

Scottish Court Service response to Civil Courts Review consultation paper

Thank you for seeking the views of the Scottish Court Service (SCS) on the civil courts review consultation paper. I now attach our response together with the response information form. In so doing, we take this opportunity to assure you and the rest of the Review team that SCS consider the review to be of the utmost importance and that we regard the review as essential to the promotion of accessible and efficient civil justice. We strongly support the review's work to look at ways in which disputes can be resolved without the involvement of the courts. As can be seen from the terms of our response we very much support the emphasis on making sure that business which does have to come to court is dealt with at an appropriate level and that judicial time is only used for things which require it. We also see a lot of potential in the use of technology to facilitate the courts' services to court users, especially if linked to reforms which enabled actions to be initiated centrally.

For us too, the Review is a real opportunity to take a fundamental look at the infrastructure - especially court buildings - to ensure that we provide what is needed to support civil court business properly for decades to come. Infrastructural change is expensive and time-consuming, and the pressure on resources is clearly very high across the public sector. SCS stands ready to do whatever work is necessary on costs and benefits to ensure that all options are fully evaluated before major investment decisions have to be taken.

Alastair Sim
Director of Policy & Strategy
10 April 2008

Chapter One: Introduction

Question One: Should civil justice system be designed to encourage any resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

The answer to this question is “yes”, although SCS would suggest that in addition to dispute resolution the courts have an important role in granting authority to people to do certain things, e.g. to adopt a child, and that there needs to be a continuing role for the courts in the most important instances such as this of granting one person power to do something to another.

The key features of a civil justice system designed to encourage early resolution of disputes should include:

- reasonable equality of arms between parties with different levels of resources (e.g. by restricting maximum recoverable costs);
- a problem-solving approach to disputes in the first instance, rather than an adversarial approach, including the use of pre-action protocols and consideration of other forms of dispute resolution (preferably prior to coming to court but also by considering the potential for engagement of other forms of dispute resolution outwith the court process after court action has commenced); and
- use of professional representation only where necessary.

Question two: Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review’s recommendations? Should they be supplemented by other factors?

Yes. We fully support the principles of proportionality and value for money but would emphasise the need for public confidence in the system, most particularly but by no means exclusively, in cases involving vulnerable individuals. Where procedures for some cases are kept simple to facilitate such principles of proportionality and value for money, the presence of powers to remit cases of complexity, novelty or difficulty to different procedures or higher (or lower) courts should allow different methods of processing cases to be engaged where merited.

In addition, SCS sees a need for ensuring equality of arms. The Civil Justice Council consider “the participants having at the outset access to means of funding their case” and “the lawyers on each side having at the outcome access to reasonable remuneration” as being some of the overriding principles upon which deliver of access to justice is dependent. However, we know from experience that this is not currently achievable and that many litigants represent themselves and are increasingly being permitted / encouraged to do so in legislation. In this regard, see further our comments at question three, chapter two below.

Chapter Two: Access to Justice

Question One: What contribution can public legal education make to improving access to justice?

We think the most important thing is access to advice at the point of need, rather than specific legal education. We consider that a member of the public does not need to know how to pursue a dispute until they are involved in one, but once they are so involved, they should be able to get informed advice easily about what options are open to them in order to resolve the dispute most efficiently and economically. We think what is needed is for citizens to have a clear idea of where they can access that sort of advice, rather than for more general public legal education.

We do though feel that there could be more public education about how to manage finances and avoid debt and mortgage actions but appreciate such a need would require to be managed along with all the other demands already placed on the education system.

Question two: 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?

SCS has no specific knowledge in this regard, although we have been led to believe such gaps do exist. We note also the information provided in the consultation document at paragraph 3.31 and consider others in Scottish Government with responsibility for legal services provision, the Scottish Legal Aid Board, the voluntary sector and of course the legal profession will be better placed to inform the review on this issue.

Question three: 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?

As noted in our response to question 1.2 above, we consider equality of arms an important issue for the review. Once an individual is engaged in court proceedings, there is a severe inequality of arms if only one party in a court procedure is legally represented. From our experience we consider that once a case has reached court, except in the simplest cases e.g. small claims, both parties should have representation, but that prior to a dispute coming to court there should have been ample opportunity to resolve the dispute through non-court means.

Court procedures should, of course, be as straightforward and explicable as possible, but SCS experience with party litigants is that however straightforward a process is, and however clearly it is explained, some will find it difficult or impossible to comply with the procedure. This is neither in the interests of the court (whose time is likely to be wasted), or of the party litigant (who is likely to be bested by a professionally-represented party). So, above

a level of business at which it is reasonable to expect both parties to be unrepresented, it may be neither feasible nor desirable to design court procedures with party litigants' needs in mind.

Question Four: What contribution, if any, can (a) self-help services for party litigants and (b) court based advice services make to improving access to justice?

If there is thought to be merit in the formation of self help groups these should concentrate on education in the first instance on how to avoid debt and housing repossession and on what means there are of resolving disputes without the need to come to court.

In our view the role of SCS staff should continue to be restricted to giving straightforward procedural guidance about what a party litigant needs to do to pursue or defend their case in court. While the Scottish Government has funded in-court advice services in six Scottish courts which have had some success in guiding party litigants towards more appropriate means of dispute resolution, and in settling some cases, in general, we think that it would be better if many of the people who become party litigants had access to advice facilities e.g. through CAB or the sort of self-help services considered above, entirely outside the court system to point them towards appropriate dispute resolution methods before they consider resorting to court action.

Question Six: 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?

We have earlier proposed that the lowest value cases should be able to be dealt with without the parties having legal representation. In these cases we would suggest that the approach should essentially be one of trying to broker a resolution between the parties rather than adjudicating on an adversarial contest. This could be in a court setting or elsewhere, but even if the case were dealt with in court it may not require the skills and legal knowledge of a sheriff. Small claim is the obvious category, but there are other possibilities. For instance, given that so many heritable cases relate to disputes between landlord and tenants which are potentially capable of negotiated resolutions (e.g. where the tenant cannot pay rent until a housing benefit claim is sorted), and that in other cases such as mortgage repossession the court is performing merely an administrative function, these cases may best be dealt with in this problem-solving way rather than by a normal court-based adversarial process.

Chapter Three: The Cost and Funding of Litigation

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

Some non case-specific data on expenses awarded in different types of cases has already been passed to the Review team. We would emphasise however, that what little information SCS has relates to party and party expenses only in these cases. It does not disclose the true cost of litigation to either the successful or unsuccessful party, both of whom may have solicitor client accounts to settle for expenses which relate to issues which are not chargeable to the opposing party – as is already noted at paragraph 3.15 of the consultation document.

Question three: Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

Court fees and fees for services offered by the Office of the Public Guardian (OPG) are prescribed by Scottish Ministers under statutory powers. The Scottish Government's policy, which SCS supports, is that fees should be based on the principle of "full-cost pricing". It is our view that Court fees should generally be set at levels that reflect, on average, the full cost of the processes involved, with a well-targeted system of fee exemptions to protect access to justice.

For further details on the SCS view on these matters please see our recently published "Consultation paper on review of fees charged by the Court of Session, Sheriff Courts, Office of the Public Guardian, Accountant of Court and High Court to be found at

<http://www.scotcourts.gov.uk/CourtFees/b54943%20reviewR.pdf>

Question four: Are the current rules for recovery of judicial expenses satisfactory?

In our view the general principle that expenses follow success is sound, subject to the ability of the court to cap such expenses in certain case types in order to achieve proportionality and to remove any statutory capping in order to penalise procrastination. Due to lack of information on the true cost of litigation, as noted at question one of this chapter, it is difficult to comment on whether or not recoverable expenses should extend beyond the current "fair and reasonable expenses of process". We note the information given in relation to Commercial actions at paragraph 3.16 of the consultation document but suggest that it should always be open to parties to choose the best or most specialised lawyer to handle their case – but that in the interests of fairness and fair notice to the other party, the level of expenses to be paid by the other party must continue to be governed by a scale of fees. However,

it may be considered that the fees for commercial actions should be different from that for ordinary debt actions .

Question Five: Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

In most of our courts the local sheriff clerk is the auditor of court and is commissioned by the Sheriff Principal to conduct judicial taxations. This forms a very small part of the sheriff clerk's official duties and given that our courts vary greatly in size the grade and experience of individual sheriff clerks vary – as does their ability to carry out this function.

We are aware of the concerns noted at paragraphs 3.17 to 3.20 of the consultation document and we have concerns about sheriff clerk auditors of court being engaged in extra-judicial taxations and assessments, which involves them as public officials in providing a paid private service. The Scottish Court Service has taken a policy decision to remove from Sheriff Clerks the ability to undertake extra- judicial taxations and assessments and is liaising with the Scottish Government to find a way forward which protects consumers' interests.

Chapter Four: The Structure and Jurisdiction of the Civil Courts

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

Yes, to some extent. In the Supreme Courts there is some evidence of priority being attached to first instance criminal business whilst the civil (and criminal appeals) delays are extending. The position in the sheriff courts is not as clear cut. In most cases in the sheriff court, where there is a perception that civil business is a casualty of something or other, the cause is mainly due to programming difficulties brought about by the unpredictability of whether or not cases will proceed and the absence of good projections as to how long they will take to conclude if they do proceed. These difficulties exist in the Court of Session too. Because of this lack of certainty more cases are often assigned than a court could actually deal with. On many occasions this approach is successful whilst in others, or where cases have proceeded for much longer than was predicted by parties', adjournment of some cases may be necessary.

Question Two: Should (a) some judges of the supreme courts and (b) some sheriffs be designated to deal with civil business?

In general, while a degree of judicial specialisation would appear to be in the interests of providing expert adjudication of technical issues, it would probably be best if both sheriffs and judges retained some flexibility to deal with routine criminal business when necessary, reflecting peaks and troughs of demand for different areas of activity. Further, unless business is processed in an entirely different way, sheriffs in the smallest jurisdictions, where there is only one sheriff in the court, would require to continue to handle all civil and criminal business.

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

There would be some advantage in cases being dealt with by sheriffs who had particular expertise in particular areas of civil business e.g. family actions and other cases involving children; commercial cases and actions involving personal injury.

The advantages to civil litigants of having their business dealt with away from the potentially threatening or intimidating atmosphere of what is also a criminal court building (or the part of a building dealing with criminal business) are also clear. As above, however, complete separation would be likely to lead to inflexible use of judicial and court room resources, resulting in escalating costs, and a solution e.g. through scheduling civil and criminal business in a way which minimised the interaction between the different clienteles, and utilising sheriffs who were able to combine specialised expertise in certain areas of civil business with a continuing ability to do some

criminal business when necessary, would be preferable from an administrative point of view to complete separation of civil and criminal business.

Question Four: 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?

See also our responses to questions two and three of this chapter.

While we are supportive of some degree of specialisation for the reasons stated above, we are of the view that, realistically, specialisation is only feasible in larger courts with a static judiciary, unless the sheriffs or at least some of them became peripatetic. There are many and varied models of delivery involving specialist sheriffs to be considered. SCS provides a service to a number of stakeholders most notably the public. Its stated corporate purpose is to provide "Access to Justice". Before we could give our support to any emerging model of specialisation (or centralisation as later considered) SCS would require to consider the impact of that model on those we serve.

As noted at question three of this chapter, we consider family actions and other cases involving children, commercial actions and actions involving personal injury as being particularly suited to specialisation. For reasons of operational flexibility, we would however prefer to see sheriffs, where possible as their career develops, gain some form of accreditation for multiple areas of specialisation, and have the ability to do non-specialist business e.g. small claim and summary cause (if not removed from the sheriff courts), interim interdict hearings, summary applications and summary crime. This would provide a reasonable combination between the need for technically difficult cases to be dealt with by an appropriately qualified and experienced sheriff, while continuing to enable a reasonable flexibility in court scheduling to enable the speedy disposal of business. We understand that accreditation for multiple specialisms is common in England and Wales. This would be practical for larger multi-sheriff courts; however, if it were still intended that smaller courts should provide a full range of specialisms this could be achieved by having appropriately-accredited sheriffs appointed to or travel to these courts as necessary to deal with the specialist business.

Question five: 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?

Litigants and their agents will be best placed to respond to this question but from an SCS perspective it appears as though the perceived importance of the issue to the client, the availability of funds to meet the steeper costs usually involved and the proximity of the chosen agents would appear to be the main considerations.

Question Six: In what, if any, types of cases should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

We think the most important thing is for there to be a minimal overlap, if any, between the jurisdiction of the different levels of court, in the interests of clarity for the citizen, in the interests of ensuring that parties cannot “shop around” to decide where to place a case in their own interests, and in the interests of ensuring that the expensive and highly-qualified time of the Court of Session is not spent dealing with things which could perfectly well be dealt with by a lower level of judicial officer. For clarity’s sake, we would suggest that if it should remain competent to raise actions for payment of money in the Court of Session, that no case where the amount sought is less than £100,000 should be pursued there. We believe that all family actions including divorce, dissolution of partnership, contact and residence should be within the sheriff court’s sole jurisdiction at first instance. So should most other actions raised at common law, e.g. interdicts, delivery, forthcoming, multiple pouding. Likewise, we believe that the appellate jurisdiction of the Court of Session should be limited to cases above a certain value, with appeals below that level being dealt with by sheriffs principal or by a panel of sheriffs, but with the capacity for that shrieval appeal court or any other sheriff to refer difficult or novel points of law to the Court of Session for an opinion.

Question Seven: Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

While not being averse to this idea, we question whether it would bring about any gains. We think that there is value in litigants being clear that different categories and value of business should be dealt with at different levels within the court system, and that certain categories of business can be dealt with locally. That implies that whether or not the Court of Session and sheriff’s civil court form a single institution, there are divisions within that institution which deal with different categories of business. It may be that the unification of the judiciary under the Lord President’s direction and the creation of the new SCS as planned for under the Judiciary and Courts (Scotland) Bill will bring about benefits in any event and that any further unification of the civil or criminal courts within Scotland will not be considered necessary.

Question Eight: 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 believe it is appropriate for the Court of Session to retain first instance jurisdiction for cases of the highest importance and value, and probably also for judicial review since this is likely to raise issues of difficulty and novelty. The general principle should also be that the Court of Session deals with matters of setting important legal precedent, although obviously it may well arise in cases of relatively low financial value. Where cases which raise issues of substantial novelty are raised in the sheriff courts, we believe that the Court of Session could have a valuable role as a referral court (much as the Court of Session might refer matters of European law to the European Court of Justice), although any opinion reached by a sheriff court on the basis of such a referral would have to be subject to the possibility of appeal to the Inner House.

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

It should be set at a level high enough to ensure that there is clear justification for raising the case in the Court of Session and that the level should be no less than £100,000, but that there should be power given to the Lord President to review the privative limit as and when justified by inflation or other demands upon the courts.

Question Ten: Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?

The transfer of cases between sheriff courts and to and from the Court of Session and sheriff courts is currently restricted both by legislation, competency of the proposed recipient court and judicial discretion. SCS is of the view that if access to courts is altered by the outcome of the Review, it should be open to the sheriff to remit cases of complexity, novelty or difficulty to different procedures within the same court, to another court of the same level or to higher courts and that any refusal by a court to so remit should be reviewable by a higher court by some sort of abbreviated written appeal procedure. It should also be open to a higher court to remit a case to a lower court when it is considered the cases would be more suited to being processed in that court.

Question Eleven: 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?

In other parts of this consultation response SCS has made various suggestions which we hope would result in fewer cases coming to court. Arguably, a large part of the jurisdiction of a “third tier” court would be business which should not be coming to court in the first place. While, we are not at this stage advocating that there should be a lower level of court built into the system, if it is considered by the Review group, on the strength of submissions made in response to this consultation exercise that there may be merit in the creation of a lower tier of civil court, for specific types of business, SCS would welcome the opportunity to comment further on the impact and effect of such a court.

Question Twelve: Alternatively, should there be another level of judiciary within the sheriff court to deal with third tier business?

Again, whilst not advocating the introduction of a third tier of business within the civil court structure, SCS does recognise that there may be some aspects of some of the current civil court processes which may be suitable for handling by a judicial office-holder with a lower level of qualification or experience. However, many factors would require to be considered by SCS before firming up on a view on this matter, not least of all the impact on current court programmes, accommodation and resources. Again, if it is

considered by the Review group, on the strength of submission made in response to this consultation exercise, that there may be merit in the creation a lower tier of civil court, SCS would welcome the opportunity to comment further on the impact and effect thereof.

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

There is a degree of advantage in certainty for litigants in knowing where their business will be dealt with. The geographical division into Sheriffdoms also has some advantage, in particular in giving Sheriffs Principal and Sheriffdom Business Managers the ability to manage the disposition of shrieval and administrative resource – both criminal and civil - over a manageable size of jurisdiction. The disadvantages include the potential for inflexibility in the use of resources if business cannot be easily be shifted between different parts of the sheriff court jurisdiction, and potential disadvantage to litigants who find themselves having to travel to somewhere which is geographically perverse. There are inevitably certain boundary perversities which mean, e.g. that the litigant in Kyle of Lochalsh has to travel to a court in Dingwall rather than just crossing the bridge to Portree. Rather than abolishing the principle that people should be able to have their business dealt with reasonably locally, we would prefer to affirm the principle that justice should be done in a location which is reasonably convenient to the litigants, but that the boundaries between sheriff court districts and between Sheriffdoms should be quite porous so that business can be reallocated between geographical jurisdictions where this is to the greater convenience of the litigants or is needed to balance out peaks and troughs of business in different locations. This could be combined with centralised processing of the initiation of cases, so that parties could submit documentation to a central point either electronically or through any convenient court facility, with a case only being allocated to a specific court if there was a requirement for a hearing. It would be possible to retain geographical sheriff court districts for criminal work while operating a more fluid disposition of civil business.

Question Fourteen: Are the arrangements for dealing with undefended actions satisfactory?

We consider that the current arrangements are unsatisfactory in two regards. First of all, it is unsatisfactory that judicial time at any level is being allocated to undefended actions. Secondly, the fact that these actions are undefended, when they may lead to consequences as serious as eviction or sequestration, suggests that the people against whom action has been taken are either unaware of its potential seriousness or that there is such an inequality of arms that they are unable to instruct or pay for a competent defence. This suggests (a) that a court is not the best means of securing justice between a well-resourced authority and a person who is about to have enforcement action taken against them but whose chaotic lifestyle, limited means and relative inarticulacy means that they are at a severe disadvantage. These cases would surely be better dealt with by a problem-solving officer with duties to both parties. Also (b) undefended actions which do reach court should be

capable of being dealt with administratively, possible in a centralised fashion, under the authority of a sheriff but without specific judicial input into every case.

Question Fifteen: Are the current arrangements for the disposal of cases raising issues of public and administrative law satisfactory?

We are not aware of any particular defect in this regard; through judicial review the courts demonstrate a robust and independent line in matters of public or administrative law. We do have some concerns that legislators appear to look to the courts as the first and only port of call for disputes over decisions taken by other public bodies, where other alternatives with different disciplines, which might result in better use of public resources and reduced costs to parties, for example what has been done in relation to environmental matters where appeals may be made to specific post holders within Scottish Government who have expertise in the area.

We also have a problem where public law has prescribed an administrative function for sheriff clerks, sheriffs or judges which could be equally well be carried out by another public authority, subject to appeal to a tribunal or court where constitutionally necessary e.g. Conjoined Arrestment orders, the checking of Revenue and Customs aspects of commissary proceedings, divorce or dissolution of partnerships where these are consented to and certain applications under the Adults with Incapacity Act.

Question Sixteen: Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process, e.g. commissary business?

See answer to question 15 of this chapter.

Commissary is already largely an administrative task. However SCS questions whether or not courts require to deal with at least some of the work currently involved and are in the process of considering proposals for reform.

Question Seventeen: 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 case, particularly for business which is submitted electronically and for cases which are unlikely to require a physical appearance by either party or their agents (e.g. most undefended actions) for centralised handling on a national level through a “back office” which principally carried administrative functions but which would be able to seek judicial input/authority as necessary. This would in effect be one element of a national sheriff court. Equally, it seems reasonable that the parties to a dispute, who may not even be familiar with Scottish geography if one of the parties is not based here, should not have to know the details of sheriff court and Sheriffdom boundaries to know where to initiate business, and should be able either to go to a central

point or to submit the necessary documentation at the court building which is most physically convenient to them. Again, this argues for some national handling of the initiation of cases. However, any move to national administration of the initiation of cases should be balanced with the presumption that where cases require the physical appearance of parties they should be dealt with, as far as possible, in localities which are convenient to the parties. While the distribution of court buildings which we have inherited is, to some extent, historically quirky, it does provide us with a local network of centres for access to justice which is a valuable resource. Centralised initiation of cases and their subsequent allocation to local appearances if physical appearances are necessary need not be contrary to current arrangements for appeals to Sheriffs Principal since cases which were being appealed would be likely to have been contested in a local court within a Sheriff Principal's jurisdiction.

Question Eighteen: Is there a case for all sheriffs to have an all-Scotland jurisdiction?

While not advocating that sheriffs should arbitrarily be moved around the country, we can see no strong argument against sheriffs being appointed with a commission which would enable them to serve anywhere in Scotland.

A move to such a form of appointment would also facilitate contingency planning for events such as transport disruption or other major catastrophe.

Question Nineteen: 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?

If the respective jurisdictions of the sheriff courts and the Court of Session are defined clearly and exclusively, we do not see why there would be a need to transfer cases except in the circumstances described above at Chapter one, question two.

Question Twenty: Are the existing appeal arrangements satisfactory?

The principal unsatisfactory features of current appeal arrangements appear to us to be the multiple possible routes of appeal and the possibility of multiple tiers of appeal. As can be seen from table 11 of the annex to the consultation document, a high percentage of appellants mark their appeals directly to the Court of Session. The reasoning behind doing so may well be justified in some cases but in others it may not. We believe it would be more efficient, economical and appropriate for the civil appeals from the sheriff court to be dealt with in first instance either by the Sheriff Principal (or by a bench of sheriffs) – with an onward appeal to the Court of Session being competent only with leave of the Sheriff Principal (or bench of sheriffs). Additionally, where cases are considered by parties to be of particular importance, because of novelty or complexity, it could be open to the appellant to seek

leave of the Sheriff Principal or bench of sheriffs to appeal directly to the Court of Session.

Question Twenty-One: Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

SCS sees an important role for Sheriffs Principal, now and in the new arrangements being considered in the Judiciary and Courts (Scotland) Bill. For the foreseeable future, Scotland will have a network of local courts. This network is currently being expanded through Summary Justice reform. The business – both judicial and administrative – of these courts needs to be managed and it makes sense for this to be done on a regional basis by managers with sufficient local knowledge and a sufficiently manageable number of courts. We believe that the combination of a Sheriff Principal and an administrative Sherifffdom Business Manager, as at present, is the right way to manage a dispersed network of courts. This need not be inconsistent with national arrangements for the initiation of cases – they would not come within the SP’s jurisdiction until they were allocated to a local court. Nor is it inconsistent with adding flexibility to current boundaries for civil cases. Sheriffs Principal would still require to deal with any appeals flowing from sheriffs within their particular Sherifffdom.

Question Twenty-Three: 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 general, we see no reason why there should be more than one level of possible appeal, except where there is provision for reference to an international court (e.g. European Court of Justice or European Court of Human Rights), or where leave to appeal further may be granted, e.g. from the Sheriff Principal to the Court of Session or from the Court of Session to the House of Lords.

Chapter Five: Principles for Reform to Civil Procedure and Key Procedural Issues

Question One: 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?

The expression of the objectives of civil justice contained in the civil procedural rules for England & Wales, included at paragraph 5.4 of the consultation paper, seems to capture the objectives and philosophy of effective civil justice very well.

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

The court should certainly encourage appropriate non-court resolution of disputes, to prevent the court from being burdened with cases which are able to be resolved in other forums without being escalated for judicial decision. This should not however be a blanket requirement since there will be cases where the issues in dispute are clear and there is no possibility of a resolution other than one imposed by a court. Strongly opposed parties may not be willing to accept a mediated solution or to agree to subject their dispute to resolution by a non-judicial arbiter. In general, the court should exist as the forum to which people come if non-court means of resolving disputes are impractical, rather than the court being the facilitator of other methods of dispute resolution. There may be exceptions to this, e.g. if resolving small claims disputes between unrepresented parties becomes a matter for a problem-solving approach by the court, or where it becomes clear during the course of a case that the parties may find a basis on which to settle if they are invited to pursue other methods of dispute resolutions.

Question three: If so, how should this be done and at what point or points in the progress of a dispute?

We are aware that both the Sheriff Court and Court of Session Rules Councils have been consulting on and considering this matter in careful detail and have nothing further to add to their deliberations.

Question Four: Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential?

By definition, any dispute where the parties will not consent to a mediated or arbitrated solution (i.e. they are both in it on an “all or nothing” basis) requires judicial determination. It is also unlikely that mediation or arbitration would be useful in settling ‘bulk-issued’ claims for debt enforcement e.g. by utility companies, or in many statutory cases where an order of the court is a necessary outcome. Matters involving novel or contentious issues in law are also appropriately for judicial decision, as are reviews of the lawfulness of the

action of public authorities. Applications from a party to the court for the court to grant authority for the party to do something (e.g. from a local authority to use common good funds for purposes for which they were not intended) should be subject to judicial determination.

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

Obviously, there is a wide range of dispute resolution methods and different methods are appropriate to different types of dispute, and to different degrees of willingness by the parties to compromise. As a general rule, we think that the parties should have to bear the cost of dispute resolution, whether through the courts or through alternative means of dispute resolution including mediation. In general, we do not see the courts or the state more widely as the normal provider of non-court dispute resolution mechanisms, although we can see that there may be a public interest in establishing some form of accreditation or regulation to ensure that alternative dispute resolution practitioners are appropriately skilled and qualified.

Question Six: In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

SCS already successfully uses IT in civil courts in the form of - a case management and tracking system (CMS) which has the capability to issue documentation; e mailing to and from litigants and agents where this is their chosen method of communication; video and telephone conferencing in cases in which rules of court or agreement by sheriff/judge and parties permits; electronic presentation of evidence where there is an agreement reached to use same; and in the recording of evidence.

In response to a call for extension of the use of IT into the realms of transmission of civil documentation, an SCS project team is developing a pilot for the electronic transmission of civil documentation to the courts.

We are conscious of the fact that the Civil Courts Review is now underway and that the Report that ensues may well recommend different ways of processing and handling our business as well as possible new structures and jurisdictions for the civil courts. With this in mind the pilot action being taken in relation to electronic transmission pending the outcome of the Civil Courts Review is being done with a view to testing systems which could be adapted to whatever form the civil courts take after the Review.

The pilot for electronic transmission of documentation in civil courts will:

- be commenced as a pilot or proof of concept, pending the outcome of the CJS and CCR;
- initially involve only small claims and summary cause payment cases;
- be conducted from a “virtual court”;
- engage on-line web based applications for individual litigants and bulk processing facilities for bulk users;

- require only defended cases or cases where offers to pay are rejected being transmitted to individual courts for calling there; and,
- require users to pay by debit card when transmitting cases to court by this means.

The project team is now taking steps to procure the IT system necessary to facilitate this pilot.

In light of the experience we gain as an organisation through this pilot and as structural and procedural proposals are developed in the course of the review, SCS would welcome the opportunity to comment further on this issue.

Question Seven: To what extent should the court control the conduct and pace of litigation?

To the maximum extent consistent with justice. While respecting that the parties should have adequate time to prepare for each stage of court proceedings, in general we do not think they should be approaching the court to resolve their dispute unless matters have come to such a head that a negotiated settlement is unlikely and a judicially-imposed settlement is sought. Neither should the parties be approaching the court with an ill-defined dispute. The proper use of the court is as the ultimate dispute resolution forum, and we regard it as an abuse that cases are brought to court which are capable of non-court resolution. It is also an abuse that either party is able to delay court proceedings through lack of preparation, and the court should have the power to require proceedings to be conducted to a fixed and brisk timetable.

Question Eight: What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?

SCS agrees with the contention at paragraph 5:50 of the consultation document that a “one size fits all” model of case management is not likely to be appropriate.

We consider that all cases ultimately brought to the court in future should be so prepared and considered prior to litigation commencing that they would at least be capable of being processed to case flow timetables prescribed by rules (or the court in light of the circumstances of the particular case) and that this timetable should be monitored and enforced by the court, (hopefully with the support of extended use of IT). Such a system of case flow management should require minimal intervention by the judge and the administration and as a consequence, not be overly costly, thus supportive of the principle of proportionality. Such a system could, in our view and experience, be applied to case types where large or small volumes of such work is processed by the court e.g. family actions, summary causes, adoptions.

It is our experience, however, that judicial case management requires a high degree of intervention by the judge and the court’s administration. It is expensive in terms of unit cost since the judge and court staff require to be

more proactive and set up, prepare and attend hearings. Such a level of judicial case management is most effective in the types of cases that would by their nature take up a large amount of court time in the ordinary system and we would suggest is not suited to dealing with large numbers of cases. There is however the potential to build into any new system specialised judicially case-managed processes, such as exist at present for commercial type actions, which could deal with actions thought by parties and the court to merit processing in this way. This would be an opt-in system, however SCS is of the view that the court fees levied in any such system would require to be calibrated in such a way as would recover the additional cost that such a labour intensive system would have on the public purse.

Chapter Six: Working Methods of the Civil Courts

Question one: What are the advantages and disadvantages of pre-action protocols?

See below for what are considered to be the advantages. We do understand, however, that where lawyers are involved by both sides in handling pre-action protocols their costs will mount up and that this will be seen by some as a disadvantage. This has to be balanced against the potentially vary major savings if pre-action protocols make the parties decide not to pursue their disputes in court.

Question Two: Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?

We can see advantage in the general use of pre-action protocols for the reasons outlined in the consultation paper. In general, this appears to be a useful stage in focusing parties' minds on defining the issues in dispute and assessing the strength of their case as a useful "check stage" at which parties may decide that they do not have a strong enough case to go to court. We think pre-action protocols are likely to have value in all cases where an action is likely to be defended. It is recognised that the format of protocols may be different for different case types. Damages actions, actions for damages for personal injuries, payment actions, and housing cases would all be suitable for pre-litigation protocols, the process of which may remove the need for court action altogether.

Question three: Should compliance with pre-action protocols be voluntary or compulsory.

We consider that compliance should be compulsory is certain actions such as those we describe at four above and voluntary in all other cases.

Question Four: 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 are not convinced of the merits of producing new gate-keeping procedures. For these procedures to be fair, there would have to be an opportunity for the party to challenge the decision of the gate-keeper. We think this proposal carries the high risk of the perverse result that weak cases would clutter up judicial and court time even more than they do at present. Pre-action protocols would have more value and should be preferred to such a procedure.

Question five: Are the current arrangements for making the rules of civil procedure satisfactory? Please give your reasons for your views.

Not in areas where jurisdiction is concurrent in both Court of Session and Sheriff Court. The current arrangements result in both Rules Councils

considering the same issues to some degree separately and create the opportunity for them to come to different conclusions and to prepare and instruct rules which are in some way different but could for ease of use of the litigant, practitioner and court staff have been the same.

Question Six: Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

Ideally yes, particularly if types of cases continue to be able to be raised in both courts. We say this because since 1995 solicitors outwith Edinburgh have had the right to raise summonses and petitions in the Court of Session but rural and many city agents rarely do, preferring instead to instruct Edinburgh Solicitors to do the necessary work for them. This practice is largely due to lack of familiarity with rules and procedures and has the potential to increase the overall cost of litigation. If rules and procedures could be at least similar if not the same where at all possible, this coupled with engagement of modern technology means of communication may encourage more solicitors furth of Edinburgh to practice in the Court of Session, thus potentially reducing the cost of such litigation and improving access to justice in rural areas. However, we do not see this as a matter of the first priority., as long both Courts are operating to rules which are clear and which promote the efficient disposal business

Question Seven: 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?

A single initiating document, particularly in all actions for payment of money, would be useful if it gave a clear description of the issues in dispute and the remedies sought. It might be a redaction of the pre-action protocols.

At present there are four different forms of action for payment of money. Appropriateness of use is dependent upon the sum sued for and the chosen court. We know that the vast majority of such cases are never defended. The engagement of a single initiating document would make the raising of actions for payment of money simpler, potentially less costly, and simplify the procedures necessary in any central processing site.

Question Eight: To what extent should a system of abbreviated pleadings be introduced?

The greatest possible brevity and clarity in written pleadings, consistent with reasoned explanation of the issues in dispute, must be of advantage to everyone, but the arguments in the consultation against over-simplification of the issues are cogent and argue against a rigid insistence on abbreviated pleadings. We refer the Review to team to the report by Elaine Samuel in relation to the Personal Injury Actions in the Court of Session to which we can add nothing further.

Question Nine: Are the current arrangements for summary disposal satisfactory?

We have nothing to add to what is set out at paragraph 6.47 – 6.49 of the consultation document.

Question Ten: 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?

Arguably, doing a bit of routine procedural business is part of working life for everyone including the judiciary. It is also hard to see how becoming a “routine procedural” judge would be an attractive career for anyone of any imagination or ability. It seems more relevant to consider what routine procedural business can be removed from the courts; what routine procedural business can be dealt with by administrators, subject to judicial oversight and delegated authority; and what lower-tier business might best be dealt with outside the adversarial and legally-represented environment of the current court system.

Question Twelve: 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?

Yes. If parties’ representatives cannot make their case within a reasonable time prescribed by the court then they are failing in their advocacy skills and wasting the time and money both of their clients and of the court. Consideration can be given to facilitating supplementing what is ultimately said with written submissions, if thought necessary.

Question Thirteen: In the conduct of substantive hearings should there be greater use of written rather than oral arguments?

Yes, if this reduces the pressure on court time and facilities by enabling the judge to reach an opinion without hearing the parties or with the benefit of a shorter hearing than is typical.

Question Seventeen: Should civil jury trials be retained?

No, for the reasons advanced in our earlier submission and in the consultation paper.

Question Eighteen: Should written judgments be required in all cases?

There should be a written record of the decision in all cases, to avoid any ambiguity about the outcome of the case. In the simplest cases, however, this might just be an interlocutor signed by the clerk of the court recording the court’s decision. In more complex cases a brief narrative of the facts, circumstances and decision should suffice, with only the most complex requiring a full judgment.

Question Twenty: What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?

If we are not to create a preliminary sift stage, the means, as for other parties, would include requiring the litigant to demonstrate that they had exhausted non-court solutions, requiring them to complete a pre-action protocol, requiring them to submit competent written pleadings, and strictly limiting the court time available for any oral hearings.

Question Twenty-Three: Would it be desirable to introduce separate procedures for a multi-party litigation?

For the reasons advanced in the consultation paper, there appears to be a good case for this.

ENDS