

## THE SHERIFFS' ASSOCIATION

### RESPONSE TO THE CONSULTATION PAPER ON THE SCOTTISH CIVIL COURTS REVIEW

The Council of the Sheriffs' Association recognises the importance of this Review and offers comments on the matters discussed in the Consultation Paper and answers to the questions raised, as noted below.

The Council's approach to responding to the Consultation Paper is that the Council attempts in this paper to provide a clear and unqualified answer to every relevant question in respect of which it believes it has a locus to comment. Additional comments to supplement the answers to the particular questions are included in the response where the Council thinks that appropriate. The Council recognises that it cannot attempt to represent the view of every individual Sheriff in Scotland, but nonetheless it seeks to ensure that the answers that it offers to the various questions are as representative as possible. This response takes account of the views of members of the Association, including Sheriffs who contributed to the discussion of the Review at the session at the Sheriffs' Conference on 8 March 2008 to which the Lord Justice Clerk and Sheriffs Stephen and Stoddart contributed.

#### CHAPTER 1: INTRODUCTION

##### Questions –

- 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?***

The purpose and design of the civil justice system is ultimately a policy matter, but so far as it has a locus to comment on this the Council of the Sheriffs' Association agrees that the encouragement of early resolution of disputes, preferably without resort to the courts, should be an important element of the design of the system. (It should also be an important element of the design and operation of the system once disputes are before a court.) However, in the view of the Council no prospective (non vexatious) litigant should be refused access to a judicial decision if that is sought. The consultation paper asks if, as a matter of public policy, courts should be a last resort (para1.10) and seeks views and suggestions. The Council's view is that it would be wrong to deny anybody access to a judicial decision of a disputed matter but that in many cases other methods of resolution could have been tried. Courts might chose to penalise in expenses a party who refused without adequate cause to seek an alternative resolution.

The Council of the Association was consulted by the Sheriff Court Rules Council in 2006 on "The Sheriff Court and Alternative Dispute Resolution". The Council

submitted comments on 4 September 2006. The Council's views remain essentially as stated in that response.

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

We agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations. However overriding all the questions of proportionality and value for money is the primary purpose of the review stated in para1.9 of the paper, namely- "to improve access to justice for the people of Scotland". Accordingly value for money cannot be allowed to close existing avenues of access to justice unless there is a viable and effective alternative substituted.

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

There are no other matters within the Review's remit about which we have concerns but which are not dealt with in this paper. However, the Council does have comments about another matter arising from Chapter 1.

We have concerns about the evidence-base for proposals for major reform, as well as for some of the statements, assertions and suggestions contained in this paper. We recall that in the final report of the civil justice advisory group chaired by Lord Coulsfield ("The civil justice system in Scotland – a case for review?", published in November 2005) there appears this statement in paragraph 5 of chapter 8: "The lack of empirical evidence was a common theme throughout the process, and it is difficult to see how a review body could give adequate consideration to possible reforms unless this deficiency is addressed." The report went on to list the kind of information that was needed, and recommended that research should be carried out into the views and experiences of court users. We are not persuaded that this Review has done enough to address these recommendations. It is difficult to see how this Review can put forward radical ideas for reform without an adequate evidence base for them. We note what is said in para. 1.17 about the information of which the paper takes account. Civil judicial statistics have not been published since 2002, but we recognise that there is some factual information in annexes to the paper and we are aware that the Review has recently undertaken some focus group research. However, we also note that the paper itself (in para. 1.17) states that it "aims to identify where there are significant gaps in knowledge about how well – or how badly – the system is working at present."

A further comment that we have about information available to the Review, including information about opinions and views, is that there is inadequate attribution of views, criticisms and comments reported in the paper to assist meaningful comment on these and on suggestions and proposals based on them. It is impossible to assess the weight to be attached to them.

## CHAPTER 2: ACCESS TO JUSTICE

### Questions –

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

We do not feel well qualified to answer this, but we are generally in favour of improving public legal education and we think it likely that anything which widens the scope and extent of public knowledge about the courts, their procedure and all other methods of dispute resolution, and public understanding of legal issues and principles should improve access to justice. However, whilst increased public legal education which informs members of the public of their legal rights and responsibilities can only be a positive step it is difficult to see that it is likely to have any substantial impact upon the avoidance of legal problems of a sort which are likely to require access to civil dispute resolution.

**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?***

In the experience of some of our members there appear to be gaps in such provision in some geographical and subject areas. Such gaps are thought to be linked to the increasing disparity between private client remuneration for solicitors and legal aid payments for the same work. One subject area where it appears that a gap may be developing is in legally aided matrimonial work. There is an impression that courts are experiencing increasing numbers of party litigants as a result of gaps in legally aided representation, but we are unable to point to hard factual information about this. Research may be needed.

**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?***

It is no doubt desirable in principle that court procedures should enable litigants to take part in the process without legal representation. However, this should not in our view be the primary consideration in designing court procedures. We do not regard as acceptable any notion that the procedures should be tailored to suit a particular category of potential litigant. Court procedures should be framed so as to promote the just and efficient disposal of business put into court. There cannot be one system if you do it yourself (or your opponent so elects) and a different set of rules if lawyers are employed. No short cut around the rules of evidence or the legal principles on which our law is based is possible as one or other side may be disadvantaged. We are doubtful as to the extent to which it is feasible to design court procedures with a view to enabling litigants to take part in the process fully effectively without legal representation – although that may vary depending on the nature of the cause. An adversarial system is not designed to deal with parties with very different court skills.

Such factors as the simplicity of forms and accessibility of language have no effect on the complexity of the issues at the centre of many cases, regardless of value. On the contrary, there is a danger that individuals may be led erroneously to believe that they can, by use of “common sense” or by dint of filling in a form correctly, advance fully and satisfactorily a position which is far more complicated than they have the skills or knowledge to realise and which may involve substantive or evidential difficulties which require the training and experience of a lawyer to advance or at least to advise upon. It is not just legal language which can be inaccessible – it is legal principle and practice. We would further observe that the suggestion is made elsewhere in the consultation paper that the law is becoming more complex. The body of law is constantly growing. We now have a legislature in Scotland. It legislates. It does not always do so in a way that is readily comprehensible to the non-lawyer.

**4. *What contribution, if any, can (a) ‘self-help’ services for party litigants and (b) court-based advice services make to improving access to justice?***

In the experience of sheriffs both self-help services and court based advice services can assist improving access to justice for party litigants in respect of simple claims such as may be found in small claims or summary cause actions. We do not believe they could be of any assistance in preparing a party to deal effectively or capably with more complex forms of action.

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

There are no such issues that occur to the Council.

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

The Council is of the clear view, on the basis of experience and having regard to the Review’s underpinning principles of proportionality and value for money, that there is a strong case for a new method (or new methods) of dealing with low value cases. The new method (or methods) should be separate from the existing court structure. Small claims and most summary cause actions, including cases involving repossession of heritable property, could be dealt with in this way, although there would require to be provision for transfer to or initiation of such an action as an ordinary action in the sheriff court. Depending of the nature of the subject matter of the dispute and the extent to which issues of law as opposed to issues of fact may arise, it might be thought appropriate for there to be some form of tribunal chaired by a legally qualified chairman, and there may be merit in adopting an inquisitorial, rather than adversarial approach.

### **CHAPTER 3: THE COST AND FUNDING OF LITIGATION**

The Council of the Sheriffs' Association recognises that the costs and funding of litigation are matters upon which it cannot usefully or appropriately contribute.

### **CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS**

#### **General Comments**

Prior to answering the 24 questions posed at the conclusion of this chapter, we feel it necessary to make the following general observations.

It is not apparent to us that there are any material problems associated with the conduct of the great majority of the large number of civil actions presently raised in the sheriff court, and there is no evidence contained in the Review document which contradicts that statement. It was therefore a matter of some surprise to be told at the Sheriffs' Conference that there were complaints from reparation practitioners about the conduct of proceedings in the sheriff court. It was unfortunate that we were not given any specification of these complaints. We do not know the statistics but, based on our experience and anecdotal information, we are clear that very few reparation actions actually proceed to proof, whether in the sheriff court or in the Court of Session, which heightens our surprise that there is any material basis for complaint. In our opinion, the suggestion of complaint may have more to do with what is in the best interests of reparation practitioners than the court system. What may be of benefit for the public and the court system should not be governed by the unsupported claims of a small element of the profession without clear evidence to vouch them. There is no good reason why the sheriff court should not deal with the bulk of these reparation actions. If it did so, we believe that there would be significant savings to the public purse and the logjam in the Court of Session would substantially disappear.

There is, in our experience, no general or widespread conflict between civil and criminal work in the sheriff court. We are not aware of complaints from the public or the legal profession about delay or poor quality of decision making. In most if not all sheriff courts a diet of proof can be assigned within eight to twelve weeks of an options hearing. In special cases, proofs can be assigned at shorter notice. We recognise that there is some substance in the complaint about difficulties in getting more than one day for proofs in some sheriff courts. However, it is unfortunate that there is no clear information about the scale of this problem. There is, for example, no statistical evidence about the number of proofs which actually proceed. Based on our experience, we suspect the percentage of proofs which proceed is about 5%. Sheriffs have supported their clerks in restricting the allocations of proof diets. So far as possible, in the few cases which actually proceed, sheriffs insist on continued diets being at the earliest opportunity. However, in our experience these efforts are commonly resisted by counsel or agents because of other commitments. In our view, problems about interruption of proceedings and continuation days for proofs should be capable of being resolved by the proper provision of adequate judicial resources and effective judicial case management.

Returning to the point that has been raised about the possible detrimental effect of criminal business on the management of civil business, we are not qualified to comment on the position in the Supreme Court. However, we note what is said (at para. 4.5) about the suggestion that at the Supreme Court level the volume of criminal business in the High Court is causing a serious problem in the timetabling of Court of Session business and the subsequent suggested solution (in para. 4.11) of creating a new “mid-level” of judges to deal with the bulk of the work of the High Court. In a letter dated 7 December 2007 the Secretary to the Review identified a number of specific issues on which she said the Review would welcome our views. One of these was - “whether there would be support for the creation of a new “mid-level” of judicial officer (equivalent to, say, a circuit judge in England & Wales), to deal with serious crime”. The Secretary later clarified this reference and the reference in the relevant part of the consultation paper (at para. 4.11) by explaining that the reference was to “those circuit judges who are ticketed to hear serious criminal cases and not circuit judges generally”. In fact our understanding is that ticketed circuit judges (as opposed to Old Bailey judges) are not a different level of judicial officer from other circuit judges; they share the same judicial grading.

We do not support the creation of a new so-called “mid-level” of judicial officer to deal with serious crime. This is not necessary to achieve the aim of offloading criminal business from the High Court. There is in our view already a “mid-level” of criminal court - namely the Sheriff and Jury court. The Sheriff and Jury court already deals effectively and satisfactorily with the great majority of criminal jury trials in Scotland - the more so since the increase in sheriffs’ solemn sentencing powers. There are many sheriffs who are very experienced in conducting criminal jury trials of serious and sometimes complex cases. Sheriffs are of equivalent judicial grade to the circuit judges (including ticketed judges) in England and Wales. The removal of some of the criminal first instance work of the High Court could be appropriately achieved by transferring it to the Sheriff Court and further increasing the sentencing powers of sheriffs.

We are not in a position to comment on the suggestion that public misunderstanding about the courts and a tendency to associate the courts with criminal matters may make some people reluctant to become involved in litigation. We do, however, recognise that there are legitimate concerns about the negative experience, stress and anxiety of some of those involved in civil litigation attending courts where many of those present are involved in criminal matters. We are aware that in some courts civil courts are located in a separate building (as at Hamilton), or civil business is time-tabled for days when criminal business is minimal. We think it important to recognise that anxiety and stress arising from the experience of attending courts dealing with criminals are not confined to those involved in civil litigation. We are equally concerned about the negative experience of some members of the public who attend as witnesses and, in particular, prospective jurors in criminal matters. These problems arise from the unsatisfactory design and layout of court houses – which in our experience may also result in some places in a failure to comply adequately with statutory requirements concerning children and other vulnerable witnesses. There is therefore a wider issue, which involves building design and also court security arrangements.

We simply do not believe or accept the assertion contained in para.4.24 that the prospect of having an inexperienced sheriff with a criminal practice background preside over a proof has been a key factor in cases being commenced in the Court of Session. Anyone appointed as a sheriff should have the intellectual rigour to tackle any case of any nature put in front of him or her. (We understand that this is how the Judicial Appointments Board approaches the selection process for sheriffs.) If there is any truth in the assertion, it would appear to reflect poorly on the ability of legal practitioners effectively to plead the case and present relevant legal explanation and argument to such sheriffs. In any event, experience suggests that most civil litigation turns on the facts.

It is impossible to comment meaningfully on proposals for either civil justice centres or peripatetic specialist sheriffs without any idea of what the cost of establishing such alternatives would be. The capital cost for civil justice centres would be substantial. Civil justice at some level, at least for family cases, would still require to be available locally, so it is not clear whether there would be any scope for saving money. Peripatetic specialist sheriffs would reduce flexibility. One of the successes of the sheriff court is the willingness and ability of sheriffs to move from one type of business to another, irrespective of programming, to meet the demands of the day. This benefit and saving in time and expense would be lost.

All sheriffs are specialists to some extent. Many of us undertake particular work in our individual courts, but few do so to the exclusion of all other forms of business. Only in Glasgow is there a sufficient number of sheriffs and a sufficient volume of types of business to create circumstances in which specialisation might be a viable proposition and it should be emphasised that the existing “specialist” sheriffs there only devote a proportion of their time to their specialism and otherwise undertake a range of civil and criminal work. There may be merit in having different types of action being dealt with by different procedures, but we see no merit in de-skilling judges by having them focus on limited specialisms. We foresee difficulties in relation to transfers for those who have become specialists, something which might deter applicants of suitable quality for shrieval posts.

We entirely agree that the conduct of litigation could be improved by the introduction of good quality information technology systems. The present experience of the Scottish Court Service’s performance on such systems is not, however, encouraging.

We agree that it is disproportionate for sheriffs to be conducting summary cause and small claims actions even in the light of the recently increased financial limits. These should be conducted by some lower level of legally qualified assessor.

We see no merit in a unified civil court system or a “national sheriff court”. The paper acknowledges that the civil and criminal courts of Scotland are not separate institutions (para. 4.4). However, it fails to acknowledge or address the possible implications for the criminal jurisdiction of the sheriff court of the creation of a “national sheriff court”. Would this proposal mean that there would be a national sheriff court for civil and criminal business or would there be two distinct systems for civil jurisdiction and criminal jurisdiction? It is difficult to see what the benefit of a unified or national system would be.

We accept, however, that the bulk of the civil work of the Court of Session at first instance could be conducted perfectly well in the sheriff court leaving Senators to concentrate on important and high value civil actions, high level crime and the exercise of their appellate functions. We agree that there would require to be an effective system of remit among the three levels of civil court.

There is no merit in sheriffs having an all Scotland jurisdiction. There is a great deal of merit in the sheriff remaining in his or her local court and bringing to that court the benefits of his or her local knowledge, consistency, flexibility and an exercise of responsibility for the effective operation of that court. There may be some scope for adjusting the present boundaries of the sheriffdoms, or increasing their number, but we are not aware of any court which is patently in the wrong sheriffdom and the present sheriffdoms appear to work.

We see no merit in a central booking agency. We are aware of information that such a system operates successfully for England and Wales for debt collection, but that is on account of the restriction of the centralised operation to that one readily standardised type of litigation and the procedure adopted. The numbers of such actions in a jurisdiction with a population ten times ours makes it viable. We do not consider that such an arrangement would be viable in Scotland though, as with other proposals, we are hampered by having no indication of cost or any possible resultant savings. The suggestion that a central booking agency could allocate proofs and debates around Scotland to suit availability of courts is impracticable and unrealistic. It is fundamental that there is judicial control and scrutiny of cases from the outset. The inconvenience to the public, both litigants and witnesses, would be substantial and unreasonable and to the profession unimaginable. Most agents work from their office near the local court where they will have a number of cases calling, as opposed to several cases calling in each of half a dozen different courts. The suggestion that the M8 could become the traffic route to swifter justice can only have been made by someone unfamiliar with its present frailties as a means of communication.

We agree with the proposition that it is contrary to the public interest to operate the Scottish Court system with the current number of temporary judges and part time sheriffs. In Glasgow and Edinburgh sheriff courts the situation of being dependent virtually every day on the availability of part time cover is an illustration of short term financial expediency. If there is a need for a full time officer, then one should be appointed. The reasons set out in *Starrs v Ruxton* have only partly been removed by the issue of security of tenure having been addressed. We believe that it might be more appropriate to fill some of the peaks and troughs by the employment or re-employment, as appropriate, of retired full time sheriffs who wish to continue to undertake some work on a part time basis.

We accordingly answer the questions as follows:-

***Questions –***

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

In the sheriff courts, criminal business affects civil business to a degree which is variable from day to day and court to court but nowhere is it to the extent by which civil business in the Court of Session is so affected.

***2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?***

Generally speaking, no, at least so far as concerns the sheriff court. There is no evidence that civil business in the sheriff court is not currently conducted expediently and to a high standard. In fact, there is little evidence in support of many of the assertions in the review document. As has been said, such information as the review document provides supports the retention of the present system in the sheriff court.

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

No. No advantage in such a separation is perceived. The obvious disadvantage would be a loss of flexibility which would have a detrimental effect.

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

No greater degree of specialisation is necessary or viable in the sheriff courts.

***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?***

We do not consider that we are qualified to answer this question.

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

The principal court of first instance in civil proceedings throughout Scotland should be the sheriff court. The sheriff could be given exclusive jurisdiction in most personal injuries cases. There would also need to be a right to remit to and from the Court of Session in appropriate cases. There should be no financial limit for personal injuries actions raised in the sheriff court.

Additional resources may be required. The sheriff court could also be given jurisdiction in cases of judicial review (where the body who made the decision is neither a public nor other statutory body) and also in all sequestrations and liquidations.

The Court of Session could retain its jurisdiction of first instance in actions of reduction (but only in respect of sheriff court decrees), actions relating to trusts, in actions involving supervisory powers over administrative bodies, in actions to compel bodies to undertake their statutory duties, in proceedings relating to patents, in Exchequer causes, in special cases under s. 27 of the Court of Session Act, in international child abduction cases, in relation to trusts, in petitions to the *nobile officium* and in relation to devolution issues.

It was a surprise to learn that solicitors engaged in reparation work were critical of the operation of the sheriff court and unfortunate that no greater specification of the nature of the criticisms was offered. We can see no benefit to litigants in low value reparation actions remaining in the Court of Session. The potential savings in litigation expenses are self-evident.

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

No

***8. Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?***

See answer to question 6

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

Our view is that if the current structure of the courts is retained, the level at which the privative jurisdiction of the sheriff court should be set should be £100,000. See our answer to question 6.

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

In our answer to question 6 we made reference to the need for there to be effective power to remit cases between the Court of Session and the sheriff court. If our submission above in relation to the privative jurisdiction of the sheriff court being set at £100,000 is accepted we consider that a litigant who wished to maintain that proceedings should nonetheless either be commenced in or remitted to the Court of Session should require to petition the Inner House to do so. This would have the benefit of producing in a relatively short time a series of authoritative decisions on the criteria relevant to such authority being granted.

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

Yes and this should deal with all summary cause and small claims cases.

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

No, it should be outwith the sheriff court, but must be presided over by a suitably qualified lawyer.

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

The current division of the sheriff court has distinct advantages in ensuring the continuity of locally provided justice. It is convenient for the parties and thus reduces expense. It is also convenient for local legal representatives who organise their business on the basis that they are likely to have several cases in the same court. If, instead, they had several cases in several different courts as selected by a central booking agency, then the number of cases adjourned because of the non-availability of the agent of choice could escalate.

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

Yes

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

They do not give rise to any difficulty so far as concerns the operation of sheriff courts.

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

Housing cases involving evictions should be dealt with at a lower tier of court along with the other summary causes. Commissary business is conducted well in its current location and should be left alone.

***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?***

No. As indicated in Tables 30 and 40 in Annex E, there is no evidence of any serious imbalance of work among sheriffdoms. A national sheriff court system allocating resources on the basis of court availability would not serve the public. It is considered that local justice is best provided with local accountability. Where would issues needing to be resolved at initial warrant stage be dealt with? Would agents from Inverness have to come and address the sheriff allocated to the national booking agency to get an interim interdict? We cannot see that the creation of a national booking agency would have any benefits and is likely to be inefficient and costly. There would be no judicial supervision of the system. This would mean that there would be no control over the grant of undefended decrees notwithstanding that actions may be incompetent or there may be issues relating to jurisdiction. There would be no supervision of whether a given document constituted an initial writ or defences. The necessity for local sheriff court administration would remain and there would almost inevitably be conflict between local and national operations.

***18. Is there a case for all sheriffs to have an all-Scotland jurisdiction?***

No. There is huge advantage in having a resident sheriff with local knowledge. Arguably such a provision would comprise indirect sexual discrimination as fewer women, especially those with family responsibilities, would be able to take up such an appointment. This would also run contrary to the desire for diversity. (Note clause 14 of the Judiciary and Courts (Scotland) Bill currently before the Scottish Parliament.) It might operate more widely as a deterrent to potentially suitable applicants for the office of sheriff.

***19. If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?***

Yes, on cause shown. See answers to questions 6 and 10.

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

Yes. The evidence produced suggests that the present system works and is utilised.

***21. Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?***

The office of sheriff principal should be retained and sheriffs principal should have both judicial (appellate) and administrative functions.

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

This is not a matter for us to deal with.

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

This is not a matter for us to deal with.

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

The system would be better served by an adequate number of permanent senators and sheriffs. It is absurd that sheriff courts such as Glasgow and Edinburgh cannot function in a way which permits coverage of their present daily business without having to utilise part time cover. Other courts have similar problems. We understand that (15 to 20) part timers are required every day to cover normal court business. The advantages are expediency in the short term and an opportunity for the individual to decide whether he is an appropriate candidate for judicial office. The disadvantages are the lack of commitment to any particular court, the public perception that they are getting a lower standard of judge and the lack of local knowledge. There are also problems associated with a person being a sheriff one week and an agent or counsel in the same court the next week. Further difficulties arise as a consequence of the need to continue business where part time sheriffs are used. This may be where a perception of a lack of consistency on the part of some members of the public arises. The absence of a small number of sheriffs appointed as temporary judges for lengthy periods has an adverse effect on the efficient operation of their courts.

## **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 be?***

In principle we do not think that rules of procedure are the appropriate place for statements of philosophy or mission statements. Such statements might be more appropriate for a guide book or brochure *about* the work of the courts.

We recognise, however, that the desire to have such a statement may be thought to be difficult to resist having regard to the fact that such a statement exists in the equivalent rules in England and Wales and is supported in Northern Ireland. It would not be appropriate that such a statement use terms such as “justly” or “fairly”. These are already part of the judicial oath which requires a judge to do more than act justly and fairly. It requires a judge “to do right to all manner of people ...without fear or favour,

affection or ill-will”. Any such statement should avoid terms such as “proportionality”, which might not be understood by lay people.

There is a potential that the concept of proportionality could be prayed in aid to restrict access to the courts. There could be an advantage in having a statement that a judge will deal with cases in a way that is proportionate to the amount of money in the case, its importance, and its complexity. Thus, if valuable court time is being wasted, the court may justifiably bring the proceedings to a speedy conclusion. It might also underscore, without limiting, the court’s inherent power to regulate procedure: see e.g. *Newman Shopfitters Ltd v. MJ Gleeson Group Plc*, 2003 S.L.T. (Sh. Ct.) 83.

***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?***

The very nature of the mediation process is that it is voluntary. It cannot, therefore, be made compulsory. Furthermore, since under article 6 of ECHR citizens have a right to have their civil disputes determined in public by an independent and impartial tribunal established by law, litigants cannot be *required* to use mediation or some other dispute resolution process first.

We adhere to our view expressed in our response dated 4<sup>th</sup> September 2006 to the consultation paper of the Sheriff Court Rules Council on “The Sheriff Court and Alternative Dispute Resolution”. This is that, where parties decide to litigate, the sheriff should not be *required* to encourage parties to take their litigation to some other dispute resolution process. If parties wish to have their dispute decided by a judge, then they are entitled to have it decided by a judge. We were then, and remain, firmly of the view that there should no compulsion by the court on parties either to consider or to use ADR.

What has to be avoided is adding another layer of procedure which might increase the cost of resolving disputes.

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

If our view, that ADR should not be made compulsory or that sheriffs should not be required to encourage ADR is not accepted, we answer this question as follows.

In ordinary actions in the sheriff court the first opportunity currently for a sheriff to raise the issue with all parties present or represented is the options hearing. In small claims and summary causes, it is the (first) hearing, at which all parties are present or represented and the defender has to state a defence.

In our opinion these hearings are appropriate occasions at which the sheriff might raise the issue of mediation. In those sheriff courts where mediation is currently available (Aberdeen, Edinburgh and Glasgow), the question of mediation is raised at those hearings.

A sheriff ought to be able to raise the issue of ADR at other occasions during the progress of an action. It would not be appropriate or necessary to consider it before it is known whether the defender intends to defend the action, and probably not before the defence is known. The earliest appropriate opportunity in an ordinary action would be after defences are lodged. A problem is that there is no formal hearing before the options hearing (which is not earlier than 10 weeks after the period of notice on the defender to respond to the writ). In small claims and summary causes the defence is noted at the first hearing. The next formal hearing in any action is a proof hearing or, in an ordinary action, a pre-proof hearing if one has been fixed. A proof hearing will generally be too late to consider ADR. It must be borne in mind, however, that parties must have the opportunity to be heard by the sheriff on the issue; and that any additional hearing beyond those already required has to be funded, or paid for by the parties, in addition to other appearances: courts should be slow to increase the financial burden on parties or the State.

In our view if mediation or other ADR has to be voluntary, and indicators for referral to ADR have to be present (see answer to question 4 below), then consideration of it has to be done at a hearing at which parties are present or represented. Such a hearing should not be an *additional* hearing adding to the cost of litigation. It would be desirable to have parties mention in their pleadings (or some other way) if it has been considered, attempted or rejected.

The problem with a specific rule in relation to expenses is that it is difficult to apply in practice. This, we believe, has been the experience in England and Wales where there is such a rule following *Halsey v. Milton Keynes General NHS Trust*, [2004] 1 WLR 3002, CA; [2004] 4 ALL ER 920. There is already a wide discretion in our courts in relation to expenses. It would be open to a court, in exercising that discretion, to have regard to a pre-litigation unreasonable refusal by a party to consider ADR.

***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.***

There are a number of situations in which mediation or ADR is not appropriate. These are where:-

- An interim interdict or summary judgment is required.
- There is a need for a decision on a point of law, to clarify the law or inform policy.
- Legal action is needed to get the other party to the negotiating table.
- There is a multi-party action.
- There is great animosity between the parties.
- There is a persistent litigant or one party has no genuine interest in settlement.
- There is an alleged abuse of power.
- There are insurers in the background in the way of compromise.

It does not follow that every other type of case is suitable for ADR. There are a number of indicators recognised by mediators which suggest a case might be suitable for mediation. Two of them are essential, namely, willingness of the parties to

negotiate (which is why ADR cannot be made compulsory) and that there is scope for a negotiated settlement. If these two are not present, then none of the following indicators would suffice:-

- Desire for an outcome or result that a court order cannot deliver.
- At least one of the parties is a party litigant.
- A speedy solution is required.
- Parties are exhausted by court procedure.
- Long-term relationships are important (eg family, neighbours, business contact, long-term contracts).
- Parties have an interest in undertaking future activities together.
- There are wider disputes and differences behind the court proceedings which those proceedings will not resolve.
- There may be a need for confidentiality that a public court would not provide.
- There is a high cost to value ratio.

It has to be recognised that ADR is not a panacea. It involves more time and expense and increases the cost of litigation. The process can result in parties' positions becoming more not less entrenched. A party can sometimes feel pressured into agreeing something that he or she did not want to agree, leaving problems between them unresolved.

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

We assume that the first part of the question includes the issue of whether ADR should be part of the court structure. ADR should not be provided by the courts. There is no room in existing sheriff court buildings to perform this function. In addition to criminal and civil business, various organisations have been given accommodation in sheriff court buildings to support aspects of such business. Judges are not trained mediators and should not be carrying out that function; if they do, they cannot then adjudicate a case they have mediated. If sheriff clerks were considered appropriate after obtaining their professionally qualified skills, they would not have the time in addition to their current duties or be able to maintain those skills. Those who are mediators have to be trained, join professional bodies and, to maintain their membership, at least undertake a minimum number of hours a year. The courts cannot and should not undertake responsibility for supervision or regulation of those conducting ADR. That has to be left to the appropriate professional or regulatory bodies.

If parties are required to consider ADR before or during a litigation, it has to be paid for. Where a party is legally aid or eligible for legal aid, legal aid would have to include the cost of ADR. Where parties are not eligible for legal aid, in the absence of State funding or subsidy, parties would have to pay for it themselves.

If ADR were compulsory, there is an argument for saying that it would have to be State funded.

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

In principle we support the use of modern communications and information technology to improve access to the civil courts. An example would be lodging writs and other documents electronically. More resources are, however, required to improve such access; and the system has to be efficient and kept up to date.

We do not consider, however, for the reasons we have given in our response to Chapter 4, that the development of a “virtual court” justifies the establishment of a centralised court administration.

More could be done to enable witnesses to give evidence in court by CCTV or video link from locations remote from the court.

It should be possible to conduct procedural business, where appropriate, without the need for parties or their representatives to come to court, by, for example, video conferencing. Since article 6 of ECHR requires a public hearing, the hearing of evidence, debates and even contentious motions or applications, would have to be dealt with in open court. There are exceptions where the public may be excluded, but the proceedings must be held in a courtroom where parties can see justice done.

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

The courts already exercise a degree of control over the conduct and pace of litigation. We have an adversarial system of litigation. There are limitations, therefore, to the extent to which the courts can go in controlling litigation: for instance, the judge does not have the statements of the witnesses. Within that limitation, however, more could be done by the courts. Some types of case lend themselves to case-flow management and others to “hands-on” judicial case management. For the successful management of a civil case, the same judge has to be involved with the case from beginning to end. It follows that judicial time has to be organised in such a way as to achieve this. In both management models there has to be judicial control.

***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?***

Case-flow management may be appropriate for cases where the issues are straight forward or invariably similar. For example, most personal injury litigation falls into this category, though there are exceptions in complicated industrial or medical negligence cases. Many actions for debt in the sheriff court could fall into this category; although many of those are undefended and require no management.

Commercial actions and all family actions require a more hands-on approach and would be more suitable for judicial case management.

There has to be scope for the sheriff transferring a case from one form of management to the other.

## CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS

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

Pre-action protocols are a sensible idea. One clear advantage may be that the case is resolved thus saving time and expense. Another may be the proper focusing of the live issues between the parties. Disadvantages to parties must be the cost involved, or as identified in the consultation paper, protracted correspondence, a variety of difficulties in relation to expert evidence, and over rigid application.

We note in Para. 6.9 it is stated that “there has been no formal evaluation of the protocols currently in use in Scotland”. Until such an exercise is undertaken it may be thought to be premature to consider any wider use of this form of pre-action procedure than at present.

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

See our comments to question 1

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

Compliance with pre-action protocols requires to be compulsory. For this reason careful consideration requires to be given to any extension of the existing pre-action protocols until they are properly evaluated. Although it may be thought that Reparation lends itself to pre-action procedure there is, we understand, a view that the present voluntary pre-action protocol for personal injury cases is not working as it should to encourage early settlement of claims.

### ***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?***

There should be no requirement for leave to bring actions in the sheriff court. For the Court of Session the question of leave will arise for that Court with its appellate jurisdiction. Leave should not be required for the certain defined types of action permitted to commence there. See our answers to questions 6 and 10 in Chapter 4.

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

The present composition of the two Rules Councils enables those with substantial experience of the respective courts to determine what the rules should be. Their work is however hampered by the lack of resources and administrative support so that any new rules are rarely available timeously. We consider that the Rules should be available at least 3 weeks in advance of implementation.

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

Yes. It would be of assistance to litigants for there to be one single set of Rules for dealing with all matters at first instance, whether in the Sheriff Court or the Court of Session. There should be one generally applicable set of Rules with specific Rules for identified procedures, e.g. Summary Applications. Different Rules will fall to be promulgated in relation to the Court of Session's appellate jurisdiction.

***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?***

The single initiating document must focus the issues to be determined by the Court. Although all civil actions in the Sheriff Court follow the same general pattern as the suggested form in Para 6.30 with the addition of pleas in law (which we favour as concise statements of the legal basis of the Action), albeit certain Actions may be entitled "Summary Application" or "Initial Writ", those different titles do not alter their basic form.

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

It should not be introduced. The true difficulty with pleadings is not their length but that they are generally woefully inadequate. To introduce "brevity" is likely simply to compound an already existing difficulty.

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

Yes

***Question 10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?***

No

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

Yes

***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?***

Of all the parties involved in litigation the Court is the one least best placed to make any accurate assessment of the length of time any proof/debate/other hearing is likely to take. It may know how many witnesses each party intends to call. It does not know what those witnesses will be speaking to, nor have any idea, at its own hand, of how long they will take.

More use should be made of Pre Proof Hearings some time in advance of the allocated diet(s) for Proof so that the issue of timing/length of the diet(s) can be addressed with minimum disruption to the Court programme.

Hearings should not be time limited.

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

We are in favour of written submissions being provided to the court and exchanged between parties. The advantages of better preparation and presentation for the subsequent oral Hearing outweigh any cost implications.

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

Disclosure of evidence between the parties should be encouraged as much as possible.

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

It is a matter for Parties to determine the evidence they wish to place before the Court.

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

Yes. Such a system would operate in the same way as the current tender system.

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

There is no need for civil jury trials in the Sheriff Court.

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

No. In many straightforward civil actions where the issue is the credibility and reliability of the witnesses' testimony a written decision is unnecessary unless an Appeal is marked. While an ex tempore judgement is only open to those present, in the type of actions envisaged there is no wider public interest.

Where written judgements are required the necessity for setting out detailed Findings in Fact in numbered paragraphs should be abolished. The Sheriff Court Rules Council should be requested to consider appropriate amendments to OCR 12.

***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?***

Existing powers are adequate.

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

No further measures are required in the Sheriff Court.

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

Yes. The test at present is unduly onerous. Details of those who are found to be "vexatious litigants" should be published.

Recognising that in the 21<sup>st</sup> Century the Lord Advocate is no longer the sole Government litigant, consideration should be given to whether or not it remains appropriate for the Lord Advocate to be solely vested with the power to apply for a Declaration. What of the Advocate General or parties' legal representatives?

***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?***

We support the existing arrangements whereby persons without right of audience cannot address the Court on behalf of party litigants other than in Summary Causes or Small Claim Actions. We see no need for any extension of those provisions.

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

This is a matter for the Rules Councils to consider.

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

We have no experience of Judicial Review.

-----

**28 March 2008**