

**Response to**  
**Scottish Civil Courts Review**  
**Consultation Paper**

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## **Submission 1**

(Chapter 1, Question 1; Chapter 5, question 2)

(a) The civil justice system should of course encourage resolution of disputes at an early stage.

(b) It should however be recognised that by the time a dispute reaches the civil justice system at least one of the parties will have decided that the dispute is not capable of being resolved without resort to the courts. There is a risk that if the courts concern themselves unduly with deterring parties from resorting to litigation, when at least one of them has decided that resort to the courts is required, then injustice is going to result. In particular the resolution of the dispute may be delayed, and unnecessary expense incurred, as a result of the civil justice system trying to persuade the parties to explore other alternatives for the resolution of their dispute. Parties who have legitimately chosen the litigation route may regard themselves as ill-served by a civil justice system which then devotes resources to discouraging them from pursuing that route. Any measures to encourage resolution outwith the courts should therefore be proportionate and should recognise the right of parties to vindicate their rights before the courts if they so choose.

(c) Alternative dispute resolution (ADR) or mediation should not be imposed by the court. ADR or mediation is less likely to achieve a satisfactory outcome if conducted under compulsion. ADR or mediation can entail significant expense and delay. An imbalance in the parties' respective resources may result in an unfair outcome from ADR or mediation. While there should be an opportunity for the court, if necessary, to impress upon parties the desirability of a non-litigated outcome, the court should not be empowered to compel the parties to go down that route.

(d) An effective method of encouraging early resolution of disputes, without resort to court, is to ensure that those who are involved in advising parties pre-litigation are fully conversant with the options which are available for the resolution of disputes. If, for example, those who are advising a party pre-litigation are fully conversant with the practicalities of mediation, including what can be achieved by mediation, how mediation achieves those ends and at what cost, then it is inherently more likely that the mediation route will be fully considered before the party resorts to litigation.

(e) Consideration should therefore be given to a comprehensive programme of training advisers, (legally qualified and non-legally qualified) in the available options. If a step change is to be achieved in the uptake of such options within a reasonable timescale then consideration should be given to the application of public funding to such a programme. Indeed an opportunity exists for Scotland to become a leader in ADR and mediation.

## **Submission 2**

### (Chapter 1, Question 2)

(a) To characterise civil justice as a public service, like other public services, (para. 1.11) creates a risk that it is treated merely as an administrative system, in which the efficiencies of administration are paramount and considerations of justice are subordinated to those efficiencies. There is of course a great deal more to the civil justice system than the provision of an administrative structure. Priority must be given to justice.

(b) The Review should therefore explicitly recognise that the primary consideration is to ensure that justice is achieved in all cases and that the efficiencies of administration are subordinate to that end.

### **Submission 3**

(Chapter 2, Question 6; Chapter 4, Question 9)

(a) It is submitted that an important question of principle arises as to how one defines 'value' for the purposes of allocating business as between the higher and lower courts and for allocating business to any system separate from the courts.

It is submitted that it is simplistic and anachronistic to allocate business on the basis of monetary value alone. For example, on that basis a commercial dispute of high value involving a straightforward contractual issue is accorded more importance than an action for damages for personal injuries of moderate value based on the alleged negligence of a doctor but involving a great deal of complexity and substantial importance to the individual and the doctor involved.

It is submitted that a more discriminating approach should be taken to defining 'value'.

(b) Such an approach would involve basing an assessment of 'value' on a range of factors, of which monetary value is only one. These factors would reflect the priorities to be set for the civil justice system in Scotland, which would in turn reflect public values in Scotland. For example, any action which involves a significant degree of physical injury to an individual, or the death of an individual,

may be regarded as having a relatively high value. Any action which involves a significant loss of livelihood on the part of an individual may be regarded as having a high value. An action which concerns an allegation of negligence against a professional or skilled person may be accorded a high value. It is submitted that such an approach would lead to a civil justice system which better reflects the priorities of the population which it serves.

## **Submission 4**

(Chapter 2, Question 6)

It is submitted that in considering whether certain cases should be dealt with by boards or tribunals, as opposed to being litigated in the civil courts, there should be taken into account the wider benefits of litigation in the courts. The public, written decisions of the Scottish courts provide authoritative and reasoned guidance on the law, including the construction of statutes and statutory instruments and the legal relationships between individuals, organisations and the state. This is against a background of increasing amounts of law, including legislation from the Scottish and U.K. Parliaments and Europe and judgments of the European Court of Justice and the European Court of Human Rights. The removal of disputes from the courts to boards or other tribunals will tend to diminish the resource which the case law of the Scottish courts represents.

## **Submission 5**

(Chapter 3, question 3)

(a) It is submitted that it is self-evident that a system of levying court fees adversely affects access to justice, in all cases in which a party is potentially ultimately liable to pay such fees.

(b) It is submitted that as a matter of principle the interests of justice must take precedence over the interests of administration: (see submission 2 above).

(c) If the efficiencies of administration are taken to be the main or principal consideration then there is likely to be relatively little restraint on increases in court fees. The effect of court fees on justice itself will not be given due weight. If however priority is given to achieving justice, and if it is assumed that the use of the civil courts is necessary to achieve justice, then it will be recognised that levying a fee on the use of the courts will tend to act as a barrier to justice.

(c) It is therefore submitted that as a pre-condition to any increase in court fees the Scottish Government should require to demonstrate publicly that the proposed increase will not have any adverse impact on access to justice.

## **Submission 6**

(Chapter 3, question 4)

(a) While the cost of litigating may act as a deterrent, the uncertainty of the outcome as regards expenses also acts as a deterrent. It is submitted that so far as possible the parties to a court action should be put in a position where they can predict the likely outcome in expenses, whether in the event of success or failure.

(b) For example, therefore, for proceedings in which there is no automatic sanction for the employment of counsel, (as in the Sheriff Court at present) there should be a specific mechanism allowing the parties to seek sanction at the commencement of an action. Similarly there should be a specific mechanism allowing the parties at any stage of the action to seek sanction for instructing a particular type of skilled witness, before the expense is incurred.

## **Submission 7**

(Chapter 4, question 8)

(a) It is submitted that access to the Court of Session at first instance should be preserved.

(b) It is submitted that it is in the interests of justice generally to allow parties access to the Court of Session at first instance. Parties should be allowed access to judges of the supreme court for the determination of their disputes at first instance. Through dealing with such business judges maintain expertise and experience in presiding over cases at first instance, including cases which involve hearing evidence from witnesses. Such expertise and experience in turn enhance the quality of appellate justice. Further, it is in the interests of justice that judges in the lower courts, parties and their advisers have access to written opinions of judges of the Court of Session at first instance. Such opinions provide guidance on a wide range of matters of law. If the Court of Session only issues opinions in appellate matters then the volume of judicial law emanating from the Court of Session will be substantially reduced. The influence of the Court of Session in the development of Scots law will therefore be significantly reduced.

(c) As to the suggestion that only certain types of action may be raised at first instance in the Court of Session, it is submitted that this would create the risk of a 'two tier' civil justice system, whereby parties involved in a certain type of dispute are allowed access to the supreme court at first instance while others are not. Such a system may give rise to charges of elitism. If any first instance business is to be excluded from the Court of Session then it should be a blanket exclusion and not restricted only to certain categories of case.

## **Submission 8**

(Chapter 5, question 1)

The rules of civil procedure should explicitly recognise that the priority of the civil justice system is to ensure that justice is achieved and that the efficiencies of administration, including procedural rules, are subordinate to that end. See Submission 2 above.

## **Submission 9**

(Chapter 5, question 7)

A high level of judicial intervention or management is not necessarily conducive to the efficient determination of a dispute. Judges are likely have a more limited understanding of the overall context of a dispute than the parties' advisers. As a result directions from the court may simply result in the parties incurring significant time and expense without significantly advancing resolution of the dispute. Any power on the part of the court to manage disputes should therefore be limited.

## **Submission 10**

(Chapter 6, questions 10 and 11)

(a) In the Court of Session more efficient use should be made of the judges' time.

(b) It is submitted that the existing system, whereby judges deal with routine interlocutory hearings (motions and By Orders) at the beginning of the day, before hearing their substantive business of the day, is inherently inefficient. The system delays commencement of the day's substantive business. Further, if as often happens an interlocutory hearing is not allocated to a judge before the substantive business of the day begins, then the parties' representatives are left waiting, often for hours, for a judge to become available later in the day. The cost in lost time is substantial.

(c) It is submitted that a judge (or temporary judge) should be allocated to spend the day hearing routine interlocutory business. This would leave judges with substantive business free to start the day's business promptly, without having to hear other business first.

(d) It is also submitted that an appointment system should be introduced for all routine interlocutory business, similar to that operated in the Commercial Court. This would tend to reduce the time wasted by parties' representative waiting for a judge to become available.

## **Submission 11**

(Chapter 6, question 17)

- (a) It is submitted that civil jury trials should be retained.
- (b) Civil juries are an important and direct connection between the civil justice system and the public. The use of civil jury trials is a rare opportunity for the wider community to become directly involved in the administration of justice. They should be regarded as an important asset in the civil justice system and should be retained. Their abolition or restriction would only lead to less engagement between the civil courts and the community which they serve.
- (c) The argument that the civil jury trial system is particularly wasteful of resources, (para. 6.63) assumes that the end result, whereby members of the public are actively involved in the administration of civil justice in cases which proceed, is of little value. It suggests that considerations of administrative efficiency are of greater importance than justice being done and being seen to be done. Administrative efficiency should be recognised as subordinate to justice.

## **Submission 12**

(Chapter 6, question 19)

(a) There should be no rule allowing a legal representative to be held personally liable for the expenses of a case or part of a case, (para. 6.72). The fact that a legal representative is involved in the conduct of court proceedings should not make that representative susceptible to summary penalties in the form of orders to pay expenses. Such a rule has the effect of treating a representative as a party to the case. Professional disciplinary procedures are sufficient sanction for culpable conduct.

(b) Any rule which allows a legal representative to be held personally liable for the expenses of a case or part of a case should be restricted to the minimum measure necessary. Any such rule should be subject to procedural safeguards. For example no judge should be permitted to impose a penalty on a legal representative as a result of anything which has taken place before that judge. The matter should be removed to a judge who has had no prior involvement in the case. There should be an automatic right of appeal against the imposition of any penalty.