

Scottish Courts Review

Consultation Paper

Response on behalf of the SCFLG – Scottish Collaborative Family Law Group

The SCFLG (The Scottish Collaborative Family Law Group) are a group of family lawyers who have undergone comprehensive core training in Collaborative Law. Many of our members are also accredited by the Law Society of Scotland as specialists in Family Law. Many are also accredited Mediators. Our membership is Scotland wide and across our membership we have significant experience of litigating cases in both the Sheriff Court and the Court of Session. Collaborative Law is a means of dispute resolution which has its origins in the United States of America. Parties in a collaborative case are represented by their individual lawyers however, all communication is done by way of face to face meetings either by two way solicitor/client or four way, both solicitors and both clients. Minutes of meetings are recorded and circulated by way of e-mail. The principal tenants of collaborative law are as follows:-

1. The parties sign a Participation Agreement whereby they contract to deal with one another in a respectful and dignified fashion.
2. They agree that there will be full disclosure of all facts both personal and financial.
3. That children will be treated as a priority.
4. That the parties agree to the joint instruction of experts.
5. Most fundamentally, the parties agree not to either resort to or indeed threaten court proceedings. In the event that either party does this then the lawyer instructed is personally barred from representing that party in any future litigation.
6. Clients are encouraged to seek the services of a trained counsellor to help them through the process.

Chapter 1 Introduction

Should the Civil Justice System be designed to encourage early resolution or disputes, preferable without the resort to the court? If so, what would be the key features of such a system?

Our members approach family law cases from the perspective of attempting to reach an early and amicable resolution of disputes both concerning children and financial issues.

Certain cases are not suitable for collaborative law and require the full rigour of the courts such as adoption, exclusion orders/domestic abuse issues. Of those other private law issues concerning children and financial provision, we believe that the majority of cases are suitable for collaborative law subject to the appropriate screening of clients. We therefore welcome this review proceeding on the basis that improvement should be made primarily for those using the system as oppose to those who work within it. There are a number of recommendations we would wish to make in this regard:-

1. Public Information/Education

We believe that as a first step the Government should provide a public funded information service in order to create a climate where it is the norm that people seek an ADR option. It is our opinion that in family cases, speed and efficiency are not the same marks of success as in other cases. Success in family cases can in fact mean adopting a slower pace so that all parties are comfortable with the transition. Therefore, in our opinion, a portal which is Government funded similar to the Australian model would be an essential first step in providing the public with a valuable tool which would enable them to assess their own situation and choose the best options for themselves and their family. Within this portal we believe it is essential to include all information including protective measures which require the full rigour of the court, ADR such as Collaborative Law and Mediation and further access to all other agencies who would be able to assist such as Child Psychologists, Relate, FMS, counselling services etc. We believe that peoples' attitudes are key to successful outcomes. Accordingly, any system has to be able to foster a change of attitude.

2. People First

Changing attitudes can only be achieved by education and for the people involved in family disputes feeling as though they are heard and understood and have had a fair hearing. Parties need to be able to understand the decision even if they don't agree with it.

In family cases, people require to take an emotional journey when obtaining access to justice. We therefore suggest that counselling the clients going through divorce and separation would assist them greatly. Further, the system should take action to encourage good behaviour such as early financial disclosure. The terminology used at present such as pursuer/defender does not, in our opinion, encourage good behaviour as very often, clients involved in litigation see themselves as being involved in a competition/fight.

Where children are concerned, every effort for enquiry to bring forth the child's world should be encouraged. Courts should be much more prepared to look at the detail of the child's

life and look into what the parties have in common. People involved in child cases including the Judges, Sheriffs, Lawyers, Curators and Court Reporters should be properly trained in such areas as child development, family dynamics and soft skills. We believe that the Judges/Sheriffs should have more control of the process and should adopt an inquisitorial style. We believe that Court Reports provide a very valuable function if the reports are done well in that the Reporters are able to engage with the family, get to know the individuals concerned and provide far greater insight into the family dynamic than a Sheriff or Judge could ever achieve by asking questions. Court Reporters do not necessarily require to be solicitors however, they should be from a Social Work/Educational Law background and should be properly trained. This training should be formalised and all Reporters should be aware of child development issues, family dynamics etc and should be aware of impartiality. We suggest that these individuals should be known as Family Facilitators. These individuals could also deal with cases which have not yet reached court and are perhaps being dealt with by Collaboration/Mediation. Those Family Facilitators could be used to ascertain the children's views.

3. Consistency of Approach

We should be making it as easy as possible for people to make their own decisions about their own lives. We also believe, as a group, that we should be able to provide our clients with a degree of certainty as to the outcomes we might expect when going through the court process. Accordingly, we need consistency. A consistency of approach from lawyers and those on the bench. Accordingly, both Sheriffs and Lawyers should be experienced and have appropriate training. We do not believe that lawyers should be practicing in family law unless they have undergone minimum training unless under strict supervision. We further believe that Sheriffs and Judges should have "a ticket" whereby they have an appointment to hear family cases for a period of time. The aim should be for consistency i.e. the same Sheriff throughout and the same approach throughout. We believe that less time should be spent in court by clients but when they attend court that attendance should be meaningful. Clients in family cases should not require to attend the same building as criminals and be subjected to the same frightening experience, particularly when very often, as occurs at Child Welfare Hearings and Options Hearings, the clients are not heard and the case is over before the client has had the chance to understand what is going on. We do however agree that there are times when we do require the power of the court and a degree of formality does require to be maintained. It is for that reason that we believe that the Sheriff/Judge's role should be that of inquisitor and not as mediator as sometimes occurs.

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

We are in agreement with the principals and assumptions underlying the consultation paper but observe there are certain features which are specific to family law cases which may not readily fit with the answers to each of the questions posed.

1.3 Are there any matters within the Review's Remit about which you have concerns but which are not dealt with within this paper?

We accept the general principal of proportionality in civil cases. This however does not sit readily with issues regarding children which require to be dealt with within a short timeframe and are of paramount importance. We believe that children's hearing suites are an under utilised resource and thought should be given to those premises being made available for child cases.

Chapter 2 – Access to Justice

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

Once again, we believe that the Government funded portal should be seen as a priority.

2.2 Are there any particular geographical or subject areas in which there are gaps in provision in relation to legal advice or representation? If so where?

There are a number of areas within Scotland in which the SCFLG do not have legally qualified collaborative lawyers however, the gaps are closing. Cut backs in civil legal aid have also meant that there are a number of areas in Scotland where there are no specialist family lawyers prepared to provide legal advice and assistance or civil legal aid to those requiring family law advice.

2.3 To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigant to take part in the process without legal representation? If so where?

We do not welcome litigating cases against party litigants. Family law in particular, is emotive and there is ample opportunity within the context of a family law case for an emotionally disturbed party litigant to cause chaos and considerable expense to the party who is represented.

2.4 What contribution if any, can (a) “self help” services for party litigants and (b) court based advice services make to improving access to Justice?

The assistance of an in court advisory service in focussing party litigants as to what is required by way of financial disclosure, presentation of pleadings and productions etc. would be of some assistance but we remain of the view (as above) that party litigants are ill equipped to represent themselves in family cases regardless of what assistance they receive to do so.

2.5 Are there any other issues which impact on access to justice in Scotland which the review should consider?

The priorities given to criminal business in the Sheriff Court often means a lack of time for the hearing of family cases. The pressure of business often results in interim decisions in family cases concerning residence, contact and maintenance being made in a very pressured environment with very limited court time by a sheriff with little experience or interest in family law matters. The environment within which such cases are heard is also far from ideal and is not conducive to the early focussing of issues and the hearing of cases from a child centred perspective or indeed, sufficient time and resources for appropriate case management to secure an early resolution of the issues. The lack of continuity in sheriffs dealing with the case, the difference of approach between individual sheriffs and between different sheriff courts also contribute to these difficulties. Consideration should be given to the appropriate resourcing of family law cases to enable them to be dealt with in the interests of families within the court system with the appropriate weight being given to the importance of the subject matter to those involved. We would refer again to the use of children’s hearing suites being used with specially trained sheriffs. Consideration should also be given to the use of “Family Facilitators” as above.

2.6 Is there is 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?

We have confined our answer to cases involving family law issues. We consider there may be some merit in cases for financial provision for capital claims of less than £5,000 being dealt with effectively within expedited small claims type procedure providing there are resources within the court system for such actions to be dealt with. However, in family actions there is generally an overlap of money with child issues and this would not be appropriate for most cases.

Chapter 3 – The Cost and Funding of Litigation

3.1 What, if any, information can you give the review about the levels of legal expenses in litigation, and how such expenses compare with the sum of awarded by the court or settlement figures?

Awards of expenses in family cases are very rare. The majority of cases either settle prior to proof or because of an element of divided success in the outcome of a proof are dealt with on a no expenses due to or by basis. It is consequently very difficult to comment on this issue. A great deal of expense is incurred in family cases either due to the level of hostility between the parties or due to a lack of early disclosure and focusing of the issues between the parties. More pro-active case management by the courts with a front end loading of the rules would be the most important factor in resolving cases at an earlier stage, reducing the number of actions proceeding to proof and decreasing the costs involved. Consideration should be given to a system such as the English “Directions Order”. Many cases should not be in court at all. If the public had all the necessary information (the portal) and ADR was considered the “norm” procedure should be streamlined with less emphasis on complicated written pleadings for low value cases.

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

Significantly. Many family law actions settle simply because of the cost of proceeding to a multi-day proof in either the sheriff court or court of session with the consequent risks involved.

3.3 Does the current system of levying court fees effect access to justice?

In our view this does not have an impact on access to justice in family cases.

3.4 Are the current rules for recovery of judicial expenses satisfactory?

Expenses are rarely awarded or recovered in family actions.

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

Yes but rarely used (see above).

3.6 To what extent and in what respect does the availability of Legal Advice and Assistance and Legal Aid affect access to justice?

Increasingly, fewer family law clients are eligible for legal Aid and there are a significant number of areas across Scotland where family lawyers will not provide their services at Legal Aid rates. This has a real impact on the access to justice for many litigants.

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

As already indicated there are a number of areas where the provision of Legal Aid for family cases is limited or non-existent. The Family Law Association report that this is particularly common in urban areas, Glasgow, Edinburgh, Aberdeen and also in the north west of Scotland.

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

Not applicable in family cases.

3.9 Should Legal Expenses Insurance including “Before the Event” and “After the Event” Insurance have a greater role to play in the funding of litigation in Scotland?

We have yet to find an insurer who will cover separation from partners/divorce and therefore thus far this has not been applicable to family cases.

3.10 What impact would the ability to recover “After the Event” Insurance Premiums from unsuccessful parties have on litigation?

Not applicable.

Chapter 4 – Structure and Jurisdiction of the Civil Courts

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

Yes. The progression of civil cases is regularly impacted upon as a result of sheriffs requiring to give priority to criminal business, deal with deferred sentences prior to the start of civil courts, interrupt civil courts in order to deal with custodies etc. Proofs are regularly discharged due to the lack of court time, there are difficulties in certain courts obtaining dates for proof. There is often a disinclination on the part of sheriffs and judges to hear contested family cases either in respect of opposed motions, child welfare hearings or proofs.

4.2 Should (a) some judges of the supreme court and (b) some sheriffs be designated too deal with civil business?

In our view there would be considerable benefits in having dedicated civil sheriffs and judges and in particular in having dedicated judges and sheriffs to deal with family business. The benefit of expertise, continuity of dealing with cases and the allocation of appropriate court time for family actions would be of significant benefit for the expeditious resolution of cases and ultimately to both the court and the parties.

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

We are supportive of civil business being separated from criminal business and in particular in a separate family division for cases. (The advantages have been outlined above). The only disadvantage would be in terms of the resource required.

4.4 Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

We consider that there is a strong case for the specialisation of both sheriffs and judges in family cases given the uniqueness of the subject matter involved, the different approach and increasing complexity of the legal provisions involved and the necessity for a different approach to other civil cases. We do not think that courts should be used at all for family cases and that other premises such as tribunal or children's hearing suites should be utilised.

4.5 What are the key factors which influenced the decision to raise an action in either the court of session or the sheriff court where the jurisdiction is concurrent?

The complexity of the legal provisions and consequent desire to instruct counsel, complexity in factual matters and number of documents, specialist reports etc required, also the amount of court time required for hearing the case or cases with international elements either in relation to child law or family issues are all factors leading to actions being raised in the court of session.

4.6 In what, if any types of case should (a) the court of session and (b) the sheriff court have exclusive jurisdiction?

The current rules providing for privative jurisdiction of the Court of Session in certain family cases are appropriate and we have no recommendations to make regarding their amendment.

4.7 Should the jurisdiction of the court of session and sheriff court be unified to create a single court?

We see no merit in this. There are a relatively small number of family actions raised in the court of session and these are self selected from the perspective of cost or complexity of the issues involved meriting instruction of junior and sometimes senior Counsel. We do not see any benefit to litigants in preventing them from litigating such cases in the court of session.

4.8 Should the court of session become a court of appeal only or should it retain the first instance jurisdiction? If so for what types of action and why?

We have confined our response to family law actions and as indicated, remain of the view that litigants should be able to raise certain actions in the court of session where appropriate and see no merit in amendment to the current jurisdiction on provisions to preclude this.

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

(Not applicable – see above)

4.10 As the current powers to transfer cases between sheriff courts and the court of session satisfactory?

The Rules of Court are adequate in this regard though could be simplified and made better use of.

4.11 Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?

Other than the referral of family law cases with purely financial issues in claims of under £5,000 being remitted to some form of small claims procedure, we cannot make any further recommendation in respect of this question. The level of family business which would be separated out under such a provision would not merit another “tier” of sheriff court.

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

This may be the more pragmatic solution of more resource perspective in respect of dealing with small claims cases but the applicability to family law is limited.

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

A greater flexibility in the ability to raise actions throughout Scotland might be appropriate providing there is a restriction on the ability of parties to raise actions outwith the forum conveniens for parties, witnesses etc.

4.14 Are the current arrangements for dealing with undefended actions satisfactory?

There is regional disparity. In some areas of Scotland there could be scope for speeding up the disposal of such cases. The electronic filing of documents would also be a welcome step.

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

(Not applicable to our area of expertise).

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

(Not applicable to our area of expertise).

4.17 Is there a case for a national sheriff court which would allow cases to be raised in the sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

This may lead to cherry picking of certain jurisdictions where there are sheriffs specialising in family law or to the raising of actions by parties in a location deliberately inconvenient to their spouse/ex partner or witnesses in order to gain tactical advantage from a cost perspective. This has advantages and disadvantages. Some courts cannot cope with the volume of business and other rural courts do not sit often enough to deal with urgent business.

4.18 Is there a case for sheriffs to have an all of Scotland jurisdiction?

Yes, this would allow floating sheriffs specialising in family law to work throughout Scotland.

- 4.19 **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 leave of the court of session to transfer a case there? If so, what factors should be taken into account?**

We would be in favour of such a provision to enable the transfer of cases between courts on the basis of the level of complexity involved both in terms of law and fact.

- 4.20 **Are the existing appeal arrangements satisfactory?**

No. There can be a significant delay in family cases being dealt with. Routinely family cases will take between twelve and eighteen months to proceed to appeal before the Inner House. This is entirely inappropriate in cases involving issues relating to children. It is also an inadequate time scale in cases involving the division of matrimonial property where the issue of the decree of divorce and the parties' ability to move on with their lives and achieve a distribution of their assets awaits the decision of the Appeal Court. There should be a provision for fast tracking family cases on appeal. However on some occasions appeals can be dealt with very quickly.

- 4.21 **Should the office of Sheriff Principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?**

The opinion of our members was divided as to whether we should retain the appellate function of sheriff principals. We are in favour of a court of session Outer House judge being able to hear appeals from the sheriff court in family cases to allow these to be processed more expeditiously and for there to be a sifting process for appeals to the court of session to weed out unmeritorious cases.

- 4.22 **Should the majority of statutory appeals continue to be dealt with by the Inner House of the court of session?**

Not relevant to our area of expertise.

- 4.23 **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?

It may be more appropriate for such appeals to be dealt with by a single judge in the Outer House. We would be supportive of cases being appealed to the Inner House only with leave where there are legal issues. Also that the decision of the Inner House represents a final determination of the case with no option to appeal to the House of Lords available in family actions.

4.24 What are the advantages and disadvantages of reliance on temporary judges and part time sheriffs?

The employment of temporary judges and part time sheriffs allows clearing of bottlenecks within the system and provides additional resources for cases to be dealt with. In some cases this allows those with specialist knowledge of a given area of law to be allocated to hear proofs. In our experience the expertise of part time sheriffs is rarely matched to the business which is set down before them and there is significant room for improvement here. The hearing of proofs by part time sheriffs can add an additional layer of difficulty in fixing continued dates. There is also a significant benefit to litigants from the continuity of the same sheriff dealing with their case in family actions. We would subsequently be more supportive of the appointment of all of Scotland floating sheriff specialising in family law who would work within specific regional areas and could provide both continuity and expertise in the hearing of family law cases.

Chapter 5 – Principles for the reform to civil procedure and key procedural issues

5.1 Should the rules of civil procedure have an overriding objective or statement of philosophy and if so, what should the main elements of that overriding objective or statement of philosophy be?

We do not believe that this would be of benefit given the variety of different types of civil cases litigated in the sheriff court and the fact that the overarching principles of the Children (Scotland) Act 1995 with a strong focus on determining actions in the best interests of the child are key in family action. The philosophy and principles applicable to the determination of family disputes often do not chime with the prevailing issues in other types of civil litigation.

5.2 Should the court (a) encourage (b) require (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

We would obviously be supportive of the court encouraging and facilitating parties to use mediation. We consider there should be an amendment to the rules of court to encourage more proactive consideration of mediation in family cases at an early stage and in particular in sheriff court actions that it should be mandatory that the issue of mediation is raised and considered at the Child Welfare Hearing and Options Hearing stages of the action. However, it is not appropriate in our view that parties are required to attend mediation. It may be appropriate that they are required to be given information about the option of mediation both before and during court proceedings in family actions.

If so, how should this be done at what point or point in the progress of a dispute (See above).

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

A number of family law cases require judicial determination e.g. adoption, child abduction, applications for a child to relocate abroad, public law matters and issues of safety, exclusion orders, interdict and powers of arrest etc. In addition, there are some cases where private law issues in respect of residence and contact, financial disputes are not suitable for mediation due to either the level of distress, acrimony and power imbalance in the relationship between the parties involved or quite simply that the parties require a solution to be imposed upon them rather than being capable of agreeing matters through the services of a neutral mediator.

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

Much literature on support service for families on relationship breakdown confuses the roles of counsellor, mediator, collaborative lawyer and arbiter. We consider that there is a significant role for public education in the different options open to families. Mediation can only be provided by a neutral mediator who does not have the power

to impose a solution on the parties but simply facilitates them in reaching an agreement between themselves providing appropriate information as to their rights and obligations, if required, throughout the process. Collaborative lawyers represent parties throughout discussions and attempt to facilitate parties in reaching agreement on issues concerning both child and financial matters. They provide an advisory role and are not required to remain neutral throughout the process. A limited number of family cases are suitable for arbitration and a pilot project has been devised by a number of our members in conjunction with certain members of the Faculty of Advocates. Arbitration provides a fast track procedure for the determination of issues in certain family case, where the parties seek the imposition of a solution from a third party with specialist legal knowledge. We consider that public funding should be provided for the provision of information on options for dispute resolution to parties and appropriate Legal Aid funding for access to the different options where appropriate.

5.5 In what respect can modern communications and information technology be harnessed to improve access to the civil courts?

Electronic filing of documents and the use of video conferencing (particularly in rural areas) would assist in family cases.

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

We would be supportive of a far more pro active case management approach in family actions to the imposition of timetables specific to a given case with pro forma forms for the disclosure of financial information, reliance on joint expert reports and the early agreement of areas of evidence and a focussing of the issues.

5.7 What type of case would benefit from (a) judicial case management (b) case flow management?

Family law actions would be suitable for case management as indicated above.

Chapter 6 – Working Methods of the Civil Courts

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

We believe that in actions where there is no urgency, the parties should have to confirm to the court that they have exhausted ADR avenues.

6.2 Should there be a greater use of Pre Action Protocols? If so, in what courts and for what types of action?

See above.

6.3 Should compliance with Pre Action Protocols be voluntary or compulsory?

Compulsory save for urgent actions.

6.5 Are the current arrangements for making the rules of civil procedure satisfactory?

We consider there should be a greater level of communication between the sheriff court and court of session rules council and a greater focus on devising a set of procedural rules directly applicable to family actions rather than “tweaking” the civil court rules for family cases.

6.6 Should there be a single set of rules of civil procedure in both the court of session and the sheriff court?

We do not consider this to be necessary though a greater level of communication and consistency on certain issues pertaining to family cases e.g. standard forms of disclosure etc. Between both courts would be appropriate.

6.7 Should there be a single initiating document (for all types of action) and/or be at all levels in the court structure? If so what format should that document take?

There is some scope for making the pleadings in family cases more formulaic e.g. specimen craves, pleas in law, standard forms for disclosure of information etc. The use of a formatted document could assist with the layout of pleadings to focus better the issues between the parties. However, an element of information provided in respect of the grounds of divorce, the arrangements for the children, reasons for

departure from equal sharing of matrimonial property/ an award of financial provision on the breakdown of cohabitation or death of a partner and the need for spousal maintenance/resources of the parties will always be required. We do not consider that pre-printed documents would be sufficient for this purpose save for financial information.

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

There is a greater scope for non contentious routine procedural matters to be dealt with by sheriff clerks and for the better timetabling of hearing of contentious motions within the court system.

6.9 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?

We consider that more pro-active case management will result in an early focusing of the issues and the greater use of Joint Minutes of Admission. We consider that sheriffs dealing with Options Hearings should more pro-actively identify the areas of evidence that can be agreed, limit of the scope of the issues between the parties, identify the number of witnesses involved, the potential for agreeing expert reports and the use of affidavit evidence. Having identified the amount of court time required agree between the parties a hearing for the appropriate number of days required should then be fixed (as opposed to one day of court time being fixed with subsequent days at a later stage as is often the case in many regional sheriff courts). If parties and agents are then unable to stick to the timetable fixed by the court, we do not consider that they should be precluded from leading further evidence as this may be essential to determine the issues between the parties.

6.10 In the conduct of a substantive hearing should there be greater use of written rather than oral arguments?

The use of written submissions allows an earlier focussing of the issues, saves court time and is to be welcomed in cases involving financial provision on divorce. The option for oral submissions in cases involving children or where the sheriff or judge requires to test the strength of the arguments being put forward by solicitors or

counsel or requires clarification from them should not be denied by the time involved could be greatly reduced with the use of focus on written submissions.

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

We are supportive of the use of pro forma forms for the disclosure of financial information in family cases and pro active case management to ensure the use of joint expert reports, the agreeing of valuation evidence, the use of affidavits etc in order to greater focus the issue between the parties and reduce the scope of proofs and encourage early settlement. We refer to the English “Directions Orders”.

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

We consider it appropriate that the court explores in family cases whether a single expert should be used e.g. a surveyor to value heritable property or an actuary to provide a pension valuation. A decision requires to be taken as to the extent of questions posed to the expert to cover the perspective of both parties. In some actions e.g. those concerning business valuations, the input of more than one expert accountant may be required but there is scope for more pro active case management in narrowing the issues and remit. Consideration in some actions whether a remit to a specialist for determination of a particular issue may be appropriate.

6.13 Should Civil Jury Trials be retained?

Not applicable to family cases.

6.14 Should Written Judgements be required in all cases?

Where evidential Child Welfare Hearings take place or where determination of issues at an interim stage by hearing of motions in family cases, written judgements are not required. In some actions a more expedited form of written judgement could be provided. In family cases where there is a prospect of an appeal on certain issues a written judgement would still be required.

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

We consider that there should be greater use of the imposition of awards of expenses for parties failing to make early disclosure of information and co-operate in agreeing of evidence and focusing of the issues.

6.16 What measures should be available to the court to identify and manage un meritorious causes or appeals brought by party litigants?

The importance of the subject matter to the parties makes identification of such actions difficult in family cases. There are certainly a number of actions in respect of parental rights and responsibilities or the opposition or order for freeing of adoption where a careful balancing act is required between litigant's article 6 rights to a fair trial and the fact that they are clearly pursuing cases which are unmeritorious. From an objective stand point their reasons in pursuing matters relating to the breakdown of their relationship is to get back at an ex-partner rather than the issues in dispute in the litigation. Pro-active case management should allow earlier determination of some of these cases and a sifting process for unmeritorious appeals/leave to appeal being required would reduce the number of appeals in such actions by party litigants.

6.17 Is the current legislation on vexatious litigants in need of reform and if so how should this be done?

We would question whether or not a family law litigant could be regarded as "vexatious"

6.18 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?

Presentation of family law cases by either party litigants or non legally represented advisors results in a greater amount of court time being taken up, a failure to address the relevant legal provisions and issues required to determine the case, a lack of appropriate focusing of the issues at an early stage and an ineffective use of court time. We can see arguments in favour of parties not entitled to legal aid who cannot afford legal representation requiring to present their best possible case by seeking advocacy skills from an advisor/friend or family member. This may also be the case

in a number of actions where for parties for whom English is not their first language. Nevertheless, for the larger part, we consider this to be discouraged in family cases as it does not facilitate an early, cost effective resolution of matters or who have health difficulties. Nevertheless for the larger part we consider that this is to be discouraged in family actions as it does not facilitate an early, cost effective resolution of matters.

6.19 Would it be desirable to introduce separate procedures for multi party litigation?

Not applicable to family actions. Cases where curators, grandparents etc enter process are adequately catered for in terms of the existing rules.

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

Not applicable to family actions.

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