

# **R E S P O N S E**

by

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to

**THE SCOTTISH CIVIL COURTS REVIEW  
CONSULTATION PAPER**

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# CHAPTER 1

## INTRODUCTION

### 1.1 **Should the Civil Justice System be designed to encourage early resolution of disputes, preferably without resorting to the courts? If so, what would be the key features of such a system?**

Some of the work we undertake cannot be resolved without recourse to the courts. For example, Adoption, Interdict and Exclusion Order cases and applications to relocate a child abroad require to be litigated. In other cases, such as financial provision on divorce and issues of residence of and contact to children, we are of the view that courts should be used as a last resort.

To enable clients to resolve issues arising from their separation, we use a variety of methods of alternative dispute resolution, including mediation and collaborative family law.

We are of the view that particularly in relation to child law cases, mediation is an option which could be encouraged at a variety of stages by the courts. Perhaps the most obvious juncture at which mediation could be by order of the Sheriff is at the Child Welfare Hearing stage.

In cases where court suggested intervention is inevitable, there are a number of ways in which the system could be improved:-

#### 1.1.1 Better time management

Unlike other types of litigation, Family Law cases generally will require parties to attend at court on more than one occasion. It is not unusual for them to require to attend several Child Welfare hearings, even in cases where a final hearing is never reached. If adjustments were made to the court timetable to limit waiting times, perhaps by fixing only two Child Welfare hearings per hour, parties would avoid requiring to wait lengthy periods at court often disrupting their employment commitments and child care arrangements.

#### 1.1.2 Accommodation

Attending at court for any party is undoubtedly daunting. At the same time, having to face your ex spouse/partner, can lead to unrivalled levels of stress and anxiety. We would suggest that it would be beneficial for facilities to be made available in order that agents may try and resolve issues whilst waiting for cases to call. Quite often there is scope for negotiation to take place within in the court building, as it is often the only opportunity which agents have to get both clients together. Facilities where they could wait in separate locations for their case to call, in some degree of comfort may also be constructive in moving matters forward together.

### 1.1.3 Case management of Family Law actions

From our involvement in family cases which have been raised in England, we note that court procedure there is heavily weighted at the beginning of the case towards full disclosure of matrimonial property. Whilst reducing a significant element of procedure by way of specification of documents, adjustments, amendments, etc, this also encourages parties to negotiate settlement at an early stage. Far too often, we find ourselves in the position where parties agree settlement literally on the day of Proof. As well as limiting the days of court time wasted by cases settling on the day of Proof, cases settling at early points in the court procedure would avoid court timetables being clogged up with cases which ultimately will never require a final hearing.

### 1.1.4 Continuity of Sheriffs

In our experience, it is a rarity for the same Sheriff to deal with any particular case from start to finish. Particularly in relation to child matters, this can lead to differing approaches, which serves no purpose other than to confuse parties and ultimately their children. It also results in court time being wasted, as the agents find themselves continually explaining the same issues to a variety of Sheriffs. The creation of a group of Sheriffs dealing with only family cases, would limit the potential for a variety of Sheriffs to be involved in one particular case. It would also increase the opportunity for a Sheriff to retain a case from its start to its conclusion.

# CHAPTER 2

## ACCESS TO JUSTICE

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

For many clients, knowledge is the most important thing which they require during their break-up. Information answering frequently asked questions, in particular in relation to child related issues, would no doubt be of benefit. Information relating to financial claims, whether it be upon the breakdown of a marriage, civil partnership or co-habiting couple would also be of use. There is a limit, however, as to how much information should be given. This should be on very broad terms. Too much detail can often leave parties feeling confused or worse- entrenched in a position which may not be accurate!

Whilst there appears to be a greater knowledge on behalf of the public as to the options available to them when choosing which dispute resolution method they think would best suit their situation owing, in the most part to the internet, more information relative to collaboration, mediation, negotiation by solicitors outwith a court context and litigation would be of benefit.

As a society, we are now more accepting of the use of various support agencies when required to assist us in coping with our difficulties. Support services such as Relate, Step Family Scotland, Voluntary Service Aberdeen, Family Mediation, Family Therapy, Mediation, Contact centres etc are valuable at these times. Information should be readily available to assist those who require these services.

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

In Aberdeen and Edinburgh, there are a very limited number of firms offering a legal aid or legal advice and assistance service to clients requiring family law advice. Anecdotal evidence suggests that this problem is becoming widespread across Scotland.

### **2.3 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?**

Litigation is by its nature a stressful process. Family cases add to the mix unsurpassed levels of anxiety, distress and acrimony. The involvement of legal advisors usually serves the purpose of providing a calming influence during these testing times. Lawyers can also supply an objective view. Party litigants are unfamiliar with the rules of court, and this can cause disruption to the procedural aspects of the case. In short, it is rare that a party litigant will have the necessary skills to conduct litigation in family cases effectively.

**2.4 What contribution if any can (a) self help services for party litigants and (b) court based advice centres make to improving access to justice?**

An in court advisory service would be of benefit to party litigants in so far as it would enable them to be shown where relevant literature can be found. They could also be briefed as to what is expected of them by way of pleadings, productions, court procedure, etc.

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

The pressure of business in courts based in smaller towns often results in courts running into the early evening. Decisions at that stage are often rushed, and parties may be left feeling that they have not been given a fair hearing. They themselves may feel pressurised into hasty decisions owing to childcare difficulties, etc.

**2.6 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?**

Often parties are discouraged from litigating, as the sums they are suing for equate to less than the likely fees to be incurred. A streamlined process for cases where parties are seeking capital sums of say £20,000 or less may be cost effective.

# CHAPTER 3

## THE COST AND FUNDING OF LITIGATION

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

It is difficult to comment on this issue. Awards of expenses in family cases are very rare. The majority of litigated family law cases are dealt with on a no expenses due to or by basis owing to divided success at proof. Alternatively, cases settle prior to the proof with no expenses award ever being made.

- 3.2 To what extent does the cost of litigating deter people from pursuing their defending cases in court?**

Cost is probably the single most influencing factor in any client's decision as to whether to litigate a case or not. Unless dealing with matrimonial property of significant value, it is unlikely to be cost effective for most parties to proceed with a proof in either the Sheriff Court or Court of Session.

- 3.3 Does the current system of levying court fees affect access to justice?**

No not in our view.

- 3.4 Are the current roles for recovery of judicial expenses satisfactory?**

As per 3.1 above, expenses are rarely awarded or recovered in family law actions.

- 3.5 Are the current arrangement for the taxation of judicial accounts of expenses satisfactory?**

Yes, but rarely applicable – see 3.1 above.

- 3.6 To what extent and in what respect does the availability of legal advice, assistance and legal aid effect access to justice?**

As fewer and fewer firms are willing to undertake family law work upon a legal aid basis, there is undoubtedly a huge impact on access to justice for some litigants.

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

This appears to be a countrywide problem.

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

Not applicable.

**3.9 Should legal insurance including “before the event” and “after the event the event” insurance have a greater role to play in the funding of litigation in Scotland?**

No insurer will cover separation from partners/divorce.

**3.10 What impact would the ability to recover “after the event” insurance premiums for successful parties have on litigation?**

Not applicable.

# CHAPTER 4

## THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

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

At Aberdeen Sheriff court for example, the two areas are managed very well. There does not seem to be much impact on civil business by the criminal courts. In smaller courts, however, it is not uncommon for civil business to be deferred until later in the day or indeed a separate date, to allow criminal business to take priority.

**4.2 Should (a) some judges in the Supreme Courts and (b) some Sheriffs be designated to deal with civil business?**

Yes. It is desirable for some Judges/Sheriffs to be designated to deal with civil business. As per the above, it would also be beneficial for each court to have designated Judges/Sheriffs who deal exclusively with family law.

**4.3 Should the Sheriff Courts be separated into Civil and Criminal divisions? What would be the advantages and disadvantages of such a separation?**

The division of the two elements would indeed be beneficial. This would assist greatly with timetabling of cases, etc as per previous answers.

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

The Scottish judicial system could benefit greatly from there being a specialisation of both Sheriffs and Judges in family cases. The subject matter, and approach required to deal with family law cases is unique. Specialist training could be offered to Sheriffs designated to deal with this business, which would, we hope, result in a more uniform approach being taken across Scotland. Separate courts, outwith the Sheriff Court building could be set up to deal with this business. Keeping family law cases distinct from other civil and indeed criminal business should be a priority.

**4.5 What are the key factors which influence the decision to raise an action in either the Court of Session or the Sheriff Court where the jurisdiction is concurrent?**

In cases which involve complex legal issues, or in high value cases, those clients expect their cases to be heard in the Court of Session. These factors also lead to the requirement or desire to instruct Counsel, which again points to the Court of Session being the most suitable forum for the case to be heard. Cases involving international elements also would normally be raised in the Court of Session. Some clients with a high media profile also prefer not to have to litigate in their local Sheriff Court.

**4.6 In what, if any types of case should a) the Court of Session or b) the Sheriff Court have exclusive jurisdiction?**

We have no recommendations to make in this regard.

**4.7 Should the jurisdiction of the Court of Session/Sheriff Court be unified to create a single court?**

The requirement for the Court of Session to be available as a court of first instance remains. Whilst the number of cases which are raised in the Court of Session in respect of family law are limited, there remains the requirement for cases of unusual complexity and value.

**4.8 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 actions and why?**

Please see above. We remain of the view that the Court of Session should be available as a court of first instance.

**4.9 If the current structure of the courts is retained, at what level should the private jurisdiction of the Sheriff Court be set?**

Not applicable.

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

Yes. No reform is required.

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

Yes. Please see answer 2.6 above.

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

This may serve to only complicate the system.

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

The current rules are satisfactory. They are generally clear. They prevent “forum shopping” and ensure that actions are raised at reasonably accessible courts.

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

Yes. The only criticism would be that it can on occasion take an unreasonable length of time for undefended divorces to be processed.

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

Not applicable.

**4.16 Are there types of business in the Sheriff Court which could be more efficiently or appropriately dealt with by administrative rather than judicial process? For example are the current arrangement for the disposal of Commissary business satisfactory?**

Not applicable.

**4.17 Is there a case for a national Sheriff Court which would allow cases to be raised at the Sheriff Court level anywhere in Scotland? If so what appeal arrangements should there be?**

We do not believe that this is a welcome suggestion. For lower value litigated cases, the client is entitled to expect that they be litigated at a local level.

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

Yes. Particularly if Sheriffs are to be specialising in family law. This would enable them to move freely around various Sheriff Courts in Scotland.

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

We would be in favour of such a provision. The complexity of the case would require to be taken into account. How complex it is in terms of both fact and law require to be considered.

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

No. There is a significant delay in family cases being dealt with. This is entirely inappropriate in cases involving children. It also prevents parties from moving on with their lives, as division of matrimonial property cannot be finalised until such time as the appeal has been concluded. A fast track procedure should be in place.

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

The present arrangements are satisfactory.

**4.22 Should the majority of statutory appeals continue to be dealt with by the inner house of the Court of Session?**

Not relevant to our area of practice.

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

Appeals should be limited to two per case subject to cause being shown in exceptional cases.

**4.24 What are the advantages and disadvantages of reliance on temporary Judges and part-time Sheriffs?**

Whilst the employment of temporary Judges and part-time Sheriffs speeds up the court process, this again leads to a lack of consistency and approach. It also leads to a lack of those with specialist knowledge of a given area being allocated to hear Proofs.

# CHAPTER 5

## PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

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

We think that “civil procedure” is too wide a topic to have an overriding objective or statement of philosophy.

**5.2 Should the Court a) encourage, b) require, c) in other ways facilitate the needs of mediation or other methods of dispute resolution?**

Whilst the Court should encourage the use of mediation, etc, it would not be feasible to require that parties engage in such services. Often, by the time court actions are raised in relation to family matters, the parties are so entrenched in the respective positions that it would be impossible to ask them to try and resolve their issues without a third party making the decisions for them.

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

A number of family cases require judicial determination. Examples are actions of Interdict, Adoption, Child Abduction, applications for a child to relocate abroad, etc. In other cases, the personalities of the individual parties involved will determine that the use of mediation or other methods of dispute resolution are inappropriate, owing to the levels of stress, acrimony, distress, power imbalance in relationships, or unwillingness on one or other party to co-operate.

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

The use of CALM solicitors and voluntary bodies such as FMS should be encouraged.

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

Electronic filing of documents (such is the case in commercial courts) would be of assistance. Use of video conferencing would assist in family cases. More information on the internet as to what clients can expect at court may assist in alleviating any fears they may have.

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

We are of the view that a more proactive case management approach is required. Rules requiring early disclosure of the matrimonial property would be of benefit. A more thorough approach at Options Hearings, whereby Sheriffs encourage parties to identify the areas which can be agreed, and those which are still in dispute would focus cases earlier in proceedings.

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

Most family law actions.

# CHAPTER 6

## WORKING METHODS OF THE CIVIL COURTS

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

Not applicable.

**6.2 Should there be a greater use of pre-action protocols?**

Not applicable in family actions.

**6.3 Should compliance with pre-action protocols be voluntary or compulsory?**

Not applicable.

**6.4 Should there be a greater requirement for leave to bring or to take steps in proceedings?**

The present arrangements are generally satisfactory.

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

Yes.

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

Whilst this would certainly be helpful in terms of there being a uniform approach between the two courts, this may be rather difficult to facilitate. Perhaps some similarities between the systems would be of benefit. For example the usage of standard forms for disclosure of matrimonial property would assist.

**6.7 Should there be a single initiating document “for all types of actions” and/or be at all levels of the court structure? If so what format should that document take?**

There is scope for streamlining of the family pleadings. A pro forma document to agree the nature and value of assets and liabilities would assist in obtaining some uniformity to pleadings. Given the vast range of different scenarios and facts of which make up the average family law case, it would not be possible to use pro forma's for all aspects of this type of action.

**6.8 To what extent should a system of abbreviated pleadings be introduced?**

The present approach works reasonably well.

**6.9 Are the current arrangements for summary disposal satisfactory?**

Yes.

**6.10 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?**

Yes.

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

There is greater scope for non-contentious routine procedural matters to be dealt with by Sheriff Clerks, thus freeing Sheriffs to deal with contentious matters only.

**6.12 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?**

A more proactive approach by Sheriffs at Options Hearings, would go some way to determine the appropriate length of time which a case will require for Proof. If further time is needed, the parties should not be precluded from leading further evidence at a date to be later identified.

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

Yes. The use of written submissions allows an early focusing of the issues. This enables a Sheriff to digest the information at his or her leisure. Oral submissions could then be used to confirm matters, and answer any queries which the Sheriff may have. This would reduce court time considerably.

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

We are supportive of the disclosure of financial information at the earliest possible stage. This will encourage early settlement and reduce the requirement for a Proof. In the event that parties cannot agree how the matrimonial property should be divided, if they are at least able to identify the scope of the matrimonial property, this will reduce the likelihood of a Proof lasting for more than one day.

**6.15 To what extent should the court have control over the use of expert witness evidence?**

Where appropriate, the court could determine that one expert be instructed to provide a valuation of some of the matrimonial assets, on behalf of both parties. As well as reducing scope for dispute, this will cut back on the court time required, as one expert could give evidence on behalf of both parties.

**6.16 Should a system of Pursuers offers be introduced to the civil court procedure? If so what features should such a system have?**

In family law cases involving financial provision, it is common for parties to set out settlement proposals in writing, in order that a benchmark may be laid down with a view to avoiding the payment of expenses. In the event that settlement offers are subsequently deemed to have been unreasonable by the court, an award of expenses should be made. This would encourage early settlement of cases.

**6.17 Should civil jury trials be retained?**

Not applicable to family law.

**6.18 Should written judgements be required in all cases?**

Yes. Often, due to the stress and anxiety associated with court proceedings, parties forget what the Sheriff's decision has been. Even in the most simple of hearings, for example, Child Welfare hearings, a brief written judgement would help to remind parties as to the Sheriff's decision.

**6.19 Should the courts have greater powers to impose sanctions for non-compliance of the court rules whereby a party or his/her representative has behaved badly? If so, what should these rules be?**

We are of the view that awards of expenses should be made against parties who behave unreasonably. This will encourage parties to try to agree any matters which are capable of resolution at an early stage.

**6.20 What measures should be available to the court to identify and manage unmeritorious claims or appeals brought by party litigants?**

The heavy emotional element involved in family cases makes the identification of such actions difficult. What may not seem to be an issue of great importance to the Sheriff or indeed agents, may have the utmost importance to the parties. Proactive case management, however, should resolve a number of these cases at an earlier stage, and policing of appeals should reduce the number of appeals in such cases by party litigants.

**6.21 Is the current legislation vexatious litigants in need of reform if so how should this be done?**

Again, owing to the high level of emotion involved in family law cases, it would be difficult to categorise a litigant as "vexatious".

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

The same concerns which we have raised regarding party litigants would also apply to such a person.

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

Not applicable to family actions.

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

Not applicable to family actions.