

## **RESPONSE BY THE SCOTTISH LEGAL AID BOARD TO THE SCOTTISH CIVIL COURTS REVIEW CONSULTATION PAPER**

The Board welcomes the opportunity to respond to the consultation paper. The Board provides, through civil and childrens' legal assistance, access to justice for many people who could not otherwise afford to meet their legal costs. The Board spends around £55 million each year on civil and childrens' legal assistance in meeting the cost of solicitors, counsel and case outlays such as experts. Around £11 million each year is recovered in contributions, property recovered and preserved and expenses.

In 2006/07, there were 114,000 grants of advice and assistance (including ABWOR) for civil matters and children's referral cases. There were 11,323 grants of civil legal aid (16,291 applications) and 4,456 grants of children's referral cases. In addition to making grants of civil legal aid, the Board considers requests for the employment of counsel and experts in the course of civil and children's legal aid cases. The Board also itself acts as both pursuer and defender in civil cases, for example seeking the recovery of sums owed to it or defending cases brought against it, such as judicial reviews. In addition, through its solicitors employed under Part V of the Legal Aid (Scotland) Act 1986 ('Part V solicitors'), the Board also provides advice and representation in civil cases. This range of points of involvement in civil cases gives the Board a unique perspective on the operation of the civil justice system.

The Board particularly welcomes the remit of the review which includes "making recommendations for changes with a view to improving access to civil justice in Scotland". The Board considers that there is a need to further improve access to justice for those who cannot afford to meet the cost of their case but who do not qualify for civil legal aid. Given its role as a third party funder of civil cases, the Board also welcomes the focus in the review on the cost of litigation to parties and the public purse. Finding ways of enabling people to resolve civil problems quickly, at reasonable cost and without recourse to the courts, where this is possible, is a significant challenge for the review. The current civil justice system can be slow and expensive and the Board believes that steps should be taken to reduce the costs which clients have to pay and to speed up the process, given that delay can also lead to increased costs.

The Board has identified a number of key issues:

- The courts should be seen as a last resort, with greater resources dedicated to the early provision of information, advice and assistance so that more problems can be resolved before they become disputes, and more disputes can be resolved before they become formal proceedings.
- The cost of litigation is a concern, as there is a real risk that individuals with potentially meritorious cases may be deterred from taking or defending an action. The costs of many cases seem likely to be well beyond the means of the majority of the population, meaning that only the least well-off, who are eligible for legal aid, and the wealthiest will be able to access the courts.
- Flowing from this concern, the Board believes that financial eligibility for civil legal aid should be widened, for example on the basis of a tapered system of contributions.
- Much could be done to reduce costs within the court system, such as the use of technology to obviate the need for judges, parties and their representatives to convene, especially for procedural hearings.
- Parties should be held more accountable for the conduct of the proceedings, and the court itself should have a greater role in ensuring the satisfactory progress of cases.

- Inconsistency relating to the geographic jurisdiction of the sheriff courts should be removed as far as possible.
- Some form of ongoing forum should be established, bringing together key stakeholders to monitor the effectiveness of the operation of the civil justice system and consider opportunities for further development and improvement.

## **CONSULTATION QUESTIONS**

### **Chapter 1 – Introduction**

#### **Question 1 – Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?**

Yes. The Board considers that the civil justice system should positively encourage early resolution of disputes, viewing recourse to the courts as a last resort. This is very much in line with the report of the Civil Justice Advisory Group chaired by Lord Coulsfield on which the Board was represented. It is important that the review considers the role of the civil courts in the context of the civil justice system as a whole. If the courts are to be seen as a last resort it is essential that other suitable, cost effective, dispute resolution mechanisms are available and that there are adequate means to help those who use them.

Research from around the world clearly shows that one legal problem often leads to or occurs alongside other legal problems. Not all of these problems need to be addressed by a lawyer, at least at the initial stages. By ensuring the availability of information, advice and assistance to help resolve problems earlier, the escalation of problems and emergence of related problems could be prevented, thereby reducing the need for more intensive (and costly) forms of intervention, such as court action.

The Board considers that a range of interventions could be made, either by the Board or other funders, to improve the ability of those with problems to obtain access to assistance at an early stage and either resolve their problems or identify the need for specialist help. The Board believes that the resources required to facilitate early resolution would be more than outweighed by the savings to the parties and the civil justice system, including legal aid costs, and would also significantly reduce the burden on other public services of unresolved and related problems to do with benefits, housing, employment, debt and family breakdown.

Promoting early resolution of problems was a key theme in both the “Strategic Review of the Delivery of Legal Aid, Advice and Information” published in 2004 and the “Advice for All” consultation published in 2005.

Based on experience of recent developments in Scotland and evidence from other jurisdictions, these documents set out a vision of a “planned complex mixed model”<sup>1</sup> for delivery of publicly funded legal assistance involving:

- the provision of information, advice, assistance and representation by a combination of salaried public sector lawyers, private practice lawyers and non-lawyer advisers

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<sup>1</sup> A mixed model involves provision of publicly funded legal assistance by a combination of publicly employed solicitors and private practice solicitors; a complex mixed model also includes services delivered by advisers other than solicitors; in a planned complex mixed model all of these services are managed and coordinated so as to meet identified needs in the most effective and efficient way.

- funding of these services through a combination of case-by-case and block or grant funded arrangements
- co-ordination by funders of this range of services to ensure that best use is made of resources, services are directed towards the meeting of identified need and those requiring help are able to access it as easily as possible
- effective referral between different service providers to ensure that all of a person's advice needs are addressed
- quality assurance of all publicly funded services.

The Board remains of the view that such a model is the best and most cost-effective way of ensuring the early identification and resolution of legal problems – the key is to help people resolve issues.

An improved evidence base regarding civil justiciable problems would support the development of effective strategies for achieving earlier resolution through such a planned complex mixed model. Research on this topic, which is commonly carried out in other developed legal aid systems would give a wealth of information that would be of use to all parties involved in the planning of the civil justice system.

It would provide evidence as to the different routes people take to resolving problems, enabling the identification of successful routes to early resolution and the services that support this approach. It would also help inform strategies to target resources on tackling problems that appear most difficult to resolve, or that people simply do not try to sort out because of their perceived intractability.

Whilst this kind of research has been carried out in the past in Scotland, it has not been carried out on either a comprehensive or regular basis. It is important that necessary reforms are not delayed by the need for research. However, the Board would strongly support collaborative work to make this kind of information available for use across the civil justice sector on an ongoing basis.

Research of this kind has been instrumental in informing the development of civil legal assistance in England and Wales, where Community Legal Advice Centres and Networks are being developed to ensure that services are joined up, helping ensure that civil legal problems, or clusters of problems, are identified and addressed before they escalate or lead on to further problems.

As the consultation paper notes, the Legal Profession and Legal Aid (Scotland) Act 2007 provided the Board with new powers through which elements of the planned complex mixed model could be implemented. These powers reflect the range of services and service providers that are key to improving the early resolution of problems. The new statutory provisions have not yet been brought into force by the Government.

**Question 2 – Do you agree that the principles and assumptions discussed at 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. The Board agrees that the principles and assumptions which should underpin the civil justice system set out in these paragraphs provide a sound and sensible basis for the review's recommendations. The Board also supports the statement in paragraph 1.14 of the paper that "the recommendations will also be predicated on the assumption that the aim is to improve the system for the benefit of those whom it is intended to serve, rather than those who work within

it". And, as such, they need to recognise the individual needs of the range of users of the system some of whom are regular users of the courts whereas others, often individuals who may only use it once.

**Question 3 – Are there any matters within the Review’s remit with which you have concerns but which are not dealt with in this paper?**

Yes. The paper lists at paragraph 1.16 a number of related areas of policy that the review should take into account as they may have an impact on the work of the civil courts. The Board believes it is essential that the review considers these areas if it is to make recommendations which will improve access to civil justice in Scotland.

One of the matters listed at paragraph 1.16 is the structure and regulation of the legal profession. The Board agrees that it is important that the review take this into account, and particularly that it considers the potential opportunities - in terms of access to and cost of legal services - that may be offered by any changes resulting from the current consideration of alternative business structures.

There may be merit in the review considering the implications of geographical variations in the operation of the civil justice system. As detailed in the Board’s responses to several other questions (for example, Chapter 3, question 5 and Chapter 4, question 13) these variations can cause difficulties as the Board administers the civil legal aid system consistently across the country.

**Chapter 2 – Access to Justice**

**Question 1 – What contribution can public legal education make to improving access to justice?**

Considerable. As is set out in the consultation paper, PLE activity is already prevalent in many jurisdictions, including in Scotland. It forms a core part of much of the publicly funded advice sector’s work, encompassing voluntary sector advice agencies, those in the public sector such as welfare rights teams, and not-for-profit solicitors either in law centres or those directly employed by the Board (Part V Solicitors).

As with other aspects of publicly funded legal advice and information provision in Scotland however, this is not provided comprehensively, or in a planned strategic way. The Board believes that PLE could be made a broader and more effective instrument for improving access to justice if it was planned and co-ordinated, making use of information about trends in civil disputes and the experiences of those who have civil justiciable problems, information from court users and making the identification of PLE requirements a part of development of new areas of legislation in advance of implementation.

This is borne out by the Board’s experience of running a programme of ‘Part V’ projects, in which Board-employed solicitors work with other advice organisations to act for their clients, provide support to advisers on individual cases and more generally to provide training and support to build the capacity and ability of those organisations to provide effective advice to a wide range of clients.

Some of this work has focussed on specific client groups or subject matters, such as asylum, mental health, housing and disability, while others have been more generalist in nature, focusing

instead on building provision across wide rural areas such as Argyll and Bute and the Highlands and Islands. All of the projects have aimed to tackle gaps in supply and reduce unmet legal need through interventions that go beyond the traditional legal aid model of assisting individuals on a case by case basis. This non-casework element of activity has extended the reach of the projects to have potential for longer-lasting and broader impact than would be possible from a single focus on dealing with individual disputes as they happen to arise.

The Board's experience would suggest that the strategic use of PLE could contribute more widely to access to justice in ways that include:

- Improving access to information about different types of legal problems and how to deal with them at an early stage
- Enabling access to accurate information about the different kinds of dispute resolution mechanisms that exist
- Improving availability of information about providers of advice, assistance and representation and what kind of work they do
- Supporting, training and informing those affected by and involved in implementing legislation that may result in civil disputes
- Helping organisations whose clients/service users may need to go through the civil justice system

This type of activity would not just focus on improving knowledge of how the civil justice system (not just the courts) operates, but also would assist in facilitating early appropriate advice and assistance from the most appropriate source. It would also help demystify the law, the courts and legal procedures, helping make each more accessible and easier to use to those who may need them.

The Board therefore believes that if existing work was co-ordinated more effectively it could contribute to access to justice on a national scale by:

- Reducing the number of problems that escalate to a point that involves them entering the formal court system – early intervention
- Increasing the effectiveness of court processes when problems do end up there – improving knowledge and capacity of those who do need to go to court

Further activity would of course be dependent on availability of resources for this purpose, and agreement on who should be responsible for leading on this area of work.

The provisions of the Legal Profession and Legal Aid (Sc) Act 2007 included new powers for the Board to grant fund activity that would facilitate access to civil legal assistance. This goes beyond funding of direct representation and was drafted to include the kind of activity normally included within the definition of PLE. While the activity would fall within the scope of the Board's funding powers, no funds have as yet been made available by Government to give effect to these provisions. The Board believes that implementation of these powers would have a significant impact on access to justice and reduce the costs of the current system.

**Question 2 – Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?**

We do have concerns over access. In the area of civil legal assistance the Board is seeking to adapt to the challenges of an ever changing legal services market, the changes in behaviours in society and the types of issues and problems encountered by individuals which may require them to seek legal assistance. Changes in any of these elements may impact in such a way as to create

a gap in provision due to a mismatch between need for assistance and the availability of supply to meet that need.

The issue of identifying emerging gaps is a complex one, but the Board has developed a broad range of activity focussing on understanding trends in needs for advice and representation, and mapping supply effectively by improving the information available about numbers of legal aid outlets as well as the range of services available from these outlets.

In terms of identifying need for legal assistance, there are currently gaps in the availability of information about general prevalence of civil justiciable problems in Scotland. From the Board's perspective, information is available about the number of applications for civil legal aid, but this relates to instances where people successfully access advice and representation rather than being information about the range of legal problems which people experience in Scotland, and whether they encounter any difficulties in accessing assistance in resolving these problems.

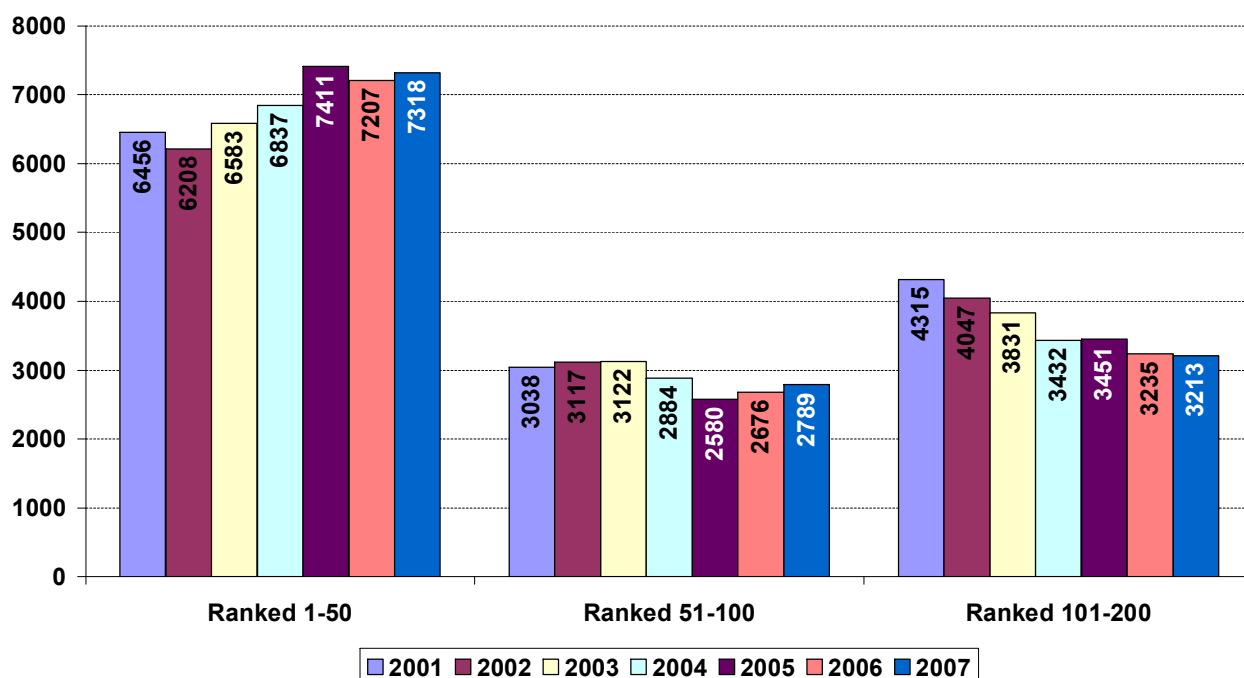
The Board's information does show a general downward trend in the number of applications being submitted for civil matters, and the number of people receiving advice and assistance. However, this downward trend is not evenly spread across type of problem, and any drop (or increase) may be due to a variety of reasons. For example, there may have been changes in the proportion of the population being eligible by way of means assessment or changes in the number of firms willing to take on work. There may also have been changes in rates of civil problems occurring, or changes in the way individuals handle different kinds of problems, such as through no win no fee arrangements, mediation or other providers of advice. The nature of civil problems experienced by the public also changes over time. As new government policy or legislation is brought in, some problems may be reduced, others may be created, or new rights and remedies may become available. Reductions in, or changes in the nature of, applications may therefore not be an indication of a gap in supply, but due to a complex mix of drivers.

In terms of available legal aid suppliers, the available information also points to a general downward trend in the number of firms providing civil legal assistance. An important feature of civil legal aid is the small number of cases that are – and always have been - undertaken by many of the solicitors registered to do this work. Only 10% of active outlets submit more than fifty civil legal aid applications per year, with almost half submitting ten or fewer. The latest evidence suggests that, while the number of firms providing civil legal aid has been falling for several years, a relatively small number of firms are increasing their civil legal aid business.

In 2007, 524 firms submitted at least one civil legal aid application, 6% fewer than in 2006. However, the number of applications submitted by the busiest 100 firms increased slightly. In fact, the total number of applications submitted by the top 100 firms (at 10107) was higher than the equivalent total for any of the previous six years. These 100 firms are between them responsible for over 60% of all applications submitted (the top *ten* firms are responsible for 19% of all applications).

The Chart below illustrates the concentration of work amongst the busier firms and the growth in the level of business of the very busiest firms over the last seven years. The 200 firms represented on this chart submitted 83% of all applications in 2007.

### Civil Legal Aid applications submitted by top ranked firms, 2001-2007



This evidence suggests that fewer firms are undertaking civil legal aid work but that the busier firms are maintaining or increasing their levels (and share) of business.

There is little doubt however, that people do experience barriers in access to advice, as is borne out by research as well as the Board's own experience of dealing with difficulties faced by some clients in finding a solicitor to take on certain types of work in certain parts of the country on a legal aid basis. Further work is ongoing to establish whether the long term reductions in applications might indicate wider problems in accessing advice or obtaining particular legal remedies and the Board would therefore be most interested in having an opportunity to assist the Review team further in their deliberations on this issue once all responses have been collated.

On a fairly general level, the Board is aware that there has traditionally been a shortage of solicitors able and willing to provide help on matters of social welfare law (employment, housing, mental health, immigration and asylum, debt, benefits) and much of the legally-aided activity in these fields is concentrated in a very small number of firms, most of which tend to be central belt-based.

More recently, the Board has seen evidence that solicitors are acting less frequently in cases involving protective orders relating to domestic violence. As for why this may be so, the evidence is mixed. While some solicitors have suggested that the reduction in legal aid applications is a result of a more robust approach to domestic violence matters by the police and COPFS, including the imposition of bail conditions that largely obviate the need for an interdict, others have argued that access to solicitors is still necessary and has become more difficult.

Solicitors have also become less willing to act on a legally aided basis in complex family cases or divorce cases involving financial provision. The Board understands that where a client is likely to be better able to access the resources required to finance the case at the conclusion of the case than they are at the outset, such as where matrimonial property forms the basis of the dispute, many solicitors are continuing to act for clients, but on a privately funded basis.

More generally, solicitors have argued that the fees payable under civil legal aid are insufficient and that this is a major factor in their decisions whether to provide a legal aid service. The Board's analysis of civil legal aid cases suggests that there has been a significant increase of around 16% in the average fees payable in civil cases following the introduction of block fees in 2003. This figure does not take account of subsequent improvements to the civil fees for undefended cases, such as many interdicts, and the introduction of additional payments for a wider range of court diets. In addition, the fees for work in the Court of Session and for advice and assistance have increased by 21%.

However, the Board recognises that some types of case have fared less well since block fees were introduced. The Board is hopeful that the subsequent changes addressed some of these concerns and will encourage solicitors to continue to provide a legal aid service. Following a review of civil fees carried out by the Board, Ministers are also currently considering further changes to the civil legal aid fees, including potentially the introduction of an exceptional case provision.

Geographically, there is still a good spread of solicitors across most areas. However, the Board has some evidence from other agencies of some clients facing difficulties in accessing services in various parts of the country, including the major cities. In particular, the Board is aware that in large parts of the rural north and west of Scotland, there are small numbers of solicitors providing a legal aid service. Where contested court proceedings are involved, there is sometimes a difficulty with conflicts of interest and, where there are too few solicitors or a case requires specialist input, potential clients often have to look further afield for assistance.

In recognition of these problems, and in close consultation with the local bar, the Board recently launched the Highlands and Islands Part V Service, with Board employed solicitors providing a casework service to complement that available from local solicitors across the Highlands and Islands, including Orkney and Shetland. A similar service is provided in Argyll and Bute via a Part V project based in Lochgilphead.

While the Board believes that there may be a wider future role for Part V employed solicitors in filling gaps in specific locations or areas of law where there is evidence of problems in the supply of civil legal aid services by private sector solicitors, the Board's first priority is to encourage and support local private sector provision. The part V solicitors work alongside local solicitors, referring clients to them wherever possible.

However, in a number of fields of law, and perhaps particularly social welfare law, non-lawyer advisers in the voluntary or public sectors are also often well-placed to help people resolve their problems. As noted above, the Legal Profession and Legal Aid (Sc) Act 2007 gave the Board grant funding powers that could support this sort of provision, as well as allowing for case by case advice and assistance by non-lawyer advisers. The Board sees this combination of approaches – private practice solicitors, Board-employed solicitors and non-lawyer advisers – as the best means of ensuring appropriate access to advice, assistance and representation across the country. The Board is keen that the new provisions should be implemented as soon as practicable.

**Question 3 – To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?**

While some parties may choose to represent themselves and consider themselves competent to do so, others may have no option but to do so because they are unable to find a solicitor willing (for whatever reasons) to act in their case, are ineligible for legal aid and cannot afford to fund

representation privately, or have been refused legal aid on merits grounds but nevertheless wish to proceed with their case.

While there is currently little research evidence on party litigants' experiences of the court process, anecdotal evidence suggests that it is likely to be a daunting and stressful experience for many, particularly for those who have no choice but to represent themselves. The Board is also aware that many non-lawyer advisers are reticent about representing clients in those summary cause actions where they are permitted to do so, partly because they find the process intimidating. It is also often said that party litigants pose problems for the court itself, occupying a disproportionate level of time and resources. For these reasons, it would appear sensible for court procedures to be designed as far as practicable to enable party litigants to participate effectively in the civil justice system. The Board would be pleased to contribute to any research that might aid understanding of the experience of party litigants and help inform the development of any proposals for change to court procedures to improve this.

**Question 4 – What contribution, if any, can (a) “self help” services for party litigants and (b) court based advice services make to improve access to justice?**

While the Board supports the aim of enabling early intervention to avoid cases having to go through formal court procedures, not every case will be able to be resolved early. Additionally, where cases do end up in Court, in some instances people will not have accessed advice or representation.

The Board would therefore support initiatives that would enable people to understand their legal rights and help build their own capacity to represent themselves in a formal setting. There are many examples of successful self-help services, online and physical, in a number of other jurisdictions including Canada, Australia and the USA, especially California. These jurisdictions have invested heavily in largely internet-based services enabling litigants to construct and file their own claims and access step-by-step guidance on court processes. In several jurisdictions, these court-run services are integrated with legal aid-type services, so that those potential litigants who require assistance find it easy to access it.

The Board believes that this is crucial as, while many individuals may be able to use self-help kits to conduct their own case competently, not all people or cases are suited to this approach. Vulnerable people in particular may require additional support to help them deal with what are often crisis situations.

In-Court Advice Projects provide a valuable and valued service in helping individuals who find themselves in these circumstances. The Board would support further development of the In-Court Advice programme. Apart from helping the client these services can be valuable to the court in avoiding wasted time and effort and ensuring that those who reach court without seeking help can find it there.

**Question 5 – Are there any other issues which impact on access to justice in Scotland which the Review should consider?**

None, other than to emphasise the importance of a system that is simpler, more open and easier for parties to understand.

**Question 6 – Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?**

Probably. It is part of the legal aid test of reasonableness applied by the Board that the likely cost of a case should be proportionate to the sum sought. It should also be noted that small claims proceedings at first instance are excluded from civil legal aid under primary legislation. However, it is important to note that monetary value is not synonymous with either importance to the parties or complexity.

Nevertheless, the Board recognises that many of the thousands of predominantly low value debt and housing cases heard in the sheriff courts each year raise few issues of law and yet occupy a substantial part of the court timetable. Many such cases require the court to do little more than oversee the agreement of repayment schedules. As such, they do not seem to be a particularly good use of the very expensive resource the court represents. This suggests that significant benefits to the court system would be derived from the removal of these cases from the formal court structure and into some form of lay justice system.

However, complex points of law can arise in some low value cases – a point recognised with the exemption of personal injury cases from the recent increase in small claims limits. It is therefore important that in any ‘third tier’ involving non-legally qualified judges there is easy access to expert legal advice and a clear route to the sheriff court (both on appeal and by way of remit at first instance).

Further to the response to question 3 in this chapter, the establishment of a less formal third tier, whether with legally qualified judges or otherwise, would be a good opportunity to develop a system that was more interventionist and arbitral in nature, in turn making it more accessible to the litigant in person and lay representative. In this respect it is important to note that the small claims court is not generally regarded as having delivered the intended informality and accessibility. The operation of this procedure should therefore be reviewed alongside consideration of any new third tier.

### **Chapter 3 – The Cost and Funding of Litigation**

#### **Question 1 – What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?**

The Board only holds information in relation to the actions which it funds. The amounts paid and average case cost figures for civil legal aid in 2006-07 are published at Appendix 3 (3.21) of the Scottish Legal Aid Board Annual Report 2006-2007. The average gross cost of a civil legal aid case in 2006/07 was £2,643, 20% more than in 2001/02. The annual report shows the wide variation in costs between different types of case and those heard in different courts. For example, in the sheriff court the average case involving the recovery of heritable property cost £339, while the average reparation case cost £4,395. In the Court of Session, the average reparation case cost just over £19,000. Such a cost seems likely to be beyond the means of all but the most financially secure, especially when one considers that solicitors will often opt to accept judicial expenses as these are often greater than the sums payable under legal aid.

The Board would also comment that, in the last few years, there has been an increase in the number of extremely high cost cases for which the Fund has been liable. Some very long running expensive cases, particularly in the area of childrens’ legal aid, where several parties have been granted legal aid by the court and each is represented by counsel and independent expert, have given the Board cause to look closely at the reasons for escalating costs, amongst which are the significantly increased cost of counsel and the increased use and cost of experts, reporters and

curators. The Board is keen to explore means by which better control can be exercised over such costs.

The Board would be happy to provide the review team with more detailed analysis of the costs of cases, and the respective costs of solicitors' fees, counsel and outlays, such as expert witnesses, if this were thought helpful. In addition, the Board holds information about property recovered and preserved and the outcomes of cases for which civil legal aid has been made available. Although this does not cover all cases, the Board would be happy to explore with the review team what further information might be useful.

It should also be noted that the sums payable under legal aid are often likely to be lower than those charged by solicitors to privately paying clients. Indeed, a significant factor for solicitors in considering whether to accept instructions in a legal aid case is likely to be not only the actual rate of pay for civil legal aid, but the differential in income the solicitor can generate for a firm by undertaking work for private clients compared to legally aided clients.

The Law Society of Scotland General Business Table of Fees (which provided guidance for recommended rates for work payable on a solicitor and client basis) was withdrawn with effect from 1st August 2005 following a ruling by the Office of Fair Trading and this appears to have increased market rates for solicitors in privately funded cases. Anecdotal evidence suggests that the hourly rates chargeable by solicitors for private clients for work similar to that undertaken in legal aid cases varies, but can be between £150-£200 per hour.

Overall, the differential between legal aid and private fee rates for all types of work has never been greater, even allowing for the estimated 21% increase in legal aid rates when civil legal aid was reformed in October 2003. By way of example, the table below shows the difference between legal aid and private judicial fee rates between 1995 (the last civil legal aid fee increase prior to the 2003 reforms) and 2007.

**Changes in legal aid and judicial fee rates, 1995-2007**

Hourly rates	1995			2007			% change 1995-2007		Inflation 1995-2007
	Legal Aid	Judicial	Difference	Legal Aid	Judicial	Difference	Legal Aid	Judicial	
Non-advocacy	43.60	57.20	+13%	52.60	128.00	+143%	+21%	+224%	+34%
Advocacy	56.40	63.00	+12%	68.00	140.60	+107%	+21%	+223%	

*\*comparison between detailed legal aid and detailed judicial fee rates*

Recent Cost of Time Surveys conducted for the Law Society of Scotland show that agent and client rates have increased substantially over recent years and that the gap between these rates and those payable under civil legal aid is bigger than ever before.

This suggests that the information on costs available from the Board should not be taken as representative of the cost of litigating for those paying privately. These costs are likely to be significantly higher, and to have increased even more rapidly over recent years. It is also worth noting that, in the absence of a table of fees in the sheriff court, the cost of counsel in legal aid cases has increased markedly in recent years and is unpredictable, making it difficult for litigants (and the Board) to estimate the likely cost of a case. A table of fees would bring greater transparency and certainty.

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

The cost of litigation is undoubtedly a deterrent to parties from pursuing or defending cases and this rises depending on the level of court in which the matter is litigated. As noted above, the cost of civil cases can be extremely high and is increasing. The Board knows from its dealings with applicants for civil legal aid, either in the context of assessing their means or in setting contributions, and also from opponents' representations in respect of applications for civil legal aid, that parties are unable to progress cases without public funding. If costs continue to increase, more and more people will be unable to take or defend civil proceedings.

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

In most cases, court fees are likely to be a relatively minor component of the cost of a case, given the level of solicitors' fees and other case-related costs such as counsel and experts where applicable. However, where court fees make up a more substantial proportion of the overall cost of a case, they may contribute towards the overall cost-disincentive against parties pursuing or defending meritorious cases.

Currently, assisted persons are exempted from paying court fees. However, there may be scope to reduce the impact on the public purse by requiring unsuccessful parties in a case to meet the cost of their opponent's court fees as part of the costs of process. As a legally aided party will not have been required to pay any court fees during the course of the case, these will not be included in any expenses payable to the Board by their opponent. This means that the unsuccessful non-legally aided party will actually face lower expenses if their opponent is legally aided.

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

No. The Board has various concerns about the rules on recovery of judicial expenses, namely;

**Modification** – s18 of the Legal Aid (Scotland) Act 1986 applies to situations where an award of expenses has been made against an assisted person and the assisted person applies to the court to modify (reduce) the sum to be paid. In practice, expenses are commonly modified to nil. There seems to be confusion at times about the point at which a motion for modification should take place. The legislation talks about "decerniture" and the practice in the sheriff court is that the motion must be made prior to any decerniture. This differs from the process in the Court of Session in which specific timescales are fixed. This inconsistency in approach means that on occasion, the less well informed in the sheriff court may miss the opportunity of seeking modification.

The Board is also concerned about the extent to which the civil courts are actually making any enquiry as to the assisted person's "ability to pay" when motions are considered. Often it would appear that reliance is placed on the level of any contribution payable to the Board by the assisted party, however contributions are currently based on financial circumstances at the application stage. The assisted person's financial situation could be very different at the conclusion of the proceedings.

The existence of the modification process, however, may in itself be a barrier to access in particular to the unassisted opponent who, by virtue of section 18, may be unable to recover expenses. This is not a position which is consistent with the approach taken where parties are privately funded.

**Award from the Legal Aid fund to a successful (unassisted) opponent** – this is provided for in s19 of the 1986 Act. Again, as noted above on modification, the existence of section 19 may in itself provide a barrier to access. The unassisted party may only recover expenses out of the Fund in the event that the party has suffered financial hardship, which seems to run contrary to the concept of success in the cause. Although the test has recently been reduced from severe hardship to hardship, it is still an underused provision.

Equally, there is an inconsistency in the operation of section 19, which again may affect access in that the rules which apply to obtaining awards of expenses from the Fund differ depending on whether the proceedings to which they relate are taken at first instance or on appeal. In the latter, there is no requirement to demonstrate financial hardship.

The Board also notes that the courts rarely use their power to order the party claiming from the fund to lodge a statement of grounds. Where this is lodged it should be intimated to the Board. If the Board wishes to appear or be represented, as is provided for in the court rules, it seems that many sheriff clerks expect the Board to formally lodge opposition to the s19 motion. In fact the Board is not a party to the action but rather has a statutory right to make representations and should not require to undertake the additional work and fee which opposing the motion requires.

**Judicial Expenses** – in the majority of Personal Injury actions for which Legal Aid has been granted, solicitors elect to accept the judicial expenses as their payment rather than submitting an account to the Board based on legal aid fee rates. However, as the consultation paper notes, there is a significant disparity in levels of judicial expenses as against the actual fees the client will be charged by his solicitor. In the Board's view this does not necessarily imply that the judicial fee rates are inappropriate. There may however be scope to consider what is covered by judicial expenses and, in particular, whether they should cover all reasonable costs incurred whether the party is legally aided or privately funded.

The Board does however have concerns about the lack of transparency of the process for fixing the judicial fee rates. These rates have increased quite markedly in recent years. This has an impact on sums payable in legal aid cases as the auditor of court has regard to the judicial fees when taxing legal aid accounts. In addition, in the Board's answers to chapter 6 questions mention concerns about the rising cost to the fund from reporter and curator costs. Traditionally, these appointees have calculated their fees with reference to the detailed judicial fee table. As the Board comment in other answers, these costs can ultimately be indirectly borne by the assisted party.

**Question 5 – Are the current arrangements for taxation of judicial accounts of expenses satisfactory?**

No. The time limits for lodging accounts for taxation and awareness of the process could be better publicised. The Board also finds that there can be a difficulty in so far as the Board is not a party to the proceedings and has limited powers to ensure that an agent does in fact lodge an account for taxation, where his own account has already been paid out of the fund.

In addition, as was brought out in the Report of the Research Working Group on the Legal Services Market, there are significant weaknesses in the current system. These include the basis on which auditors' fees are paid, how auditors of court are appointed, the lack of clarity of the scope of their role and the apparent lack of consistency in decisions taken by different auditors. The Board is concerned that there has to date been no movement in addressing these weaknesses

which is very unhelpful when attempting to run a nationwide provision of civil legal assistance. The Board would also question how well the system is understood by the parties themselves.

The Board believes that the taxation system should be an important protection for parties in the civil justice system. However, it requires significant reform if it is to properly meet the needs of clients and providers of legal services.

**Question 6 – To what extent and in what respect does the availability of legal advice and assistance and legal aid affect access to justice?**

Substantially. Civil legal assistance provides a substantial number of people with help to pursue or defend their cases. Without it, many thousands of people would be unable to assert their legal rights or defend themselves when a claim is made against them. However, not everyone who might wish public funding for their case is able to access it. Several types of proceedings are excluded from the scope of either civil legal aid or assistance by way of representation. In addition, as considered below, the legal aid legislation sets out clear limits of financial eligibility. Finally, even where a person is eligible and their case within scope, it can sometimes be difficult to find a solicitor able and willing to act in a particular case.

***Eligibility***

Under current financial eligibility rules for civil legal aid an applicant whose disposable income is £1 greater than the upper income figure (£10,074) set down in regulations does not qualify.

There is a real concern that those who do not qualify and are unable to get a firm of solicitors to act on a no win no fee basis are unable to take or defend cases. This presents a real issue of access to justice. The Board has made proposals to the Scottish Government for a ‘tapered’ approach to financial eligibility which would allow those with higher disposable incomes to qualify but with increased contributions. There may also be a need to look at alternative funding arrangements such as repayable loans. However, proposals to increase legal aid eligibility should also be considered alongside other funding mechanisms, such as encouraging greater use of insurance arrangements. This could reduce the burden on the tax payer and enable greater funding to be made available to provide support for high cost cases and other ways of improving access to justice.

***Availability of supply***

It remains the priority for the Board to support and work with private practice firms to maintain their central role in the provision of legal aid services in Scotland. The Board is involved in a number of initiatives to support the sustainability of supply from private practice.

The Board has recently carried out a review of civil legal aid fees and Ministers are currently considering this. However, even with any changes in structure and increase in the fee rates payable, legal aid will often not compete with fees chargeable to private clients. Some firms may on that basis decide to withdraw from providing a legal aid service, or become more selective about the types of cases in which they are willing to act.

In order to help support civil legal aid suppliers, the Board is currently running a major project to review the administration of civil legal assistance with a view to simplifying the system for all involved. The Board is committed to reducing bureaucracy and streamlining processes to make the system as effective and efficient as possible and hopes that this will go some way to encourage solicitors to continue to provide a legal aid service.

The Board is also carrying out an active and ongoing programme of supply monitoring, which includes surveys of the profession and legal aid users and a current consultation with related service and advice providers, including Citizens Advice Bureaux, In-Court Advisers, Scottish Women's Aid and local women's aid groups. This monitoring and research will be disseminated widely and will help inform the development of responses to any gaps in supply.

As noted above, one way the Government is able to respond to supply concerns is through the use of solicitors directly employed by the Board under Part V of the 1986 Act where there is clear evidence of gaps in local private practice provision. The Board has always sought to do this in ways that complement rather than act in competition with the local profession. This is the approach adopted for the development of the new Part V Service in the Highlands and Islands. The Board has been in dialogue with local faculties to identify the areas of civil work which they do not wish to cover through legal aid any more, and to develop collaborative working relationships to try to avoid problems of access for the people who need legally aided advice in the area.

However, while Part V remains an option for filling gaps in supply, it remains the priority for the Board to support and work with private practice firms to maintain their central role in the provision of legal aid services.

While Scotland's civil legal aid system remains one of the most comprehensive and best resourced in the world, access to justice may still be at risk for those who are either ineligible or who are unable to find a solicitor willing to act in their case on a legally aided basis.

**Question 7 – Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?**

Funding for representation remains unavailable under civil legal aid for any of the proceedings excepted under part II of schedule 2 of the 1986 Act for example, simplified divorce applications, small claim proceedings at first instance, petitions by a debtor for his own sequestration, election petitions and defamation proceedings unless defending a counter claim for defamation or in the most exceptional cases<sup>2</sup> as set out under the 2007 Direction issued by Scottish Ministers. Funding is also only available for proceedings before a limited number of tribunals under Part 1 of Schedule 2. ABWOR could, however, be made available if it was considered there was a need for representation before any other tribunals not currently prescribed. Where appeals lie from tribunals to the Court of Session legal aid remains available.

**Question 8 – What impact have speculative fee arrangements had on access to justice?**

The Board believes that speculative fee arrangements have enabled significant numbers of people to be able to pursue their cases and not just those who would not have qualified for civil legal aid. It is also likely that for those who do qualify for civil legal assistance who have very high prospects of winning their case many of these have been progressed under speculative fee arrangements rather than legal aid, leaving higher risk cases to be publicly funded. This is consistent with the reduction in applications for legal aid for reparation cases over the last few years, while there has been little concern expressed in this area about a reduction in access to justice.

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<sup>2</sup> Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2007

**Question 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?**

Yes. In assessing an application for Civil Legal Aid, the Board applies a two stage merits test in addition to the financial eligibility assessment which is also carried out. The merits test requires that there is probable cause and that it is reasonable that legal aid is granted. In terms of Board guidance on reasonableness, the Board will have regard to the extent to which “other rights and facilities” may be available to fund the litigation. Legal expenses insurance, if available for the particular action would be deemed to be another facility and as such it would not be reasonable to grant Legal Aid to the applicant. It should be remembered that in many cases the premium is not paid by the client in any event.

If there were a move to a system where such insurance policies were *expected* then there would arguably be fewer grants of Legal Aid. The extent to which insurance companies would be prepared to offer insurance for many of the types of action which the Board currently funds is unknown and the Board has no information as to the cost of such policies. It is believed that currently this type of funding is used quite commonly in reparation actions, but is unlikely to be available in relation to medical negligence claims or family actions. Currently the Legal Aid fund recovers approximately 85% of the total cost of reparation actions from any principal sum and or expenses received by the assisted person. This indicates a high degree of success for such legally aided cases, which in turn suggests that this body of cases could be viewed as suitable for even quite risk averse insurers.

**Question 10 – What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?**

The Board believes that the ability to recover “after the event” insurance premiums would encourage litigation underwritten by such insurance, as parties could litigate in the knowledge that the cost of premiums will be passed to the losing party should they win and that their own exposure should they lose is limited to the cost of their premium.

**Chapter 4 – Structure and Jurisdiction of Civil Courts**

**Question 1 – Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?**

Yes. It is clear that the conduct of civil court business is adversely affected by the pressure of criminal business and, in particular, the programme of criminal cases. The need for criminal business to take priority disrupts civil cases which if not heard continuously may result in them taking longer inconveniencing parties and adding to their costs and those of third party payers such as the Board. Costs can escalate and while there may be greater pressure put on parties to settle, proofs are regularly discharged as no judge is available. In the Court of Session it is common on average for about 15 cases to be set down for proof but with only 4 judges available on the day. Similar problems appear to exist in most sheriff courts where sheriffs are called upon to deal, in particular, with custody cases.

**Question 2 – Should (a) some Judges of the Supreme Court and (b) some sheriffs be designated to deal with civil business?**

Yes. See answer 4 below.

**Question 3 – Should the Sheriff Courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?**

Yes. There may be merit in separating the sheriff courts into criminal and civil divisions where this can be accommodated particularly in the larger courts or in the courts located in the central belt in terms of encouraging the specialisation talked about in answer 4. However, any separation will be a function of the volume of business and the resources available to achieve the separation within any particular location. Specialism is unlikely to work outside the three or four large urban courts and it is therefore unlikely that the proposal will result in a nationwide system. Travel to and from courts or any of the envisaged “civil justice centres” in any particular location might have adverse consequences for parties in terms of costs and reducing local access to justice but the use of modern technology and, in particular, video conferencing may help mitigate these effects. There is also a danger that by using “Centres” local practitioners will become de-skilled if not given the opportunity to plead cases locally.

In family cases the important hearing for parties is often the emergency hearing where interim orders are sought. “Centres” or peripatetic sheriffs may lead to inflexibility at that stage of the case. They will also make more difficult “ownership” of such cases by particular sheriffs and familiarity with them – something which litigants often value and which is difficult enough to achieve even when litigants try to ensure that the same sheriff sees the case through. The Board would welcome the opportunity to give further consideration to this issue if and when more specific proposals are formulated.

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

Yes. Specialism already exists in the commercial and family courts. The Board would favour at least some degree of specialisation as the volume and complexity of the law increases; as the legal profession becomes ever more specialist in approach; and as a mechanism to develop the law in these areas. The Board’s experience of children’s and family actions suggest that Sheriffs are not always aware of the legal aid rules, for example, concerning grants of legal aid in children’s cases and the court’s ability to terminate legal aid. Use of experts and commissioning of reports, an area which the Board sees as currently lacking in regulation and growing in cost, might also be more productive where the judge has specialist knowledge. In particular such reports might have clearer terms of reference and be reserved for cases where there is a demonstrable need for them. The Board welcomes the Practice Notes and other guidance which we are aware has been issued in these areas for sheriff court cases. This suggests to us that Sheriffs themselves recognise a need for particular methods of dealing with these cases. Confining judges solely to civil or criminal business or, indeed, to particular specialisms within civil may impact negatively on those cases where there would be benefit to be derived from an overlap of knowledge. Access to judges with specialist knowledge may also result in the speedier resolution of cases with resultant efficiency and cost savings. It seems however doubtful that the smaller courts would be able to introduce specialisms and as such it is unlikely the proposal could result in a single “fix” across the country.

**Question 5 – What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?**

The overriding factor is that currently parties are entitled to choose the court in which they wish to litigate privity jurisdiction apart. Parties may perceive benefits to be derived from litigating in the Court of Session where, for example, there is a well established personal injury process which may result in higher returns for them also. They may also see it to be to their

tactical advantage to litigate in a forum where costs are higher to the disadvantage of their opponent. Solicitors may have built up specialist practices litigating solely in the Court of Session or others may find using these practices sits more comfortably with their own established processes. There will always be need for cases to be heard elsewhere than in the locality of the parties.

The perceived efficiency of the system influences the decision. The “Coulsfield” reforms have increased the efficiency of the Court of Session involving, as they do, pre trial meetings at which a minute requires to be drawn up recording areas of agreement and disagreement together with settlement negotiations. As a result most actions are settled extra judicially and actions now take 6-9 months from the summons being raised. It is convenient and efficient for these cases to be focussed in one place to the advantage of unions and insurers. A substantial expertise has been built up. It may detract from access to justice to scatter such actions to eg the sheriff court.

The availability of legal aid may also influence the decision of where to litigate. The grant of civil legal aid for an action in the Court of Session is influenced by not only the value of the claim but also by the novelty, wider public interest, complexity or unusual nature of the proceedings. In this regard unless the Board is persuaded as to these, if the claim is not worth more than £50,000, then generally, civil legal aid for proceedings before the Court of Session would not normally be made available.

It is very unusual for grants of civil legal aid to be made for family related cases in the Court of Session except in appeals to the Inner House and cases with an international element such child abduction proceedings in terms of the Hague Convention.

The table referred to in answer 1, Chapter 3 (3.21 of Appendix 3 SLAB Annual Report 2006 – 2007) also shows the number of cases we granted civil legal aid for in the Court of Session and Sheriff Court respectively during last year. In the Sheriff Court, by far the highest number of cases were family/matrimonial actions but in the Court of Session most are reparation cases with judicial review cases also a main category. A total of 943 actions were funded in the Court of Session in contrast to 10,928 in the Sheriff Court. Our grant rate in relation to the Sheriff Court is about 60% of all applications received and it is about 50% in the Court of Session.

**Question 6 – In what, if any, types of case should (a) the Court of Session and (b) the Sheriff Court have exclusive jurisdiction?**

The Board would favour the jurisdiction of the Court of Session being linked to the complexity or novelty of legal argument, the value of the action and any wider public interest issues rather than having an exclusive jurisdiction confined to a particular case type. And, as is explained later, a first instance sift of cases by the court is important. The court must have the chance to consider whether any particular case is appropriate to litigate before it. Arguably, specific jurisdiction to deal with specific types of cases would enable a degree of specialisation to develop, however, it would also mean that potentially straight-forward cases of a specific type are raised as a matter of course to the higher level court and equally some very complex cases would no longer have the option of seeking a remedy in the higher court. Judicial review cases, for example, must under current rules, be raised in the Court of Session. Some of these however are not raising issues affecting the wider community but rather relate to a particular individual dispute and do not necessarily involve any particularly complex points of law. The Board’s responses in previous questions on specialisation indicate that in particular areas such as children’s cases and family disputes, adoption etc there may be a case for specialisation. The Board does not suggest that these actions are always more complicated from a legal point of view or require more skill but rather that the issues raised and the nature of the dispute (eg. the

importance of early resolution where the care and wellbeing of children is needed) lend themselves to a different type of procedure and Sheriffs who are not dealing with these cases

regularly may be disadvantaged. Whilst specialist judges would be beneficial it is perhaps not necessary to have specialist courts for the generality of cases.

**Question 7 – Should the jurisdiction of the Court of Session and the Sheriff Court be unified to create a single civil court?**

It will depend on what is contained in the final reforms package but unifying the Court of Session with the civil jurisdiction of the sheriff court may help make the administration of business more efficient by creating a single entry point to the system thus enabling the court and not the parties or their advisors to control the tier within the court at which the case is then heard. Such an approach ought to result in greater consistency and advantages for the planning and operation of the system. That said, there appears to be no good reason why these results could not equally be achieved by a consistent approach to the raising of actions and the management of any subsequent remit of those actions between the existing jurisdictions. In effect, the introduction of a sift of initial cases and a consistent remit arrangement between the courts.

**Question 8 – Should the Court of Session become a Court of Appeal only or should it retain a first instance jurisdiction? If so, what types of action and why?**

The Board does not have any specific comment to make on this issue other than to explain that the lack of leave requirements for marking an appeal in various situations can and does lead to operational difficulties. Agents are able to raise appeal proceedings under the legal aid special urgency rules, carry out a significant amount of work and ultimately, in some situations, are unsuccessful in obtaining legal aid with a resulting inability to recover all costs from the Fund. Additionally, should the Court of Session retain its first instance jurisdiction then there may be merit in introducing leave requirements for proceedings at first instance for similar reasons as relate to appellate proceedings. In addition to considering leave to raise/appeal tandem changes to the legal aid special urgency arrangements will also be beneficial.

**Question 9 – If the current structure of the court is retained, at what level should the privative jurisdiction of the Sheriff Court be set?**

The Board considers that there is no pressing need to change the level of the privative jurisdiction of the sheriff court given the recent increase. However, the recent changes need to be monitored.

**Question 10 – Are the current powers to transfer cases between Sheriff Courts and between the Court of Session satisfactory?**

No. The Board believes the current powers to transfer cases between the sheriff court and the Court of Session could be improved. Transfer from the Court of Session to the sheriff court is difficult because of the restrictive interpretation given to the statutory provisions by Court of Session judges. Remits would benefit from the setting of criteria to establish a consistent approach. Also, consideration could be given to a default transfer except on special cause shown for all actions below a certain limit. . As previously explained, the process may also benefit from an initial sift of Court of Session actions.

As regards remits between Sheriff Courts, there appears to be no good reason why, in the interests of good administration to address pressure points in the system there should not be a

general power vested in the Sheriff Principal to transfer cases between different sheriffdoms due regard being had to costs and access issues for parties and funders.

**Question 11 – Given the range and 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?**

Yes, if the purpose of this tier is to deal with low level cases involving housing, consumer and debt issues. While we do not yet know what such a tier would be like, because of the nature of cases before the court it may not be necessary for its business to be dealt with by a sheriff, as opposed to a more junior judicial officer, or why parties need always to be represented by solicitors.

Civil legal aid is however not available for small claims, the type of case to be dealt with by this tier of court. ABWOR could however be made available for representation. ABWOR is simpler to operate is, on balance, cheaper than civil legal aid and assuming amendments are made to regulations could be provided for representation by non legally qualified representatives.

**Question 12 – Alternatively, should there be another level of judiciary within the Sheriff Court to deal with “third tier business”?**

Yes irrespective of whether these cases are dealt with in the existing court or by a new tier of civil court, consideration could still be given to dealing with such cases as envisaged in our response to question 11.

**Question 13 – Does the current division of the Sheriff Court into distinct geographical jurisdictions present difficulties or does it have advantages?**

A simplified geographical administration could bring benefits. For example, areas which might logically appear to be part of Greater Glasgow turn out to be within the jurisdiction of Hamilton Sheriff Court. The cost of dismissing and re-raising actions, perhaps in a court only a few miles away, might be seen to be an unnecessary hurdle and expense.

A single court or at least a centralised administration could help to ensure consistency in the way in which courts operate and as a consequence, the way in which solicitors conduct their business. In turn, it would help the Board develop national policies which apply equally to all. For example, there are different practices in different sheriffdoms which have come to our attention such as that in Dundee of requiring a declarator of paternity in an action for contact even where paternity is not in dispute. Other courts do not require this. A downside of centralisation would be the impact it would have on specialisation within the sheriff court, as the consultation paper suggests, where the specialist Sheriff’s jurisdiction is not based on territorial considerations.

**Question 14 – Are the current arrangements for dealing with undefended actions satisfactory?**

Yes. In terms of administration, there appears nothing fundamentally wrong with the present procedures.. However, it begs the question of whether the raft of undefended actions or at least some of them, for example, relating to commissary or licensing matters need to be dealt with by the court as opposed to some other administrative way.

**Question 15 – Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?**

No. There may be an argument for creating a specialist body to deal with administrative matters such as firearms appeals, licensing applications, appeals against removal of driving licences on medical grounds, commissary business and so forth thereby removing them from the court. Alternatively, there may be a case for filtering such actions out of the system, both through a leave requirement or *de minimis* standard. However, such a body would need to provide local access to the public otherwise access issues or greater expense to the parties or third party funders such as the Board could arise. The increased use of the electronic exchange of information and other forms of communication, such as video conferencing ought to mitigate this. Equally, an administrative body could simply result in a new tier of judicial reviews to the Court of Session, rather than what should theoretically be a speedy determination of the merits of such applications in the sheriff court.

**Question 16 – Are there types of business in the Sheriff Court which could more effectively or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for disposal of commissary business satisfactory?**

Yes. See the answers to questions 15 and 16. There may however be simpler ways of dealing with commissary business which is not disputed. For example, there seems no good reason why a solicitor should require to be involved in drafting petitions to the sheriff for the appointment of executor (for which ABWOR is currently available). A simplified user friendly system could be created. There may be merit in examining arrangements in England and Wales where there is a probation service, although probate registries still appear to be linked to court. For those cases which are disputed the link to the court would need to be retained but there seems no good reason why amendments could not enable simpler and cheaper representation under ABWOR.

**Question 17 – Is there a case for a National Sheriff Court which would allow cases to be raised at Sheriff Court level anywhere in Scotland? If so, what appeal arrangements should there be?**

Possibly, but much will depend on the detail of the proposal. However, by removing the boundaries, a single national sheriff court ought to resolve many of the inefficiencies associated with the allocation of business amongst the many small sheriff courts where boundaries are in close proximity to each other. It ought to be possible to have regard to the pressure points in allocating cases and to move cases around the system to accommodate these business pressures, thus helping these cases achieve an earlier resolution. This may be of particular assistance to the busier, central belt courts. Allocation criteria would be needed to ensure access for litigants and witnesses and to minimise inconvenience. Creating such a court would raise issues as to whether there was any need to retain the office of Sheriff Principal as an appeal court, although directing all matters to the Court of Session would undoubtedly increase cost given the requirement to instruct counsel or solicitor advocates to present appeals. See our comments re consistency in relation to answer 13 above.

**Question 18 – Is there any case for all sheriffs to have an all Scotland jurisdiction?**

Yes, there would appear to be merit in this for all sheriffs to aid consistency in approach across the country as a whole and provide flexibility to address resource pressure points in the system. Additionally, there would seem to be particular merit in “specialist” sheriffs to have an all Scotland jurisdiction.

**Question 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 the 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?**

Yes. A facility needs to be retained to accommodate the transfer of cases raised in the sheriff court which concern issues of general importance, wider public interest, novelty or complexity more suited to litigation in the Court of Session. Also, assuming the absence of an initial sift for Court of Session cases a facility will still be needed to remit routine cases of low value to the sheriff court. See also the answer to question 10.

**Question 20 – Are the existing appeal arrangements satisfactory?**

No. As stated in our answer 8 above, the Board would welcome moves to make leave to appeal a requirement in most, if not all appeals. The appeal provisions could do with reform. The restrictive basis of seeking leave to appeal allows unmeritorious cases to be raised before the Inner House and the House of Lords. In legal aid terms, this means that unmeritorious cases can be easily advanced in the Inner House under the special urgency provisions without any prior authority from the Board and with no control over the potential cost for raising such proceedings. The mixed success rate of legally aided people in the House of Lords suggests that leaving matters to counsel to determine whether cases have good prospects of success allowed over optimistic assessments to be unchallenged. It seems odd that Scotland should have different arrangements for the House of Lords than the rest of the UK. As stated previously, we raised the need for leave to appeal in a response to the consultation on the creation of the new Supreme Court.

**Question 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?**

Yes. The Office should probably be retained but it will depend on what court structure is finally put in place.

If a single national sheriff court were to be created then that would raise issues as to whether it was necessary to retain the Office of Sheriff Principal. That aside, given the perceived need for greater management of court business and the retention of an appellate role within the sheriff court then it would seem sense that the Office should be retained and that it should be a mixture of both judicial and administrative function.

**Question 22 – Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session?**

No. There would seem to be merit in examining whether what may essentially be administrative appeals should take up the time of a three judge bench. For example, should appeals against decisions from tribunals dealing with Child Support or Social Security issues justify the use of three judges' time? It is however recognised that the governing statute in such cases governs the route the appeal must take. There may therefore be merit in Parliament changing the statutory requirements for such appeals. Alternatively, a sift process may assist.

**Question 23 – Should there be a limit to the number of levels of appeal through which an action can progress? If so, how many levels should be appropriate? What provision, if any, should be made for exceptional cases and how should these be defined?**

Yes. There may be a better case for defining the appropriate appellate court, where present rules would allow a choice of forum. For example, there may be good reasons for cost and efficiency in channelling matters through the Sheriff Principal, rather than allowing parties an absolute right to leap frog to the Court of Session at much greater cost. If there were to be restrictions on the number of appeals or stages at which they could be brought, there would need to be an adequate mechanism in place to avoid the possibility of judicial review or petitions to the nobile officium being resorted to in the event of no onward appeal. The progression of appeal rights through the courts, as mentioned previously, could be better controlled by the requirement to seek leave. .

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

The Board, as a court user, has observed difficulties in timetabling where a particular matter has to be dealt with by a part time sheriff who may not be back at that court for some time and has experienced delay in the issuing of a judgement in a judicial review which had been heard before a temporary judge. As the consultation paper reflects, there is a general concern about the extent of the use of part time sheriffs and temporary judges. There is a danger of people sitting and practising in the same courts; blurring the distinction between judge and pleader. The way forward may be to appoint more floating sheriffs and temporary judges thereby providing additional flexibility to accommodate pressure points within the system and help cope with the peaks and troughs of business. The resource needs to be appropriately managed thereafter and cases allocated to them should be suited to their availability..

**Chapter 5 – Principles for Reform to Civil Procedure and key procedural issues**

**Question 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?**

Yes. This would seem reasonable It would bring Scotland into line with countries with similar legal systems. The key point here is that it should be the court rather than the parties who decides what is a reasonable level of time and expense to devote to an action once it is raised. It should be the court that drives the timetable which in turn requires it to take a more controlling or managing role. Having said that, it would appear the culture change needed to bring about a real improvement in the way litigation is conducted would benefit not only from reliance on the existing inherent powers of the court to regulate proceedings but from an overarching statement of principle addressing the issues of proportionality as discussed in the paper.

**Question 2 - Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?**

Yes. The Board supports mediation as promoting early resolution of conflict. In a separate response in late 2006 to the Sheriff Court Rules Council, this general policy position was set out. It is Board policy to encourage but not to compel parties to use mediation or other methods of dispute resolution. The rationale behind this is that the use of such methods is likely only to achieve successful results where parties have voluntarily agreed to participate. Compulsion is

unlikely to lead to successful resolution which in turn would simply lengthen proceedings and increase costs both for parties and for the Board.

At present mediation costs can be met under advice and assistance or civil legal aid. The Board would caution however as to ensuring adequate rules are in place regarding the potential cost of such methods of dispute resolution and who should meet these costs. The provision of services in this area should be sufficiently regulated as to ensure adequate quality and availability throughout the country and uniform methods of funding. The Board's support in this area is based on early resolution so that mediation and other methods including arbitration must be effective in removing the need for litigation rather than adding another procedural step. As regards arbitration, there would appear to be merit in making provision for this to be publicly funded in appropriate cases as opposed to current arrangements where this would be so only where a judicial referral is made.

**Question 3 - If so, how should this be done and at what point or points in the progress of a dispute?**

Mediation and other forms of dispute resolution including arbitration must be effective in removing the need for litigation rather than adding another procedural step. Referrals should therefore be made at as early a stage as possible. Ideally, this should be pre litigation but should not overlook the benefit to be derived from the court's discretion to refer an issue to a mediator during the progress of an action, for example, in family actions where there are issues relating to parental responsibilities or to make use of referrals to men of skill. Where this is done there would be merit in clearly defining the scope of the referral. Additionally, there would be merit in the court requiring parties to consider mediation or ADR (although not compelling them to use it) and for them to give notice as to whether or not they consent to a referral. This is line with Board requirements where parties apply for civil legal aid in indicating what steps they have taken to avoid litigation as part of our "reasonableness" test.

**Question 4 - 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? Please specify**

If the benefits of flexibility of ADR have not been fully tested, it is difficult to suggest whether there are limitations in suitable case types. However, where a party pursues a claim which is fundamentally legally incompetent or misconceived, it is difficult to see how that situation could be resolved by mediation. An example might be where a party embarks upon a spurious judicial review where the public body's decision is unassailable, or where a problem litigant raises a spurious action against a public body.

**Question 5 - What form should mediation or other methods of dispute resolution take and how should this be funded?**

See the previous answers in this Chapter. The key is that there should be adequate and consistently applied rules in place regarding the potential cost and funding of these alternatives given that all services are not funded in the same way.

**Question 6 - In what respects can modern communications and information technology be harnessed to improve access to the civil courts?**

As far as possible the Board is committed to a paperless process for solicitors by the end of 2010 and welcomes the use of modern technology in improving efficiency. For example, the use of e-

mail and video conferencing as avoiding or minimising the need for procedural hearings and difficulties which can arise in making use of postal document exchange processes. As such the Board is interested in developing links with SCS systems to increase the flow of information about the progress of cases and of applications. The Board already receives some e-mail enquiries from the courts and from time to time Sheriffs will also seek information. We are very keen to promote such links.

In terms of civil procedure the Board would like to see the review exploring possible use of computer links to avoid the need for appearances at court where the incidental steps in procedure might be dealt with by written e-mail communication. In addition, perhaps waiting times could be minimised by e-mail alerts as to likely calling times.

The Board also welcomes the increased availability of video conferencing facilities at court. In addition to the obvious benefits re vulnerable witnesses giving evidence, these links have cut costs considerably, in some cases we have funded where expert/other evidence which would hitherto have been taken on commission at great expense has been obtained via video link.

### **Question 7 - To what extent should the court control the conduct and pace of litigation?**

To a greater extent. The lack of judicial control over the pace of litigation can allow cases to drift at a pace dictated by the parties. Cases can take a long time to resolve and compound practical problems in litigation, such as fading memories of witnesses. There seems no reason why simplified and accelerated procedure should not be available for all classes of litigation. However, fundamental questions of litigation culture also need to be addressed. For example, are the interests of litigants met by elaborate pleadings and a timetable dictated by debating the merits of the pleadings, rather than necessarily the merits of the action itself. Placing a lesser reliance on a system of elaborate written pleadings in favour of one in which there are simpler, templated, clearly written documents could assist in speedier litigation, and thus reduce costs to the Fund and privately paying litigants.

### **Question 8 - What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case- flow management?**

#### Judicial Case Management

There may be merit in the concept of a more inquisitorial role for the courts, for example, in determining whether it remains reasonable for a case to continue. Whilst the Board has introduced a process of stage reporting this relies on agents to provide information on the appropriateness of the continuance of the grant of legal aid in respect of the proceedings. However, on occasion, whilst having received such reports from agents the courts have drawn to our attention cases where the use of public funds has been questioned in relation to the way the cases have been managed/conducted by agents. While agents have a duty to assist, it may be that without a more interventionist or management role by the courts, the cultural change needed to bring about a real improvement in the progress of cases will not be achieved.

We are happy to receive information from the court which allows us to investigate the matters raised which in turn may allow us to consider whether fees should be paid. We would support greater intervention by the court in cases. We would like to see judges taking a greater role in questioning agents and parties in all types of case. For example, delay in actions was at one time often explained by agents as due to delay in processing of their client's legal aid application. Our current service standard for processing civil legal aid applications is 35 days and the average processing times in our hands are less than 14 days. If judges are concerned that delay is being

laid at the door of SLAB, a call or in the future, an e-mail to our offices from the court would quickly confirm the position. Where applications are not processed quickly, the main reason is that we have had to ask for information from either the agent or applicant which has not been forthcoming.

### Case Flow Management

The Board sees case-flow management as having links with the idea of specialisation. The anecdotal evidence we have regarding, for example, the Ch 43 PI procedure in the Court of Session suggest that there would be merit in having separate procedures for certain case categories to speed up the flow of business within the courts. Outwith such procedures however, there still needs to be alternative case flow management. The areas of court business identified and in which courts the procedures should be used would have to be considered against any other intended reform of the court structure and jurisdiction. Otherwise, the effect of reforms intended to push certain types of case to certain courts might be negated by only offering expedited procedures in certain courts.

### Chapter 6 – Working Methods of the Civil Courts

#### **Question 1 – What are the advantages and disadvantages of pre-action protocols?**

See question 3.

#### **Question 2 – Should there be a greater use of pre-action protocol? If so, in what courts and for what types of action?**

See question 3.

#### **Question 3 – Should compliance with pre-action protocols be voluntary or compulsory?**

The Board has chosen to deal with the questions concerning pre-action protocols in one answer. Whilst the Board has no experience of the use of pre-action protocols, it is aware that they are an increasing feature of litigation in England and Wales. They appear to have a number of positive goals which sit neatly with the Board's desire to see early, informed advice on, and disposal of justiciable problems. Thus, they could bring benefits to not only the efficient conduct of publicly funded cases, but also matters in which the Board is a party. However, the Board would prefer to look further at the extent to which such protocols meet their objectives of early exchange of information, early settlement and more efficient case management.

#### **Question 4 – Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points in proceedings and what criteria should the court apply in deciding whether leave should be granted?**

The Board has no specific view on the criteria to be applied by the court in granting leave. The Board does however consider that there should be a greater requirement to seek leave to appeal and also that leave to bring certain actions to the court would be beneficial, for example, in particular, in judicial review cases. The requirement to seek leave would avoid the raising of

some of the unmeritorious actions we have recently seen and may divert the dispute into other forms of resolution which, on balance, may prove to be more cost effective than litigation. The opportunity for raising these actions as matters of special urgency removes the possibility for the Board to apply the statutory merits test to these cases at the outset and for this reason

consideration also needs to be given to changing the legal aid special urgency arrangements. In addition, leave to bring judicial reviews would merit from being allied to a time limit for commencing proceedings.

In addition, the Board considers there would be merit in seeking leave to appeal to Sheriff Principal and Inner House and also leave to appeal to the House of Lords (we have already suggested that leave should be required to appeal to the Supreme Court when it becomes operational).

The information available to the Board is that appeals to the Sheriff Principal are less expensive and more speedy – probably one of the best examples in the present system of an efficient, cost effective and proportionate use of resources of both the public purse and litigants’ costs. It is widely used and accepted. The number of onward appeals to the Court of Session is very small. The number of direct appeals could easily be accommodated at Sheriff Principal level. A solution might be to allow appeals to the Sheriff Principal without leave but onward appeals, either before the Sheriff Principal has heard an appeal with leave from the Sheriff Principal or the Court of Session.

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

No. The key factor for the Board is transparency. The Board considers the operation of the Rules Council is far from transparent, with little or no consultation regarding changes. The extent to which change can be influenced is unclear. The arrangements need to ensure the correct people are involved in the process. To this extent the various segments of the justice community need to make sure they are more directly engaged in the rule making process for their own interests.

**Question 6 – Should there be a single set of rules of civil procedure in both the Court of Session and the Sheriff Court?**

While recognising our arguments elsewhere in this response for consolidation, the appropriate rules for the Court of Session and Sheriff Court depend upon any recommendation the review makes as to the respective roles of each of these courts. The Board would find it hard to see how a “one size fits all” approach to civil procedure would work, however, unless there are clear reasons for a difference, a standard approach should make it easier for all parties

**Question 7 – Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?**

Yes, as far as possible, there should be a single initiating document. The present divisions between the small claims/summary causes (simplified summons), ordinary actions (summons or initial writ), summary applications (initial writ) and petitions appear artificial and arcane. A single, simpler initiating document which could be drafted by solicitors would modernise the current reliance on written pleadings. This could also have the benefit of reducing expenditure. Consideration could be given to English model or “templated” documents.

**Question 8 – To what extent should a system of abbreviated pleadings be introduced?**

Wherever possible. Otherwise more detailed pleadings should only be used where the court sees a need for matters to be set out more fully. A simplified system of templated documents written

clearly, capable of being understood by party litigants and capable of being drafted by solicitors as opposed to counsel would modernise the approach to pleadings; focus on the issues in the case as opposed to adjusting the pleadings themselves; reduce the scope for costly amendments which cannot be recovered by litigants; and be more in keeping with electronic transmission of data.

**Question 9 – Are the current arrangements for summary disposal satisfactory?**

No. Our experience of seeking summary decree is that we are put to a great deal of costs and inconvenience to get to the point of obtaining decree (eg when litigating against the party litigant). Consideration should be given to a summary strike out of unmeritorious cases, eg an initial sift mechanism. We have been put to considerable time, cost and inconvenience defending such actions, with no mechanism to strike them out prior to closure of the record and a debate on preliminary pleas.

**Question 10 – Should routine procedural matters in both the Court of Session and the Sheriff Court be dealt with by Judges (perhaps at more junior level) designated for that purpose?**

Yes. The Board would welcome such a move in the interest of speeding up processes and increasing efficiency and would also suggest that for many routine matters, increased use of technology, for example, e-mail or video conferencing might remove the need for the court to “sit” in the formal sense for many procedural matters.

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

No. Current timetabling is haphazard and can involve lengthy delays at court. For example, where criminal business is given priority it can interrupt civil business. Delays in handling interlocutory matters in turn delay disposal of proofs, etc. This is inefficient and increases cost to parties and the taxpayer. Additionally, the removal of the need for the court to “sit” to deal with such matters may benefit the system.

**Question 12 – Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?**

Yes, there should be more control over time – but this needs to sit with better allocation of time slots and in particular, wherever possible, for hearings to be continuous. Inefficiency and costs increase for parties and third party funders such as the Board where hearings are interrupted for whatever reason.

**Question 13 – In the conduct of substantive hearings should there be a greater degree of written rather than oral arguments?**

Yes, there is merit in presenting wherever possible written arguments especially in more complex cases/motions; and business being conducted at a distance from the court. It has only the potential to reduce cost, provided the work is focussed. To some extent the current rules do contain elements of this. Notices to admit, for example, seek to reduce the scope of oral representation.

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

There should be more. , To some extent the current rules do contain elements of this. The requirement for exchange of witness lists and lists of productions is in some measure an attempt at focussing disclosure of evidence. As do the rules introduced in response to Lord Coulsfield’s recommendations in commercial actions which focus the issues at an early stage in the proceedings. Early disclosure as required under Counslfield rules and in the light of Article 6 should become the norm. “Stealth” litigation should become a thing of the past. The Board would support any reform designed to reduce the length of any substantive hearing and those that clarify matters at issue in so far as these do not give rise to delay in reaching the hearing stage.

**Question 15 – to what extent should the court have control over the use of expert and other evidence?**

To a significantly greater extent. The Board has concerns about the mounting costs associated with the employment of experts and also of other third parties such as curators and reporters.

Experts

At present sanction is required from the Board for the appointment of an expert. The cost of expert reports and attendance at proof can be very high and add to the length of proceedings. In cases with multiple assisted persons each party may separately employ an expert to provide an opinion on their case and to opine on the other experts’ views. We see this in particular in children’s cases where multiple grants of legal aid are common place. We understand that in some other jurisdictions an expert is appointed by the court and funding is then available only in limited circumstances to question certain aspects of the opinion. The Board would agree that there may be merit in this approach as also perhaps considering in appropriate cases, referral to a man of skill.

Curators and Reporters

Rising costs for reports from these appointees, particularly in children’s and family cases has led the Board to raise the issue, where possible with members of the judiciary. The Board recognises that these appointments can be very useful and that in the interests of the welfare of the child/children to which the proceedings relate, there can be a good case for obtaining such reports. The use of curators and reporters is increasing but practices can vary significantly across Sherifffdoms and between sheriffs in their use of curators and reporters. Against this background however, we are concerned the increased cost of these reports, sometimes mounting to thousands of pounds is not always appreciated by the Courts. There is a need to control costs in this area and the Board hopes this will be achieved by the introduction of fee tables in early course. There also seems to be a practice of awarding the expenses of the reports against the assisted party to the proceedings perhaps in the mistaken belief that there will be no resulting cost to that individual. The “clawback” rules do however mean that the cost of these outlays will ultimately be recoverable from any property recovered or preserved by that party. In family cases there may well be property in dispute.

The Board would like to see research being undertaken into the value of using curators and reporters.

Clear direction from the bench as to exactly what the appointment is intended to achieve and what matters the court would like a report to cover would, in our view, help to ensure that these

reports do in fact assist the court by providing information which would otherwise be difficult to obtain and that the practice of making these appointments is an efficient way of improving the outcome for the parties.

**Question 16 – Should a system of pursuers’ offers be introduced into the civil court procedure. If so, what features should such a system have?**

Yes. However, there seems no reason why attempts should not be made to discourage late negotiations which ought to assist the ongoing management of cases and decisions to be taken as to whether there remains a need for parties to be assisted if reasonable offers are seen to be made and rejected for no good reason. Whether this would control that problem is a different issue and in the first instance, it may be possible to pilot such a system.

**Question 17 – Should civil jury trials be retained?**

Yes. However jury trial should cease to be a matter of right, as at present, and become a procedure to be allowed in appropriate cases. The general public can play a part as jurors and it is important the judges have regard to what the public in general considers appropriate. It is surprising how often jury awards are in line with what a judge would have awarded. There is however perhaps a need for making jurors more aware of the scale laid down in judicial guidelines.

**Question 18 - Should written judgements be required in all cases?**

No. The Board considers that in every case the decision of the court should be communicated in a manner capable of being understood by the parties. However, the court chooses to communicate it, this should be done in such a way as to avoid unnecessary appearances by parties or those representing them.

**Question 19 - Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?**

Yes. As stressed in previous answers, the Board would welcome communication from the court where concerns about case management/queries about the legal aid system arise. One consequence could be the termination of a legal aid certificate – an obvious sanction for a party who fails to comply with court rules or behaves unreasonably. Generally SLAB would welcome the courts having greater powers in this area. Additionally, there would seem merit in courts having consistency in their powers to award expenses personally against solicitor and counsel alike where cases are conducted by them inappropriately. Used correctly such powers would help to protect the Legal Aid Fund from inappropriate use.

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

The Board seeks to ensure through its applications process that spurious or unmeritorious actions are not afforded the benefit of public funding. However, for reasons already explained, the raising of some actions under the special urgency provisions removes the opportunity for the Board to apply the statutory tests to these cases at the outset. If the courts were able to apply similar tests, publicly funded defence of such actions would also be avoided. As already mentioned, the Board does not get the opportunity of refusing some unmeritorious actions which are brought under the legal aid regulations for special urgency and there is a need to review these provisions. If the court had greater powers there would be a check on these actions too.

**Question 21 – Is the current legislation on vexatious litigants in need of reform, if so, how should that be done?**

The Board's experience of dealing with vexatious or difficult litigants, both as a court user and as a funder of assisted persons in litigation with such parties, suggest that there is a need to tackle:

- the ability of spurious actions to be warranted and served, and not filtered out;
- the restrictive nature of the tests which do not deal with vexatious motions, defamatory pleadings, unnecessary procedure, vexatious defences etc; and
- the inability of parties exposed to such a litigation to pursue their own remedy – only the Lord Advocate can make application to the court to have such a litigant declared vexatious. This means that vexatious litigants can continue unhindered until the Lord Advocate takes action.

Consideration should be given to allowing any party to make an application to the court; proper filtering to be introduced at the pre service stage, allowing a vexatious activity to be taken into account.

**Question 22 - Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?**

The current legislation provides that legal aid is available for representation. It would not cover "representation" by someone without a right of audience. In the interests of access to justice, however, the Board recognises that, in some circumstances, there may be a role for "advocacy" services and other forms of assistance. Short of providing actual representation such as providing a mouthpiece for those who may not be capable of or who may be uncomfortable about communicating their position. If there are significant numbers of cases eg. in family matters, where the court deems it appropriate for someone other than a solicitor/advocate/party to address the court, then the Board would suggest these cases might merit specialised rules and procedures.

**Question 23 – Would it be desirable to introduce separate procedures for multi party litigation?**

Yes, there is a need for this given that there are no formal procedures for class actions in Scotland. Where there have been actions raised involving multiple claimants these have been dealt with, as the consultation paper indicates, on an informal basis. Generally, these take the form of grouping actions together with the majority sisted pending the outcome of "test" or "lead" cases. The arrangements are not satisfactory. In particular, they do not cater adequately for funding arrangements including cost sharing between privately and publicly funded litigants, the clawback arrangements under legal aid and the liability and management of these actions. . All costs will tend to be channelled through a small number of cases, with little or no financial benefit to those litigants. The costs of pursuing such cases are likely to be out of all proportion to their value, and that cost burden is likely to fall on the Fund even where there are privately paying clients. The Board would welcome the opportunity to give further consideration to the legal aid scheme needed to support specific proposals once they are formulated.

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

No. Although the consultation paper states that in practice many 1<sup>st</sup> hearings in judicial review cases are heard months after the action is raised, the rules do anticipate that the first hearing will take place in early course. For reasons already explained regarding the possibility of raising these actions under special urgency rules, it would be possible on current rules for a petition to be raised and dealt with almost to conclusion before the Board has had the opportunity of assessing the full legal aid application. Quite apart from the possibility of unfounded actions reaching the court, there are clear risks relating to payment of expenses in these actions. For these reasons there may be merit as already explained, for the introduction of leave to bring a petition for in judicial review cases and for proceedings to be raised within specific timescales.