In Scotland speculative fee charging agreements are entered into between a solicitor and his client, with any additional fee being charged to the client (and therefore deducted from any compensation paid/awarded to the client). The same principle ought to be applied to ATE premiums. Reference is made to our comments in answer 4 on the problems associated with CFA’s in England and Wales.

A system of compulsory “BTE” insurance is worthy of research. The principle would be that contributions to the common fund would be available to all who met the necessary criteria. There would be no need to recover compulsory premiums.

## 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?

Yes.

In our view this is one of the major issues in the whole review process. As Lord Gill has emphasised 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 of the Supreme Courts, and (b) some sheriffs be designated to deal with civil business?

It seems to us that this question is inextricably linked with the issue of the privative jurisdiction of the sheriff court. If this limit is substantially increased then the need for designated civil judges in the Supreme Courts would probably be reduced. Having said that we can see merit in certain senators being designated for particular specialist cases, eg Exchequer, Admiralty and Commercial.

Some members of the Royal Faculty consider that only a modest increase in the privative jurisdiction of the sheriff court is appropriate. Other members feel that a very significant increase in the privative level of the sheriff court should be made. Some feel at least £100,000, others feel it should be significantly higher, and indeed up to £250,000. The main point is that if a substantial volume of cases are removed from the Court of Session (particularly personal injury cases) then the need for judges in the Court of Session to deal exclusively with civil business should be reduced.

From informal discussions with our membership and colleagues in the Glasgow Bar Association it would appear that even if the privative jurisdiction of the sheriff court was increased along the foregoing lines, given the volume of criminal business, particularly in large sheriff courts such as Glasgow, it is doubtful whether the present structure is such that it would be practically possible to have sheriffs exclusively designated to deal with civil business.

There is strong support within the membership of the Royal Faculty of Procurators in Glasgow that at sheriff court level there should be a split between civil and criminal work. This issue is further addressed in our answer to question 3.

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

There is a strong consistent body of opinion within the Royal Faculty that sheriff courts be separated into civil and criminal divisions. There are some isolated views to the contrary but the general thrust is most certainly in favour of a split between civil and criminal work.

The main general advantage of such a split is that it is perceived that the distinct divisions would be capable of disposing of their respective business more effectively and expeditiously than under the present regime. We have already alluded to the many delays and serious

disruptions and general wastefulness caused by the need to give priority to criminal business over civil business. Such delays and disruptions would be greatly reduced, and indeed could well be completely removed, by the introduction of separate criminal and civil divisions at sheriff court level.

While it may be more difficult to provide separate accommodation for criminal and civil business in smaller courts our overall feeling is that there is probably no need to have 49 sheriff courts in Scotland which deal with both civil and criminal business. It seems to us that the concept of regional civil justice centres is sound. In our view it ought to be possible for such centres to be accommodated in the main cities, say Glasgow, Edinburgh, Dundee, Aberdeen and Inverness. The precise locations ought to be determined following an assessment of the volume and type of civil business.

It is contended that there is a need to balance local justice with expediency. It is felt that criminal courts ought to be accessible at local level. This does not necessarily have to be the case for the bulk of civil cases. Such cases ought to be handled at regional level. The breadth of civil law is now so wide that practitioners have had to specialise, eg in personal injury, commercial law, family law etc. In the same way sheriffs ought to specialise. The number of specialists ought to be determined by the volume and type of work.

It is accepted that in certain civil cases, eg child welfare, that local access to justice would be appropriate to avoid lengthy travelling arrangements. In such cases it may be appropriate to have certain floating family law sheriffs who could attend a suitably located "local" sheriff court to avoid undue travel by parents and children to the regional justice centre. It is of course the case that under existing arrangements many parts of the country do not have readily accessible sheriff courts eg some of the islands. No matter where courts are located they will not be convenient for all. It is contended that location should be determined by convenience for the majority who are likely to use the courts. Research on cases by type and volume ought to demonstrate which courts are most conveniently located.

A possible disadvantage of a split between civil and criminal divisions is that this may discourage practitioners from seeking judicial office. Of course the same reasoning could be applied in reverse, ie the lack of opportunity to focus on a particular specialist area could well deter excellent specialist candidates from applying to become sheriffs. See also response to question 4.

**4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of cases and in which courts?**

We firmly believe that a much greater degree of specialisation is essential within civil sheriff courts in Scotland. Indeed, many practitioners feel that the case for specialisation in these courts is overwhelming. There are very few practitioners who have participated in our consultation process who do not support specialisation. In the same way that practitioners have had to specialise we believe it is inevitable that for the efficient disposal of justice sheriffs must also specialise.

In broad terms the general consensus is that specialisation should be in the areas of reparation (especially personal injury), commercial (contractual disputes, insolvency, intellectual property) and family law.

In the sheriff court there is general support for the introduction of a "third tier" court presided over by suitable specialist judges who would focus on social housing law, consumer law, welfare law.

So far as the Court of Session is concerned there is a strong consistent view that the focus in that court should be on appeals, major public law issues and also major cases of complexity/value across the whole spectrum of private law. Furthermore, there is strong support for the Court of Session being relieved from having to deal with relatively low value

cases, particularly in the field of personal injury. It is submitted that the primary function of our Supreme Court in Scotland should be to act as an appellate body and at first instance to deal with major cases of complexity/novelty with exclusive jurisdiction in low volume specialist areas and matters of public importance. We would refer the Review to our specific suggestions in our answer to question 6 of this chapter.

There is a strong perception that much time is taken up in the Court of Session with cases that could more appropriately be dealt within specialist sheriff courts.

Furthermore, it is acknowledged by many of our members that there should be power to remit cases from the sheriff court to the Court of Session and vice versa on grounds of complexity, novelty etc.

If a system of specialist criminal courts is introduced along with the removal of relatively low value cases from the Court of Session there is perhaps a lesser need for senators (as distinct from sheriffs) to specialise in civil cases. We would however envisage, as with the present structure, that certain judges in the Court of Session would be tasked by the Lord President to handle certain types of cases, eg Admiralty actions, Exchequer causes.

**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?**

From responses and informal discussions the main factors are as follows:-

- (a) 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.

This leads to many cases of relatively low value, and which are not unduly complex, being raised in the Court of Session.

- (b) Value and/or complexity is a major factor. Generally speaking solicitors will tend to raise such cases in the Court of Session. In a new structure of specialist sheriff courts we suspect that after a suitable transitional period many cases currently raised in the Court of Session would be capable of being adequately dealt with at specialist sheriff court level.

- (c) In personal injury cases the entitlement to a jury trial in the Court of Session is increasingly a major factor. There is a perception that juries award higher damages than judges and of course juries are no longer competent in the sheriff court. There are contrasting views on whether civil juries ought to be retained. (See detailed response to question 17 of Chapter 6).

- (d) As is touched on in the Consultation Paper certain firms of solicitors appear to have their systems geared to litigating only in the Court of Session.

We are of course very conscious of the issue of proportionality highlighted in the remit to the Review. There appears to be no doubt that litigating in the Court of Session is more expensive than in the sheriff court. If a lack of confidence in certain sheriff courts is indeed a major factor in deciding to choose the Court of Session then the introduction of specialist sheriff courts ought to facilitate a more efficient disposal of cases at sheriff court level while at the same time ensuring that such disposals are fair and just. The introduction of specialist sheriff courts in parallel with a suitable increase in the privative jurisdiction level of the sheriff court would, and most certainly should, result in reduced cost in many cases.

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

From feedback and discussions we would suggest the following:-

## (a) 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

Admiralty Actions

Defamation

Actions of Reduction

Petitions dealing with Company Law where the paid up capital exceeds say £250,000

## (b) Sheriff Court

Actions where the sum sued for does not exceed the privative level of the sheriff court.

The level at which the privative jurisdiction of the sheriff court should be set is in our view one of the most important issues raised in the Consultation Paper. There are differing views on this and we would refer to our detailed response to question 9 of this Chapter.

In general terms our view is that the Court of Session and the sheriff court 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).

It does seem to us that the issues of specialisation and the privative jurisdiction level of the sheriff court are inextricably linked. It seems to us that there would be no point in having one without the other. For example, if the privative level in the sheriff court was to be increased very substantially without specialisation that would compound the existing problems of non-specialist sheriffs dealing with higher value cases. The essential benefit of specialisation at sheriff court level would be to relieve the Court of Session of a significant volume of cases but this may not be achieved unless the privative level is raised substantially.

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

We do not detect a strong consistent view for a single civil court in Scotland. Our overall view is that a lower and Supreme Court structure provides suitable balance and flexibility incorporating choice at concurrent jurisdiction level.

**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?**

We would refer to the content of our answers 4, 5 and 6.

We believe that as a Supreme Court in addition to determining appeals the Court of Session ought to deal in cases across the whole spectrum of public and private law with the focus being on cases of major public importance, complexity and value. In this way the Court of Session ought to be able to fully scrutinise and develop the law for the benefit of the lower courts.

For the Court of Session to function in this way is entirely consistent with the issue of proportionality highlighted in the remit to the Review.

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

This is of course a key question. As highlighted in our answer 6 it seems to us that the issue of the sheriff courts' privative jurisdiction is inextricably linked to the question of specialisation.

From discussions which we have had a minority of practitioners favour a modest increase in the privative level to say £15,000. It is fair to say that these views have tended to be expressed by those members who focus on pursuer personal injury work. Those of our members who focus on acting for insurers, ie invariably representing defenders in personal injury cases, favour a much higher privative level on grounds of reduced expense. Some members take the view that the level should be as high as £250,000. Others consider it should be around £100,000 with it being increased over a transitional period as sheriffs become specialists.

Anecdotal and other evidence does suggest that many straightforward personal injury cases of modest value are raised in the Court of Session with the consequential increase in cost.

The Royal Faculty believes in a strong and independent Faculty of Advocates. In the event of the privative jurisdiction of the sheriff court being substantially increased there will inevitably be cases in the sheriff court which entirely justify the use of counsel. Equally there will be many cases where counsel is not justified and it is in respect of these cases where the expense of litigation can be significantly reduced.

It is right and proper that for cases involving catastrophic injuries or high value commercial contractual disputes full legal teams of solicitor/solicitor advocate/senior and junior counsel are deployed. In cases involving literally millions of pounds such use of counsel is entirely justified and the cost is of course perfectly proportionate to the value of the case.

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

We have noted the restriction on a sheriff principal to transfer cases within his own sheriffdom or to another sheriffdom in order to try to achieve the efficient disposal of business.

Given that we firmly believe that the office of sheriff principal should be retained (see our answers to questions 17, 20 and 21) we would be in favour of greater power being given to a sheriff principal to enable him to make greater use of resources where he considers that to do so will enable the efficient disposal of cases to be achieved while retaining fairness to parties.

In general terms it seems to us that the power of the Court of Session to remit cases to the sheriff court is adequate. In the same way our inclination is that the power of a sheriff to remit a case to the Court of Session on grounds of importance or difficulty is adequate. Perhaps a sheriff ought to be entitled to remit a case to the Court of Session even if the value does not exceed the privative jurisdiction of the sheriff court. There may be a novel point of law involved with wide ramifications (a *Donohue v. Stevenson* situation is perhaps a good example).

**11. Given the range in value and complexity of civil business in the sheriff court should there be a tier of civil cases below the level of the sheriff court?**

It seems to us that this question is a variation on the theme of specialisation. As previously highlighted in our view there is a solid argument for the creation of a "third tier" court for specialising in housing/social welfare/consumer law. This court could be part of the sheriff court structure and be overseen by the sheriff principal. In terms of value the court could deal with cases in the foregoing areas of law at up to small claim level, ie £3,000.

A third tier specialist court would enable:-

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

A view has been expressed that there may be scope for this type of work to be transferred to a specialist tribunal outwith the sheriff court structure.

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

We would refer to our 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?**

In our view the fundamental difficulty is 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 on the mainland 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 perhaps be located within say a radius of 30 miles of the major cities.

From our consultations we believe there is strong support for the concept of regional civil justice centres so as to enable civil business to be separated from the ever increasing volume of criminal work. Specialist sheriff courts (or centres) ought to be located within regions (probably as per the existing sheriffdoms). The actual location of such specialist courts ought to be determined after careful scrutiny of volumes, types of cases and available accommodation. It is appreciated that resources may not, and indeed are unlikely to, be available for the construction of new specialist courts. However, a model incorporating separate criminal/civil courts and specialist civil courts is likely to lead to certain redundant buildings. These could be sold and some of the proceeds could perhaps be used to supplement existing accommodation with leasing of appropriate premises for specialist courts.

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?**

From discussions on responses we are not aware of major difficulties here. It would appear to be sensible for the court in which the action is raised to issue the extract decree.

Certain suggestions have been made for centralising warranting of court actions. We have had some feedback to the effect that certain anomalies could arise in such an arrangement. 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, for example Glasgow? Some comments have been made to the effect that there could be scope for confusion with reponing notes in that it may be unclear as to whether the reponing note should be sent to the warranting office or the actual court. Suggestions have been put forward that unnecessary jurisdictional issues could arise under the Civil Jurisdiction & Judgements Act 1982 in the event of a system of central warranting being introduced.

In general terms we remain to be 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?**

We have had limited feedback on this. In general terms there is not a hard core of evidence of dissatisfaction. In the context of judicial review one practitioner does feel that there should be a “proper” timescale for the lodging of answers and productions with a first hearing taking place say within 14 days after answers are lodged, and that it may be necessary to make provision for a continuation of the first hearing.

Some practitioners feel that the Court of Session should be able to remit cases involving the review of administrative decisions of small clubs, eg golf clubs, tennis clubs etc., to the sheriff court. The opposite view is that given the lack of law governing clubs/voluntary associations such matters should remain within the province of the Court of Session.

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

There is a broad feeling that commissary business ought to be capable of being handled administratively. On the other hand views have been expressed that there are legal issues (essentially involving property rights) arising with petitions for the appointment of executors dative and that these ought properly to remain judicial matters in the same way as personal and corporate insolvency petitions.

Certain views have been expressed to the effect that certain procedures are not judicial in nature, eg consideration of inventories and applications for confirmation. Some views have been expressed that such procedures could be handled by Government departments outwith the court system, eg 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?**

There is a certain logic for having an all Scotland sheriff court. This would on the face of it provide opportunities for economies of scale, administrative savings and uniformity in the operation of sheriff clerk procedures.

Such a model may also be able to harness information technology more effectively (at least in theory) and control the use of overall resources in a better fashion than at present. At first glance this approach seems attractive since it appears to answer that part of the remit to the Review which seeks to identify changes which make the best use of resources.

However we have concerns with “an all Scotland” sheriff court model. Although Scotland is a relatively small country with a population of around 5 million it is rich and varied in its geography, its people, its cultures and its economic activities. As already highlighted elsewhere in this response we believe that at the core of the Review’s remit is the issue of access to justice. It seems to us that the overall boundaries of the six sheriffdoms in Scotland probably reflect the diversity of geography and economic activity to which we have referred. Sheriffs principal are able to gain an understanding of peculiar needs for the efficient access to justice in these regions. It is suggested that total centralisation of procedures and resources would dilute the quality of access to justice, at least in the eyes of the local people concerned.

It is of course accepted that there is only one Court of Session which in theory is accessible to all the people of Scotland and arguably Court of Session judges do not have the “local knowledge” of a region of Scotland available to a sheriff principal. For the reasons already highlighted in our responses to answers 4 and 6 we believe that the Court of Session should essentially be an appeal court with its “first instance” jurisdiction being restricted to the 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 court should always be available to cover exceptional cases.

The Court of Session’s function ought to be to decide major cases in the fields of public law and private law and thereby develop the law of Scotland for the benefit and guidance of sheriff courts.

Regional based sheriff court arrangements along the lines of existing sheriffdoms also provide fair and meaningful appeal arrangements via the procedure for appeals to the sheriff principal. An “all of Scotland” sheriff court system could no doubt provide sheriff court appeal judges along the lines of “centralised sheriffs principal”. We believe that this would dilute the concept of local access to justice.

On balance therefore we 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?**

Yes. Given the immediately preceding answer it may be thought that our view is that it is appropriate for a sheriff’s commission to be restricted to a region or sheriffdom. However, as we understand it the position currently is that floating sheriffs (and indeed part time sheriffs) can sit in any sheriff court in Scotland. Conferring sheriffs with an “all Scotland” jurisdiction ought to provide greater flexibility when suitable circumstances arise than a restricted commission system.

It has been suggested that an “all Scotland” commission system might deter suitable candidates from seeking judicial appointment, given the prospect of regular travel and overnight stays. We are not persuaded that an “all Scotland” commission would be a major deterrent for suitable candidates.

**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 of first instance (which we would favour as per our previous answers particularly answer 6) then the question of remitting from the Court of Session to the sheriff court will presumably only arise in concurrent jurisdiction cases.

If the privative jurisdiction of the sheriff court is raised to say £100,000, or indeed £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 becomes clear that the sum sued for is grossly excessive and that a realistic value of the case is below £250,000 (or whatever the level of the privative jurisdiction of the sheriff court might be) then the Court of Session should be entitled to remit to the sheriff court (no doubt with a suitable finding on expenses!)

Another example might be in a judicial review involving a golf club/tennis club dispute where the Court of Session considers that the issues are capable of determination by the sheriff court.

The main factors are essentially complexity and value.

In relation to a remit by the sheriff court to the Court of Session in addition to complexity and value the novelty of the point of law involved should also be a factor. A case within the privative jurisdiction of the sheriff court could be of relatively low value but raise a new point of law, eg a *Donohue v. Stevenson* situation.

In such a situation the sheriff ought to be empowered either on the motion of a party or *ex proprio motu* to seek leave of the Court of Session to have the issue determined by that court. The Court of Session ought to give continuing guidance on the factors to be taken into account.

In general terms it is considered that novelty, complexity and value are the main factors here.

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

Having considered this aspect our feeling is that in seeking to achieve the balance between fairness and expediency there should be some restriction in the present appeals procedures.

We consider that in a model of regions or sheriffdoms a party litigating in the sheriff court ought to be able to choose to appeal either to the sheriff principal or directly to the Inner House of the Court of Session. In deciding which route to go down the party will no doubt be advised on the cost implications.

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. Where we believe there is scope for restricting appeals to the Court of Session is in circumstance where the appellant is unsuccessful before the sheriff principal. He will have had two judges find against him. In that scenario we do not believe that he should have an automatic right of appeal to the Court of Session. He 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 in our view the unsuccessful party ought to have an automatic right to appeal to the Court of Session. This is because there has been a finding by judge in favour of each party.

In relation to the House of Lords our feeling is that where there is a unanimous finding by the Inner House leave of that House ought to be a pre-requisite for appealing to the House of Lords. Where there is a majority decision then we feel that fairness dictates that there should be an automatic right of appeal to the House of Lords or the new United Kingdom 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?**

It follows from our answers to questions 17 and 20 that we 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 we have not been able to carry out a detailed review of the plethora of statutory appeals procedures currently available. Some of these provide for appeal directly to the Court of Session and some to the sheriff court.

It seems to us that in general terms where the appeal relates to a “local” public issue eg. a liquor licensing matter 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 to be in the first instance to the sheriff and thereafter to the sheriff principal.

If the initial appeal is from a decision of the sheriff then 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 our answer 20.

Where the statutory appeal is directly “to the Court of Session” it seems to us that there would be merit in reviewing the tradition of such appeals going directly to the Inner House.

Where the appeal relates to a wider public issue eg. Inland Revenue Commissioners it seems to us that the appeal should be directly to the Court of Session (whether the Inner or Outer House).

We think there would be merit in the Scottish Law Commission conducting an exhaustive review of statutory appeals with a view to establishing a logical and consistent hierarchial structure for disposing of such appeals.

**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?**

In so far as the first and second parts of this question are concerned we would respectfully refer the Review to our responses to questions 20, 21 and 22.

In relation to the third issue (exceptional cases) it is difficult to precisely define what these might be. Like the proverbial elephant, hard to describe but you know it when you see it! Phrases such as “compelling reason” are to a large extent meaningless in isolation. The inherent power of the Court of Session under its *nobile officium* is available, the exercise of which can be sought by a party in circumstances where no other remedy prevails.

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

One 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 one 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 also adequately provide temporary cover at sheriff court level.

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 works well and cases can be 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 focussed on family law will have difficulty in dealing with a complex personal injury case and *vice versa*.

The problem appears to be exacerbated with part time/temporary sheriffs handling cases in the areas of social housing and consumer law. There is anecdotal evidence of sheriffs (perhaps understandably due to lack of knowledge) allowing such 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 or tribunal to handle such cases. Whatever the level of such a court it is essential that it is presided over by a judge who has reasonable knowledge of the relevant law involved.

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.

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

### 1. **Should the rules of 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?**

In our view 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.

In general terms our view is 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. Furthermore, it is right and proper that cases should be determined both at first instance and following any appeal within a reasonable period.

### 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?**

As stated in our first answer to Chapter 1 in our view court proceedings ought to be a last rather than a first resort for the resolution of disputes. In order to avoid unnecessary litigation in our view the court should encourage the use of mediation or other forms of alternative dispute resolution in respect of those cases which are appropriate for such resolution. 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.

Having considered matters we 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.

In our view mediation/ADR 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 our comments in response to question 2. If the court rules require parties to consider mediation/ADR this can be highlighted by the court where the court considers it appropriate to do so at an early stage in procedure.

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

It seems to us that the starting point is to look at those types of dispute which perhaps lend themselves to mediation/ADR. Family law would seem to be the main area highlighted by our members.

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 which can achieve this quickly thereby enabling the parties to resume their business relationship. There

is a general body of opinion to the effect that mediation/ADR would have benefits to the parties in that situation.

There is a clear and consistent view from our members handling personal injury cases (whether for the pursuer or defender) that such cases are not appropriate for mediation. There is some anecdotal evidence to the effect that where mediation has been resorted to in such cases it has proved more expensive than court resolution. 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 increasingly achieved 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.

Where disputes involve questions of status or declaratory determinations such disputes ought to 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 open to the public. A party chooses to pursue his remedy via the public judicial system. Where parties agree to submit their dispute to mediation it seems to us 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 our feeling is that funding arrangements for mediation should be no different than the arrangements which currently apply in litigation. We would refer to our various comments on the need for equality of arms and better access to legal expenses insurance cover, perhaps through the introduction of compulsory BTE cover.

**6. In what respect 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 we would again highlight potential problems which might arise (see our comments in response to question 14 in Chapter 4).

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

It seems to us 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 us 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 us 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 we would suggest that in the sheriff court since the early 1990’s the court has essentially been bound to take such an approach through being required to ensure the expeditious progress of the cause.

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 us 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 to have judicial intervention to check that statements of value are produced in compliance with 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 we would be inclined towards the incorporation of both case management and case flow management in such cases. Judicial intervention via case management could either be at the request of a party or at the discretion of the judge.

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 applied in the Court of Session.

## CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS

### 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 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 us that greater use of pre action protocols can only be advantageous. 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 their use voluntary.

The key to the effective use of pre action protocols lies in the terms of the protocol. We would refer to our 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?

We think that this issue is particularly relevant to party litigants.

Such 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.

Apart from cases involving party litigants we have not had any feedback suggesting that the present rules relating to "gate-keeping" are unsatisfactory.

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

As highlighted in the Consultation Paper we currently have four major sets of rules at sheriff court level, together with a separate set of (extremely detailed and varied) rules for the Court of Session. It seems to us that the plethora of rules do not assist access to justice. In our view there ought to be uniformity of procedure in respect of both petitions and ordinary actions in both the Court of Session and the sheriff court. Having different rules for the sheriff court and the Court of Session causes unnecessary work for practitioners who practice in both courts. We are not at all clear for the justification for having separate rules for what are essentially similar types of actions in the Court of Session and sheriff court.

One rules council covering both courts would save time and precious resources. We cannot understand why the procedural rules governing, for example, a personal injury action ought to be different simply because the case is raised in one court rather than another. Scotland is a relatively small jurisdiction. Unnecessary complication of court rules cannot be, in our view, in the public interest.

**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 our response to question 5 that in our view there ought to be a single set of rules for both the Court of Session and the sheriff court. It therefore follows that our view is that there ought to be a single rules council covering both courts.

**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?**

In our view in respect of all ordinary actions in both the Court of Session and sheriff court the same initiating document ought to be used for the same type of action. In petition procedure the same initiating document ought to apply. In our view there must be relevant averments in the document backed up by basic legal propositions justifying the remedy sought. It seems to us that 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 "sifting" procedures to identify the documents which contain insufficient information.

In the sheriff court 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?**

We have had differing views on this matter.

On the one hand there is a view that if our system of pleading is heavily watered down we may run the risk of "throwing the baby out with the bath water".

It is probably fair to say that provided pleadings contain basic/relevant allegations of fact, with correctly stated legal propositions and pleas-in-law, they need not be laborious. On the other hand if the pleadings are unduly terse and presented in an unconnected manner it may be extremely difficult for the key issues in the case to be identified. Pleadings should of course focus the key issues and at the same time provide fair notice.

Feedback which we have received is generally to the effect that Chapter 43 abbreviated pleadings in the Court of Session for personal injury cases have worked reasonably well. On the other hand some practitioners complain that records can appear to be somewhat disjointed by the absence of pleas-in-law in the defences. Furthermore, some practitioners provide examples of inadequate pleading under Chapter 43 on medical causation to the extent that no notice is provided of the causal mechanism by which the pursuer came to suffer the injuries complained of.

It is probably fair to say that having too elaborate a system of written pleadings can lead to delay through agents taking academic points on relevancy and specification. It is probably fair to say that in general terms specialist practitioners dealing with Chapter 43 abbreviated pleadings fully appreciate the factual and legal issues in dispute. However, "purist" pleaders would prefer to have the format of defences reflecting the various factual averments, averments of duties and pleas-in-law.

Subject to the foregoing there is a general view in favour of Chapter 43 procedure being introduced into the sheriff court.

Reverting to pleading basics, 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.

In our view there is no good reason why adequate abbreviated pleadings could not be extended to cover all actions for payment of money.

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

We are not aware of any concerns from our membership on the current arrangements for summary disposal. In particular we have not received any representation to the effect that summary disposal ought to be available to a defender.

We are generally content with the current arrangements.

**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 we would accept that consideration ought to be given to the creation of "junior judges" at both Court of Session and sheriff court level.

We would emphasise that we are not aware of undue judicial time being taken up with checking and signing the relative interlocutors. In reality 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 by the Lord Ordinary or sheriff.

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

Generally yes.

Perhaps 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?**

The general feedback which we have had is that there is broad agreement that it would not be reflective of a just system for hearings, whether proofs or debates, to be subjectively limited by time. On the other hand to enable the court to programme cases perhaps a presumed number of days for different types of hearing should be the norm, eg half a day for a debate and 3 days for a proof, with parties being encouraged at a suitable juncture, eg at a pre trial meeting, to agree as much evidence as possible to try to ensure that it is only evidence on matters which are in dispute which is taken up at the proof.

We would be concerned for over time-tabling by the court. "Broken back" hearings are never satisfactory. There has to be a greater appreciation by all sides involved in the administration of justice that court time is precious and valuable. However, no matter how responsible and thoughtful lawyers are it is very often impossible to judge how long a proof will take and what issues may arise during the course of examination/cross examination/re-examination.

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

From discussions within our membership, and indeed beyond, there is a strong body of opinion in favour of greater use of written submissions. These tend to provide greater focus of the issues and are also helpful to the court when deliberating on the respective merits of the arguments/counter arguments.

The written submission should however be supplemented by oral submission focusing on the major lines of argument.

The extent of written and oral submissions is likely to vary from case to case which gives us greater capacity for handling pleadings.

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

In our 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 under the current rules.

In our view there has to be early focusing of the issues in dispute and complete candidness in disclosing evidence which is relied upon as early as possible. Such disclosure is likely to narrow the issues and thereby reduce expense and encourage settlement.

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

In keeping with the desire to avoid expense in litigation which is disproportionate to the value of the case we feel that there would be merit in adopting the idea of the instruction of an independent single joint expert in relatively low value cases whose overriding duty is to the

court. There would need to be a mechanism in place for appointing such an expert in the absence of agreement of the parties.

Our feeling is that the most likely cases for the instruction of such an expert would be those involving personal injury where the value does not exceed say £10,000.

In respect of cases which are worth in excess of £10,000 in our view it is entirely appropriate for parties to determine what expert evidence they wish to lead in support of their claims. There may be merit in a rule being introduced to the effect that the presumption is that not more than one expert in a particular discipline can be led. In the event that a party considers that an additional expert in that discipline is required then leave of the court should be necessary.

**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 equivalent to the defenders' tactical weapon of a tender. Perhaps the most appropriate approach 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. Kvaerner Govan Ltd.* 1999 SLT 638.

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

There are differing views on this issue. It is probably fair to say that those practitioners who predominantly act for pursuers in personal injury actions are in favour of retention of civil juries. The general feeling is that awards by juries tend to be higher than awards by judges. We are not clear as to whether any serious research has been carried out to ascertain whether this perception is accurate.

From a review of reported decisions it appears to be reasonably clear that awards by juries are not at all predictable or consistent. There is a strong view within the Royal Faculty membership that predictability and consistency ought to be essential ingredients of a modern civilised legal system. Lawyers ought to be able, regardless of whether they are acting for pursuers or defenders, to provide reasonably clear and consistent advice as to the value of a claim for damages for personal injury. Awards by judges tend to provide reasonable consistency such as to enable practitioners to provide meaningful advice to clients as to the value of a claim. Previous decisions by judges provide a fairly narrow range of possibilities. Clients ought to be aware of what a personal injury claim is likely to be worth. From the perspective of insurers it is unhelpful in planning and setting reserves to have uncertainty as to the likely award.

From the defenders' perspective it can be extremely difficult to judge the level at which a tender ought to be pitched in cases where issues have been allowed. Presumably a similar argument could be advanced in the event of pursuers' offers being introduced.

Some practitioners argue that judges may be detached from ordinary members of the public in determining the factual issue as to what is a reasonable value for *solatium*. They feel that matters should be left to the jury, ie 12 men and women (who as we understand it are selected from those living in the Edinburgh area). Given that Judicial Studies Board Guidelines are available at regular intervals perhaps the argument that judges are out of touch has now receded.

We would respectfully draw the Board's attention to Lord Abernethy's dissenting judgement in *Girvan v. Inverness Farmers Dairy (No. 2)* reported in 1996 SLT pages 638 to 642.

It is perhaps somewhat anomalous that civil jury trials are only competent in the Court of Session. If a model was adopted along the lines of specialist sheriff courts then the question would arise as to whether juries should be re-introduced into the sheriff court. It would seem anomalous if juries were only deemed appropriate for very high value cases in the Court of Session.

If civil juries are to be retained (and we do believe there are compelling arguments that they should be abolished) then it seems to us that changes are necessary on grounds of expediency in relation to appeals procedure. In the *Girvan* case referred to theoretically appeal from the latest jury's award could have been sought indefinitely. If juries are to be retained perhaps the Inner House should be entitled to take a view on the award to be made rather than remitting back for an entirely fresh jury in the event that the award appealed against is deemed to be excessive.

One other possibility would be, as suggested by Lord Abernethy in *Girvan (No. 2)*, for the judge presiding over the jury trial to give some direction to the jury on an appropriate range of figures within which the jury could decide on its award. This of course begs the fundamental question as to whether, in these circumstances, a jury is necessary.

As Lord Hope indicated in the *Girvan* case when it was appealed to the House of Lords (*Girvan v. Inverness Farmers Dairy (No. 2) (HL) 1998 SLT at page 34*) perhaps the Scottish Law Commission should review the whole question of civil jury trials in the Court of Session and make recommendations after a suitable process of consultation.

As indicated herein we believe there are strong reasons for the assessment of damages being left to judges with a view to achieving consistency and predictability.

#### **18. Should written judgments be required in all cases?**

In our view, and for all the reasons set out in paragraph 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?**

In our view the powers presently available to the courts through making awards of expenses are considerable. We are 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 a case which seeks to make very substantial changes to the basis of the case, then the most effective penalty available to the court is the refusal of the minute with a suitable award of expenses in favour of the opponent.

From discussions with colleagues there appears to be 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.

In summary, we believe that the powers currently available to the courts are adequate and it is a matter for the discretion of the court to decide how best to use these powers in the interests of justice in the prevailing facts and circumstances.

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

As stated in our response to question 4 of this Chapter the requirements 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 way we would suggest that the sheriff court should be given powers to filter out incompetent appeals to the Sheriff Principal (from anecdotal evidence which we have there appears to be a need for the court not to be over tolerant of party litigants who continually deviate from relevant issues during 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 the presiding judge in the action to refer the matter to the Lord Advocate.

We would also suggest that the legislation be amended to require a list of vexatious litigants to be available to the public.

**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?**

It seems to us that the purpose of legal representation is to ensure a reasonable standard of legal knowledge, articulation, and integrity so as to assist the court in the efficient administration of justice. We do not believe that this process would be assisted by allowing carte blanche representation of parties by persons unqualified in the law.

We would accept that in exceptional circumstances justice may demand representation by a non-lawyer. We would also accept that perhaps in low value cases, ie small claims, where the court has perhaps greater latitude with procedure that it may be appropriate to allow a non-qualified person, for example from a Citizens Advice Bureau, to present arguments on behalf of a party. This however should be the exception rather than the rule.

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

On balance, yes.

We 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.

We would not be in favour of contingency fees for multi-party action procedure.

It seems to us that it would not be unreasonable for legal aid to be available for multi-party actions.

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

Responses which we have received in relation to this issue are varied. Some indicate a general satisfaction with the basic rule that everything should be referred to the Court of Session to exercise its supervisory jurisdiction. Others feel that the Court of Session should not become involved in cases which do not have major public interest, eg a private golf club or tennis club etc. *Per contra* there are views to the effect that since the law governing clubs

and associations is not well developed this is an area in which the Court of Session should have exclusive jurisdiction.

Those practitioners with some experience of judicial procedure in the Court of Session feel that there ought to be a proper timescale for the lodging of answers and productions with a first hearing being fixed within a reasonable period following the lodging of answers. What is reasonable will obviously depend on facts and circumstances. One suggestion is that there ought to be a period of 8 weeks allowed after the lodging of answers to allow parties to properly prepare their arguments.

There is also a view that provision should be made for the lodging of notes of argument along the lines of procedure roll debates.

Given the focus of the remit on proportionality there does seem to be a powerful case for applications for judicial review of decisions of private clubs being determined at sheriff court level.