The Society of
Solicitors
Of Hamilton &
District
Incorporated 1867

CIVIL COURTS REVIEW

A RESPONSE TO THE

CONSULTATION PAPER

BY

THE SOCIETY OF SOLICITORS OF HAMILTON AND DISTRICT

PREAMBLE

The Society of Solicitors of Hamilton and District has over 100 members who are practising solicitors. It incorporates a wide geographical area, including Bellshill, Blantyre, East Kilbride, Larkhall, Hamilton, Motherwell, Uddingston, Strathaven and Wishaw. It is also the representative of the Faculty of Solicitors at Lanark and District.

Hamilton Sheriff Court is the third busiest Sheriff Court in Scotland, based on the volume of actions raised. It has 9 full time sheriffs and 4 floating sheriffs.

The Society's Dean's Committee created a 'Working Group' to submit a response to the Consultation Paper on behalf of the Society.

The Working Group was comprised of the following members:

Anne Brophy, Hay Cassels, Hamilton
Raymond Brown, Hay Cassels, Hamilton
Linda George, Linda George Family Law, Hamilton
Michael Higgins, T.G. Bradshaw & Co, Bellshill
Geraldine Fraser, Munro Liddell, Motherwell

The response was based on a full discussion of the Consultation Paper. The answers were agreed as being the most appropriate for the benefit of the Society. Only the questions with interest or relevance to the members have been answered.

QUESTIONS FOR DISCUSSION

CHAPTER 1

INTRODUCTION

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?**

   Ideally, the civil justice system should be designed to encourage an early resolution of disputes. It is trite to promote an early resolution. The majority of solicitors aim to practice this way. Sometimes, however, it is not possible to achieve, due to the nature of the dispute or the personalities of the parties involved. It is not appropriate to force parties to engage in alternative dispute resolution. The option of litigation must be given and should not be a last resort. Certain types of actions may be incapable of early resolution without resort to the courts. An example is an action where a protective measure is sought. Court actions can also assist parties to focus on resolving the issues and can often aid a more early resolution than proceeding without litigation.

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?**

   Yes, the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations. In respect of paragraph 1.12(ii), participants should have access to means of funding their case at the outset but also throughout the duration of their case.

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

   No.

CHAPTER 2

ACCESS TO JUSTICE

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

In our view, public legal education may contribute slightly to improving access to justice. We would favour the provision of basic information with regard to legal structures and institutions; information in respect of Legal Aid and the provision of information which signposts other related services such as mediation and counselling services etc. The provision of such information would provide a starting point to members of the public in identifying their rights and remedies when encountering problems which may require recourse to the Civil Justice System.

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?

Although there is not a comprehensive geographical Legal Aid dessert within our Sheriff Court District, reports from members of our society indicate that many are moving towards refusing to undertake certain types of court action under the Legal Aid Scheme such as personal debt, housing matters, social security benefit matters, interdicts, reparation, divorce with financial provision, bankruptcy. The remuneration for these types of actions under the legal aid scheme is not thought by our members to be economically justifiable. .

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?

In our view it would not be desirable to encourage litigants to take part in legal processes without legal representation. Our experience of cases currently where there is self-representation by party litigants is that it produces a view that the proceedings are not even handed as the Sheriff feels compelled to provide assistance to the party litigant in dealing with the procedure and the process generally. We are also of the opinion that it effectively delays or slows the conclusion of the proceedings and has a dilatorious effect on the other business of the Sheriff Court. We consider that it may be feasible to design court procedures to allow self-representation by party litigants in cases of low value and we would

favour the creation of an additional tier within the Civil Court system to deal with these. This response refers also to question 6.

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 event that an additional tier were to be created to deal with cases of low value, in our view, self-help services and court based advice services would have a valuable contribution to make to improving access to justice for party litigants dealing with cases proceeding before that particular tier.

It is envisaged that such a tier would be less formal, more robust and have a greater summary jurisdiction in dealing with cases. It is considered that self-help services or court base advice services would complement any such additional tier. In low value cases it is very rarely worthwhile for professionals such as solicitors or expert witnesses to become involved in these cases as inevitably the expenses in a vast majority of the cases expenses can exceed the sums sought. In our opinion the one solution would be to create a more inquisitorial tier for user groups with self-help services and court based advice services are in tandem.

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?

We would favour the creation of a third additional tier within the Civil Court Justice System for dealing with cases of low value which we would define as being cases of a monitory value of less than £5,000.00.

We would envisage such a structure being incorporated within the current physical court buildings and administered by Scottish Courts Administration. The structure which we would propose would involve the creation of a tier presided over by a nominated solicitor drawn from a panel consisting of senior solicitors within the court jurisdiction and having no less than ten years post qualified experience with an experience in civil litigation approved by the Sheriff Principal.

We would favour the Pursuer lodging an initiating document, the Defender lodging a detailed response. Thereafter the Sheriff Clerk would write to the parties with a Hearing Date giving detailed information with regard to witnesses and documentary evidence and directing people towards self-help services and court based advice services. It is essential for proper working of such a tier that clear public information is provided in the same way as it is provided in the Tribunal system. It is considered that the structure of Small Claims and Summary Causes at present is overly complicated for court users. When users attend court invariably they believe that that attendance is the date they are to present their case. It is generally not

appreciated that the preliminary hearing is merely to deal with issues. We consider that moving immediately to a hearing would have benefits in expediency and court users understanding the system.

We would favour limiting a hearing time to one hour per case unless there were representations made by either party in writing and prior to the hearing that this time would be insufficient to allow the matter to be concluded. Generally speaking it is our experience that low value claims can be dealt with within this timescale.

At the Hearing, the approved solicitor who is presiding ought to, as a preliminary issue, identify the disputed areas of fact so that any oral evidence can be restricted to those matters still in dispute and thereafter proceed to an expeditious progress of the Hearing to a conclusion. Given that we envisage this to more inquisitorial in nature we see little difficulty in the timescale suggested. It is our experience that contentious factual issues are very rarely lengthy. The presiding solicitor should give an oral decision at the conclusion of the Hearing.

We consider there should be one tier of appeal and there should be a right of appeal from the decision of the presiding solicitor to a nominated Sheriff of the jurisdiction in which the action has been initiated. Beyond that there should be no appellate recourse. If an Appeal is lodged then the presiding solicitor would require to issue written reasons for his decision identifying primary findings on fact.

We consider there to be three clear advantages in such a system. (1) expeditious progress of low value cases; (2) the likelihood that the system would be easily understood by court users and partners in the Civil Justice System; and (3) by diverting low value cases from already stretched judicial resources.

Whilst it is accepted that there would be a Capital and Revenue cost, such a system being established we consider that these costs in budgetary terms would be recovered and better use of judicial time and resources in higher value cases and criminal business. There may also be consideration given to a limited form of court fees in these cases.

CHAPTER 3

THE COST AND FUNDING OF LITIGATION

1. **What, if any, information can we give the Review about levels of Legal Expenses in litigation and how such Expenses compare with sums awarded by the Court or settlement figures?**

   Anecdotally, we consider that in Ordinary and Summary Cause Actions, generally speaking, a successful litigant would expect to receive only in the region of about 75% of their overall Judicial Expenses in the Action. The result of that is that, generally speaking, even a successful party ends up out of pocket. Moreover, in "low value" cases, a successful litigant often only secures a pyrrhic victory, as a result of their costs being more than the Judicial Expenses awarded and/or recovered by them.

2. **To what extent does the cost of litigating deter people from pursuing or defending cases in Court?**

   This is largely dependent on the type of Action and subject matter of Action. In "non-family" type of Actions, a significant number of people who would be fee-paying Pursuers in Actions are deterred by the potential cost of pursuing the litigation.

   Similarly, the cost of litigation for a fee-paying Defender is more likely to deter that party defending the Action when the Action is one of a low value payment type of Action.

   The result of the above circumstances is that, in a significant amount of cases, decisions by Pursuers and Defenders as to whether to pursue or defend litigation are made on economic grounds and not on the principles of seeking justice and fairness.

3. **Does the current system of levying Court Fees affect access to justice?**
   If so, how and in what kinds of cases?

   At their current level, the current system of levying Court Fees does not affect access to justice. At their current level, Court Fees are relatively insignificant in comparison with the overall level of expense involved in pursuing or defending Actions.

4. **Are the current rules for recovery of Judicial Expenses satisfactory?**

We think this question is unclear but what we do think is that, in the present system, there is no way of determining whether an opponent is going to be able to pay Judicial Expenses if granted against them. This difficulty might be improved by the introduction of the requirement for litigants to put in place a satisfactory insurance cover/Bond of Caution in respect of an award of Judicial Expenses being granted against them.

5. Are the current arrangements for the taxation of Judicial Accounts of Expenses satisfactory?

We think that they probably are, although a change of name from "Taxation" to something like "Expenses Assessment" might be more understandable and user-friendly to members of the public.

6. To what extent and in what respects does the availability of Legal Advice & Assistance and Legal Aid affect access to justice?

A legally-aided person with a small or no Legal Aid contribution has and gains an unwarranted advantage over the large number of people who fall into the category of qualifying for Legal Aid with a significant or large contribution or, indeed, those people who do not qualify for any form of Legal Aid in respect of the litigation. If the income and capital eligibility levels for Legal Aid were made more realistic, this inequality of arms may become less pronounced. Additionally, consideration should be given to passport/disregarded benefits for Legal Advice & Assistance becoming passport/disregarded benefits for full Legal Aid.

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

See our answer to question for discussion No. 2 in Chapter 2 hereof.

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

We do not feel that we are able to give any answer to this 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, but as an alternative method of funding to Legal Aid to certain categories of people. For instance, the premium on such policies may be too high for people on

low or benefit income to pay and, if they are unable to pay the premium on and thereby secure the insurance, that should not be a bar to them having access to the justice system and having access to alternative methods of funding the litigation, such as, for instance, Legal Advice & Assistance or Legal Aid or speculative fee arrangements.

10. What impact would the ability to recover "after the event" insurance premiums from unsuccessful parties have on litigation?

Having the "right", rather than the "ability" to recover "after the event" insurance premiums from unsuccessful parties may encourage people to pursue or defend litigation. We think that the important distinction between the "right" to recover from the "ability" to recover should be made. If the opponent is, for instance, a man of straw then, in our view, the "ability" to recover "after the event" insurance premiums from him would be meaningless.

Additionally, the size of the "after the event" insurance premium would be an important consideration. For instance, if the premium were, say, £100 we think that this would have much less impact on a party's overall decision to pursue or defend litigation than if the premium were, say, £5,000.

CHAPTER 4

THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

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

Within the jurisdiction of the Hamilton Sheriff Court, civil and criminal business has been physically separated for a period of nearly two years. Our experience within this jurisdiction therefore is that the physical separation of the two courts has lessened the impact on civil business of the pressure of criminal business. Prior to that physical separation, the conduct of civil business was adversely affected by the pressure of criminal business simply because of the constraints of accommodation and available Sheriffs.

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

In our view this would be helpful to the efficient conduct of cases because it would allow greater specialisation of Sheriffs who would be more up to date and well versed in the current law applying to their particular specialisation. It would give a priority to civil business within the Courts which in our view is sometimes lacking.

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

In this jurisdiction that separation has already occurred. There would require to be sufficient resources for both divisions to function well. There may be an impact on access to justice for rural areas where such a separation would be physically impossible. The separation leads to fragmentation of the local bar in our experience. The experience of Sheriffs in both civil and criminal may well be lost. There is often an overlap in law between civil and criminal which a specialised bench would perhaps have difficulty in adequately addressing.

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?

The general view is that there should be a specialisation in family cases particularly which do not appear to fit in to the progress of actions envisaged within the Sheriff Court Rules e.g. the number of Child Welfare Hearings, informal Hearings and Preliminary Hearings particularly in cases which involve children. There is already

a specialisation in complex commercial cases in for instance Glasgow, which appears to work well and to bring a speed and efficiency to this particular type of case. However, generally, a specialisation may give a narrow focus from the bench on this one particular type of case.

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 two key factors which influence that decision in our view are firstly the legal complexity of the case, the more complex cases going to the Court of Session and secondly the value of the case where a high value action is more likely to be in the Court of Session than in the Sheriff Court. In addition, consideration would be given to accessibility of the court, the cost of raising the action, the immediacy of the advice available – a local solicitor can advise accurately and quickly on procedures within the Sheriff Court whereas the Court of Session may require more specialist advice which may take time. Case management is another factor where the instructing solicitor can manage the case more effectively in the local court than in the Court of Session.

6. In what, if any, types of cases should (a) The Court of Session and (b) The Sheriff Court have exclusive jurisdiction?

In matters of International Law the case should stay in the Court of Session. The Court of Session should have the ability to remove family actions to the Sheriff Court. Apart from that, there is no further comment.

7. Should the jurisdiction of the Court of Session and the Sheriff Court be unified to create a single Civil Court?

In our view, the Court of Session and the Sheriff Court fulfil two distinct and separate roles and they should not be unified.

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?

It is not our view that the Court of Session should become a Court of Appeal only. We do not believe there is a problem with the current situation where the Court of Session is both a Court of Appeal and a First Instance jurisdiction.

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

We favour the creation of a third additional tier as set out in Answer 6 to Chapter Two. The current structure of the court would therefore be altered to that extent. On this basis it would seem prudent to set the privative jurisdiction of the Sheriff Court at £5000 being the level up to the third additional tier. It could be argued that the figure should be set as high as £10000 as this reflects a more realistic monetary value for today's society in retaining cases within the Sheriff Court and effectively out of the Supreme Court.

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

It is considered the current powers to transfer cases between Sheriff Court and between the Court of Session are not satisfactory. Where actions of divorce and financial provisions are raised in the Court of Session we are of the view that child issues should be remitted to the local Sheriff Court. We would also refer to Answer 6 in this regard.

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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. We would refer to Answer 6 in Chapter 2.

12. Alternatively, should there be another level of judiciary within the Sheriff Court to deal with "third tier business"?

It is our opinion that no further level of judiciary is required within the Sheriff Court other than that suggested at Answer 6, Chapter 2.

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

We do not see any advantage in dividing the Sheriff Courts into any other jurisdiction apart from the geographical jurisdictions at present exercised. The advantages to a geographical division as is exercised at present;

a) Sheriffs and Sheriff Clerks acquire an extensive local knowledge which can be of practical assistance in disposing of business.

b) There is a convenience to other Court users such as witnesses and litigants who in general terms will reside or have a connection with the geographical jurisdiction.
c) The local bar is able to build a good working relationship with the court staff which allows for a more expedient disposal of business. In giving advice local solicitors are also able to be more aware as to likely views of the judiciary to certain issues.

There can be certain disadvantages such as the court's geographical jurisdiction being different from the local government jurisdiction. Nevertheless we consider that the advantages strongly outweigh any disadvantages.

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

Yes. We can see no compelling reason to change the existing arrangements.

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

We consider that certain areas involving judicial reviews in respect of Local Authority decisions could be better served by a reference to the local Sheriff Court rather than recourse to the Court of Session. This would avoid unnecessary expense and inconvenience to court users. It also allows for a level of local democracy to be tested by the Sheriff court for that area. In our opinion this allows greater access to justice especially given the impact decisions made by a Local Authority can have on the population for that area. We believe the requirement that such decisions can only be tested in the supreme courts is outdated and does not reflect well on our system of justice.

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?

In general terms we consider the current arrangements work efficiently and appropriately. We envisage certain areas of business that would be dealt with by the sheriff clerk such as non contentious procedural matters. We consider such matters can be dealt with by sheriff clerks employing technology now available such as e-mail communication with parties.

17. Is there a case for a national 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?

No, there is not a case for a national sheriff court. Please see answer to Question 13 of this chapter.

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

No.

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?

Please see answers to Questions 6, 8 and 10 of this chapter above. There should be a power of transfer from the Court of Session to the sheriff court in family actions.

20. Are the existing appeal arrangements satisfactory?

Yes.

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. The office is, and should continue to be, both judicial and administrative.

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

The majority of statutory appeals could be heard in the Sheriff Court. Appeals of decisions involving local issues should certainly be heard in the local Sheriff Court.

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?

The existing appeal arrangements are satisfactory – see answer to Question 20 above.

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

There are administrative advantages. Temporary judges and part-time sheriffs help to fill any gaps in the availability of permanent judges or sheriffs. They can assist in the expeditious progress of cases. A disadvantage exists in that there may be some difficulty in scheduling cases for particular temporary judges or part-time sheriffs, once they have become involved in hearing a particular case.

CHAPTER 5

PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

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 consider that the rules of civil procedure should have an overriding objective or statement of philosophy. We believe the main elements of that objective or statement should be swift, economic and fair access to justice.

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?

We are of the view, as indicated earlier, that the court ought to encourage and facilitate the use of mediation and other methods of dispute resolution. However, it would not be appropriate in our view to compel parties to attempt to resolve their dispute by alternative means before enabling them to proceed before the courts. We are strongly of the view that litigation ought to be one of a number of options and not simply a last resort.

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

We would favour an amendment to the Rules of Court to encourage a pro-active consideration of mediation at an early stage in all court actions and that it should be mandatory to raise the issue of mediation at the Child Welfare Hearing stages in Family Actions and at Option Hearing stages in all actions. We are of the view that information ought to be given to parties both before the raising of proceedings and throughout the progress of any court action in which they are involved. We are aware that Falkirk Sheriff Court previously had a scheme whereby there was a duty mediator available on the days on which they had their Proof Court. We consider that such a scheme would have merit as it would allow parties to be given detailed and accurate information about the mediation process and meeting with a duty mediator could be used as an intake session to the mediation of the parties determined to proceed in that fashion. This could be offered to parties at Child Welfare Hearings, Options Hearings and also at Proof stage. There is obviously no guarantee that mediation will have a successful outcome but certainly could assist in narrowing the areas in dispute between the parties and therefore restrict the issues which require to be resolved before the court and therefore the length of time to bring matters to a conclusion.

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.

We do not consider that all actions are suitable for resolution by mediation or other methods of dispute resolution for example divorce, interdict and other protective orders, adoption, child abduction, applications to the Court to allow a child to relocate abroad, public law matters, bankruptcy. It is for these reasons that we do not consider that it would be appropriate to compel mediation but rather to compel the consideration of it in all appropriate cases.

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

In our jurisdiction, there is little recourse to the use of alternative methods of dispute resolution. Presently, there are no practising collaborative lawyers, no arbitrations and a limited uptake of mediation with referrals to CALM Members and Family Mediation South Lanarkshire.

The role of a mediator is to facilitate constructive communications between the parties involved in a dispute in the hope that they are enabled to reach a solution to their dispute. The mediator is not empowered to impose a solution upon them. As we understand it, collaborative family lawyers attempted to resolve disputes by maintaining an advisory role for their clients but focusing on negotiated settlements to the exclusion of litigation. Arbitration is simply expedited procedure for the determination of a dispute by the imposition of a solution by a third party with a specialist knowledge of that particular area of the law. We consider that there should be public funding for the provision of information on all options for dispute resolution to parties and proper and reasonable remuneration via Legal Aid Funding for those providing these alternative methods of dispute resolution.

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

We are of the view that the use of e-mail for the lodging of documents with the court and for receiving information from the court would expedite procedure, we would also favour the use of video and telephone conferencing in case management which would improve access to justice as it can be inhibitive to parties to pursue or defend actions if they require to travel long distances to courts out with their jurisdiction in which they reside.

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

We would be in favour of a far more pro-active case management of the conduct and pace of the litigation by the court. This could be done by imposition of timetables specific to a particular case, requirement to identify one expert to provide joint reports in relation to disputed technical areas, attempt to obtain early agreement of non controversial evidence and a focusing of issues.

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

In our view most cases would benefit from judicial case management rather than case-flow management. We would continue to advocate judicial case management but with the rider that there ought to be proper remuneration for solicitors involved in such cases.

CHAPTER 6

WORKING METHODS OF THE CIVIL COURTS

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

There is little experience within this working group of the pre-action protocol as the branches of law to which it applies become more and more specialised. The advantages of a pre-action protocol are that it focuses issues and brings parties to a clearer understanding of the case itself before it proceeds before the courts; if expert views can be agreed then court time is saved; all parties to the action follow the same route towards resolution of the case. The disadvantage of pre-action protocols appears to be the costs. Anecdotal evidence suggests that the costs may be extensive and this may limit access to justice to those who do not have the resources of the large insurers on which to rely. It may be the case that pre-action protocols bring a standardisation to cases which do not necessarily reflect the points of law which distinguish these cases one from another.

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

Again, from limited experience and anecdotal evidence only, the pre-action protocols bring a clarity and certainty to the progress of an action which would encourage greater use. We would suggest that in both Sheriff and Court of Sessions personal injury actions would benefit from a pre-action protocol as would commercial disputes. Pre-action protocols in family actions might include reference to mediators or solicitors specialising in family law as the early involvement by way of a pre-action protocol may allow parties the opportunity to resolve disputes before they reach the courts.

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

If pre-action protocols are to be in use then they should be compulsory. There should not be a possibility of opting out of a pre-action protocol. There would have to be uniformity and certainty in any pre-action protocol. Voluntary compliance would not be workable or helpful.

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 general view is that there should be a greater requirement for leave to bring or to take steps in proceedings simply because so many actions from the beginning may appear to have little merit and the sooner that preliminary point is raised and dealt with the better for the progress of the action. There should be a requirement for leave in any action to include party litigants both for their protection given the costs of pursuing matters thought the court and for their assistance. There is already sufficient requirement for the court to become involved in steps to be taken in actions for instance the amendment procedure which requires the authority of the court before a case is drastically amended. There should be no change in that regard. It is difficult to decide what criteria the court should apply in deciding whether leave should be granted as leaving matters to the unfettered discretion of the judiciary may lead to party litigants for instance failing to understand the legal basis on which such decisions might be made. It may be that there should be a compulsory referral of certain actions to experts in that field and only if a colourable case is confirmed should the action be allowed to proceed. For instance, family actions refer to mediation; commercial actions refer to arbitration; medical negligence actions refer to medical experts, buildings disputes refer to a single surveyor. Expert involvement in disputed facts prior to the courts in questions of law would be of benefit in many cases.

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

In the general view, the current arrangements for implementation of the rules appears to be arbitrary with a lack of involvement with the court users who require to implement the rules. There appears to be little involvement in the day to day procedures and it should be noted that there are differing procedures within Sheriff Courts and different interpretations of the rules which are made possible by the inability of the rules to address all situations and cover all eventualities. For instance, in Hamilton there is a procedure roll but no diet roll. In Airdrie Sheriff Court a sist can be for a certain length of time. In Hamilton Sheriff Court, there is an informal rule with some Sheriffs that only one continuation for settlement will be allowed before the action is arbitrarily sisted. The rules as they are currently written therefore allow a liberal interpretation by various courts which means that practitioners require to be aware of the rules as they are interpreted by the various Sheriff Courts. There requires to be a consistent approach to civil procedure which is not always apparent in the current legislation. It would be helpful if there was a more consistent approach to civil procedure generally.

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

Yes. We consider having entirely distinct rules and procedures are an impediment to justice. There would appear no clear reason to have separate rules for both the

Court of Session and the Sheriff Court. We believe the majority of solicitors outwith the Edinburgh jurisdiction have little or no knowledge as to the Court of Session rules. This makes it difficult to initially advise clients as regards procedures and timescales when considering actions in the supreme courts. The most obvious recourse is to instruct an Edinburgh agent at substantial cost to the client. At this juncture we would also indicate we are in favour of abolishing any convention that one must instruct an Edinburgh agent in a Court of Session action. It is difficult to justify or explain the requirement for 2 sets of solicitors in a case that will also involve the employment of an advocate. By simplifying the rules to one clear coherent set of rules court users would immediately have greater access to the civil courts and in particular the supreme courts.

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?

We believe there are powerful arguments for a single initiating document for all types of action apart from any action taken at the additional third tier envisaged by us at Answer 6 to Chapter 2. It is considered that actions over £5,000.00 and any non monitory actions should have a form of initiating document. It is envisaged the format would be in the manner of a claim form indicating what orders were being sought. Thereafter there would be a part allowing the claimant to indicate the reasons for seeking the order and the legal basis for those reasons. This would be a document not unlike the forms used in Tribunals such as the ET1 form in Employment Tribunals. We would align our comments with those we make in the following paragraph.

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

We believe there should be a system of abbreviated pleadings. In particular we believe there should only be an initiating document and a response. If any further amendment to either document is to take place then that should be done between the time of the lodging of the response form and the date of a hearing.

We consider any initiating form should be called a “Claim Form” where the appropriate claim or remedy sought may be inserted in the relevant box. There would also be a box for any urgent orders sought. These would be called “urgent” orders as opposed to “interim” orders. The use of the word urgent has a clearer meaning to lay court users than the word interim.

A response form would be sent out with any claim form and we envisage a 6 week period to respond. If a response is made the matter would proceed to a preliminary hearing to assess the case and any evidential requirements. A Sheriff or Judge would preside over this. It may be noted that there are strong similarities to the

system already in place. That is the case. Nevertheless we consider this system more streamlined, easier to understand for clients and litigants and more expeditious. The adjustment period has been taken out and the format of the documentation is friendlier for clients to understand.

In our experience it is unusual for a case to be so complex that the main line a party wishes to take cannot be put forward at the outset in the initiating claim or response. There would still be a requirement for amendment procedure to allow for more complex actions.

9. Are the current arrangements for summary disposal satisfactory?

Generally we would say they are. We believe it would be advantageous to give a defender the same right as a pursuer to seek summary decree if it can be argued that *ex facie* the Pursuer's case is fatally flawed. Any such rule would have to be taken into account if the rules were to be changed in relation to the changes we have proposed above.

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?

We consider non contentious procedural matters may be dealt with by sheriff clerks using e-mail communication with court users. We do not consider the judiciary should be divided into junior or senior levels. We are of the opinion this may cause an unhelpful hierarchical structure in the eyes of court users which has the capacity to undermine their confidence in the system of justice.

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

We would favour greater use of sheriff clerks to process non contentious matters.

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?

If cases were managed more pro actively from the outset with emphasis on early disclosure, joint expert reports, joint minutes of admission, affidavits, then the court ought to be better placed to be able to identify with more accuracy the time to be allocated to a case.

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

We would favour a greater use of written submissions as we consider that these would reduce court time required for substantive hearings. However, we do not consider that they should be a substitute for oral argument as arguments to be advanced before the court may require to be tested and clarified by the Sheriff.

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

As outlined above, we favour early disclosure of evidence. We are of the view that where possible, parties raising an action ought to demonstrate at the warranting stage of the action that they have obtained all possible information available to them at that point by lodging this along with their initiating document. This has to be balanced by the level of judicial expenses which they can recover in the event that the action is not defended. This would not be appropriate in all cases such as interdict actions where emergency orders are sought.

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

We are of the view that if expert evidence has not been obtained at the time of the first calling of the case, and it appears that expert evidence shall be required for the court to make its decision, the default position should be that the matter is remitted to one expert. If however, the court is satisfied that there are reasons that this is not appropriate (on cause shown), parties should be permitted to obtain their own independent expert opinion. There may be a need for the court to be involved in determining which expert to remit to where only one expert is to be appointed.

16. Should a system of Pursuers offers be introduced into the Civil Courts procedure? If so, what features should such a system have?

Yes, but such a system should not be compulsory and should only apply to the types of action which lend themselves to meaningful settlement negotiations.

We believe that if a system of Pursuers offers were introduced on a mandatory basis then this could possibly lead to a situation where Pursuers are forced into making offers to settle which, in other circumstances, they would not make of their volition. This could lead to a situation where Pursuers conduct and conclude actions in circumstances where they feel they are being denied full and unfettered access to the Judicial system or without their case being fully aired and disposed of.

We also feel that if a system of a Pursuers offers is introduced then such a system should be simultaneously introduced with a Defenders offers system . We think that it would be important that parties see the Civil Justice System as being evenhanded is not seen to favour the Pursuer over the Defender or vice versa.

We feel we though that there are certain types of action where no system of Pursuer and or Defender offers should be introduced because it would seem to be inappropriate. For instance, actions of Declarator of Paternity or Parental Rights and Responsibilities etc.

17. Should Civil Jury Trials be retained?

No. It is an expensive outdated procedure.

18. Should written judgements be required in all cases?

No.

We feel that there are many types of action where written judgements are unnecessary and would involve unjustified and unnecessary use of Shrieval time and Court support services times and resources. These are cases such as low value "third tier" cases, Summary Cause Actions and all Small Claims Actions.

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?

We believe that rather than considering whether the Courts should have greater powers to impose sanctions in these situations, attention should be given to the question of why the Courts do not exercise the powers and sanctions which they already have under the current procedures and in such circumstances.

In our collective experience, even in contentious matters such as Family Actions where Court orders, for example, for Contact, have not been complied with, the Courts are slow to impose any meaningful or real sanction on the defaulting party.

In our view the current powers and sanctions available to the Courts in such situations are under utilised by the Courts and a decision as regards giving the Courts greater powers to impose sanctions in such circumstances should be taken after a period of time where the Courts properly and consistently utilise the current powers available to them and a decision is taken thereon as regards whether the current powers are satisfactory.

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

Please see answer to Question 6 of Chapter 2 above.

In lower value cases, we would envisage the additional "third tier" within the Civil Court Justice System advocated herein as being capable of performing a "sifting" type of procedure to identify and manage unmeritorious causes or appeals brought by party litigants. For cases of higher value, these should be identified by the court at an early stage – please see answer to Question 4 of Chapter 6 above.

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

The model used in England and Wales could be adopted to make a list of persistently vexatious litigants available to the public for viewing. With the introduction of a "third tier" to the system as outlined in Chapter 2 above, there could be a significant reduction on the use of resources in the Sheriff Court and Court of Session.

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?

No. The party litigant has opted to proceed without legal representation.

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

The society has no particular comment to make to this Question.

24. Is the rule governing the procedures to be followed for judicial review satisfactory?

No. See answer to Question 15 of Chapter 4 above.