



Response to A Consultation Paper, Scottish Civil Courts Review

The School of Law, University of Aberdeen welcomes the opportunity to respond to the Consultation Paper. In compiling this response, the principal sources of input have been colleagues who have research interests in civil justice, but who also have practical experience between them of (a) representing clients in litigation (in Scotland, England and the USA), (b) acting as lay adviser before the small claims courts, (c) mediation and (d) drafting procedural treaties and rules.

Where possible we address the questions as asked in the document but at times we identify overlap by reference to previous answers. We summarise here the themes that run through the detailed response.

1. Scotland wide jurisdiction for sheriff courts with no limits on jurisdiction.
2. All cases enrolled through central gatekeeper.
3. Specialist judiciary
4. Remove sheriffdoms and Sheriff Principal role
5. Allocate cases according to local or specialist factors
6. Remove first instance jurisdiction of Court of Session, but cases as identified by a central gatekeeper might be put to judiciary with particular experience or expertise currently available in Court of Session
7. Two appeal levels only (Court of Session and House of Lords). Court of Session appeals available outside Edinburgh.
8. Simple, standardised documents and procedures in plain English
9. Front ended case management and setting of timetables, with periodic court monitoring involving party attendance
10. Encourage and facilitate speedy and proportionate dispute resolution and determination
11. Increase reliance on technology to generate and manage processes, allow communication by tele- or video-conference
12. Increase role for clerks and introductory level judiciary
13. Enhance training and accreditation for court staff and judiciary
14. Parties pay for each stage in the proceedings, and that state funding will exist for those who need it.

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?

We consider that the civil justice system should take a lead in encouraging early resolution of disputes. The starting point for us is that the court as the ultimate arbiter in disputes that cannot be resolved by other means, has a responsibility to couple accessibility for cases that really need adjudication

with a culture that empowers disputants to seek and obtain advice and processes that fit the dispute. We are aware that the legal profession in Scotland, more so than in many countries, has traditionally worked with clients and their opponents towards settlement by advice and negotiation rather than by pre-emptive litigation. We are aware of the very important role that the Citizens Advice Bureaux (where operating) play in providing advice and support for settlement. However, we are also aware that disputants in Scotland are likely to avoid taking some justiciable disputes for advice or litigation at all (*Paths to Justice Scotland*). We are concerned that if they do wish to litigate, solicitors willing to take on the work under legal aid are increasingly rare .

We believe that the civil justice system should give disputants a sense that the court is the right place to go for acknowledgement of the dispute (rather than a place to be used only as a threat or last resort) but that the court will encourage settlement processes by e.g. checking at each stage before further court fees are incurred, that parties have considered negotiation, mediation or other options. To this end we favour a very low fee or even no fee for enrolling the claim or action, but fees thereafter being proportionate to the input required from the court, and at each stage the party (rather than the party's agent) being asked to confirm willingness to move on to that stage of litigation. The overall aim would be to encourage parties to claim sensibly, and to retain control over the court fee element of the cost of the proceedings.

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 as to the principles and assumptions. We agree that the system must be designed for those who require to resort to it rather than those who work within it. However, we note in our later comments that it is important that those with expertise who are needed to work within a revised system are willing to do so.

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

Any issues we wish to raise are dealt with in other answers.

CHAPTER 2- ACCESS TO JUSTICE

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

We think that public legal education might have some impact but that it cannot be used as an alternative to offering expert advice and assistance. It could, for instance, be utilized to alert people to the fact that they have rights and responsibilities and, in broad terms, how to assert these using remedies within a civil justice system, while promoting skills that will enable disputes to be settled by the parties. In principle it seems to be a good thing and school could be the place where this is first offered.

However we do not equate the general good of public legal education with a noticeably increased capacity to conduct litigation in person. To do so would be to make generalized assumptions about the capacity of people who have had such education. It also risks misleading disputants as to the complexity of a process which may be needed to determine their particular dispute. Indeed increased awareness of rights, responsibilities and remedies through education may highlight to more disputants that meaningful access to civil justice is not there for them. The access to justice issues require that there is ongoing support and education beyond school level in context, supported by appropriate advice services (from lawyer and non-lawyer sources), at the appropriate level of input for the dispute, in an appropriate and accessible location, and at affordable cost. University law clinics could play a greater part, within a revised law degree or DLP curriculum. However greater resourcing of a nationwide support service is necessary in order to allow individuals to build upon that public legal education to seek advice when a dispute arises.

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?

The review will be aware of outcomes of law society and Family Law Association surveys of provision of legally aided advice in civil cases. The north east of Scotland is not alone in experiencing significant decline in firms willing to undertake civil work on legal aid or legal advice and assistance. We are told that this is due as much to the bureaucracy of obtaining and sustaining cover as to the unsustainable fee levels. Although there is an active CAB including an in-court adviser scheme for small claims and summary cause actions and some local advice or support services funded by the local authority or Scottish Government, there is no Law Centre in the North East of Scotland. Specialist advice on e.g. immigration or pensions is not available north of the central belt. These gaps or shortages in specialism in regional and rural areas can apply to client funded work as well as to legally aided work.

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 desirable that a party be given the opportunity to litigate without representation if that party is sufficiently familiar with the issues in a case, and able to articulate them so as to place them within the limits of the court's powers. However there is a danger that the rhetoric of party engagement can mask the dangers of self-representation. The party may misunderstand the limits of the court's powers and/or take up an unreasonable amount of court time at various stages of the case to the prejudice both of the court and opponents, thereby hindering speedy and efficient administration of justice for the wider public. But perhaps the greatest problem is that even if rules of procedure were to become simpler, the substantive law would not. An increase in self-representation is likely to lead to the number of cases being pled on a weak or mistaken basis, wasting time and causing expense for the unrepresented litigant, their opponents and the justice system as a whole.

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?

We are aware of successes in use of in-court advice services in parts of Scotland. However these are not widely available and much is dependent upon the knowledge and skills of the individual (lay) adviser and the understanding of that adviser’s role with court staff and sheriffs. Self-help services in the form of guidance packages including letters, forms, DVD depicting what to expect in court, could be of at least some assistance in straightforward or low-value claims. Universities might work with advice agencies on the design and delivery of such material.

However we repeat our earlier concern that facilitating self-representation should not be equated with access to justice. Parties who choose to self-represent may require to be steered towards appropriate sources of representation by the court, and for it to be understood that this is being done in the interests of ensuring that the issues appropriate for litigation are focused upon in order to be determined. It is not in the interests of justice for a party litigant to be placed in the position that a claim or defence is lost purely because of the lack of representation.

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

We think that the review should consider most seriously the reasons behind the lack of solicitors willing to carry out work within civil justice on legal aid and what must be done to ensure that solicitors will engage with a revised system. Even if a disputant has had access to support from an advice centre and a specialist lay adviser but the matter remains in need of solicitor input, the entire civil justice system will be seen to fail that disputant if a solicitor cannot be found to take the matter further.

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 favour a process which allows all claims to be made through simpler procedures and in plain English. Claims which are both low value and simple in the facts and law could be allocated to the lowest level of process. They might be handled at an interlocutory stage by clerks of court trained to a greater level of knowledge and expertise, with decisions on points of law or on the merits taken by lawyers appointed by the court and meeting a lower threshold of experience than sheriffs. The gateway to this process should apply centrally (but subject to review) and taking into account criteria that are clearly defined, and widely publicised. Parties could (jointly) opt to take higher value claims into this process if the issues are straightforward.

These cases should be handled within a structure that is clearly part of the civil justice system, with the powers and authority of a court. However we are acutely aware that most court buildings are not suited for their current juxtaposition of civil and criminal business, where common (single) entrances are used, and there is a chronic lack of space for meetings and for decision

making in a suitable flexible, private space. There may be scope for civil courts sharing suitable premises with other agencies providing advice, support or mediation, as long as the judicial function of the court remains clear.

CHAPTER 3 – COST OF FUNDING LITIGATION

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

Other respondents will be more able to respond to this than we are.

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

The perceived cost of litigation alongside low thresholds for eligibility for legal aid do deter people from litigating. The system is perceived to be unfair. Lawyers cannot give estimates of actual cost of litigation other than to quote an hourly rate, or a global fixed fee (including a speculative fee). The uncertainty of costs (determined as much by the conduct of the opponent and the attitude of the court as the actions of the party himself or herself) is a major disincentive to litigation. We know of few lawyers who would willingly embark on litigation in their own cause because of the uncertainty of cost. A clearer, fairer system is desirable, but it should be noted that any system which improves access to justice also has the potential to put strain on the justice system, certainly beyond its current capacity of people and premises.

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

Apart from the very lowest value case, where the booking fee may seem disproportionate to the sum claimed, we do not consider that the court fees affect access to justice. At present they are low in comparison to legal fees that may be incurred for the relative stages of proceedings, although we are aware that increases are under consultation at present. In our view court fees are important in showing parties that litigation is a serious process, and that recourse to progressive stages of it is to be embarked upon only if those stages are necessary. As mentioned in responses to chapter 1 we favour a nominal or nil booking fee, but higher fees for later stages of the case and repeat usage of particular procedures.

4. Are the current rules for recovery of judicial expenses satisfactory?

We do not think that the recoverable judicial expenses are sufficiently connected with the actual cost of litigation to the parties in amount, or in party understanding of what is and is not recoverable. If, as is suggested later, litigation procedures and court fee levels are designed to encourage early focusing of the issues and timely determination, recoverable expenses and actual expenses could become more closely aligned. A lack of alignment

would then be more clearly connected to choices made by parties during the litigation to depart from focused, speedy procedures.

5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

We doubt if the current arrangements are well understood by anyone other than some lawyers, the judiciary and auditors of court.

6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

Access to justice is severely affected by issues of availability of legal advice and legal aid. Many individuals and families are unable to afford the uncertain costs of civil litigation, and although on modest or tightly balanced incomes do not fall within financial levels of eligibility. Even those who do fall within those levels may find that there are no firms of solicitors offering legal aid or legal advice and assistance in the part of Scotland in which it is needed or in the subject matter of the dispute. The system of clawback from recovered awards is poorly understood (and perhaps poorly explained in some cases). Moderation of liability for opponent's expenses to those in receipt of legal aid may encourage inappropriate opposition from some parties without the actual sanction of liability for expenses.

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

Our own impression is that there is a problem for individuals in all areas. Family action clients may feel particularly aggrieved when orders for interdict or orders affecting status cannot be achieved by any means other than litigation.

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

We do not offer a view on the affect in Scotland. We note that in England & Wales where legal aid is not available for personal injury actions, speculative fees appear to have filled a gap, and the power of the court there to order expenses more closely connected to actual costs to some extent spreads the risk between parties.

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?

It may be that legal expenses insurance is a way forward although its impact in Scotland has been patchy to date. It has been used more widely in England and USA. Again it is a matter of balancing risk, but placing that balance in the hands of insurers, and subject to exclusions and conditions. To achieve this balance insurers expect realistic assessments from the party's lawyer as to the value of the claim prospects of success. In order to give realistic assessments lawyers must assume consistency of decision-making. However it might help to focus parties on realistic assessment of risk in continuing to pursue a claim or defence.

10. What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?
If it would add to the alignment of recoverable expenses with actual cost it would be desirable.

CHAPTER 4 – STRUCTURE AND JURISDICTION OF THE COURTS

1. Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?
We agree that civil litigants find it uncomfortable to be placed alongside criminal accused in court premises. We note that judges, clerks and court premises are put under strain by the volume of criminal business.
2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?
Yes, we think that some judges should deal with civil business only (perhaps rotating within specialisms of civil work)
3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?
We think that there would be advantages, in terms of allocation of time and judicial specialism.
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?
Yes. The obvious example is family actions (in all civil courts), where remedies, knowledge of other methods of resolution and judicial skill sets employed in dealing with the case are significantly different from many other types of civil action. However it is important that no area of specialism is considered of greater or lesser “value” than others. A factor in specialisation is the capacity to deal with the case from beginning to end (as occurs at present in adoption applications in most sheriff courts and in commercial actions). Specialisation in relatively rarely-encountered but complex areas of law (e.g. Intellectual Property, Child Abduction) is appropriate for a Scotland-wide jurisdiction rather than within a regional court.
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?
Exercising control over locus of litigation and in turn dictating defender accessibility in choice of court, location and engagement with counsel. Ensuring involvement of counsel and senior judiciary.
6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?
See the following answers.
7. Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

Unification is an attractive proposition. There would, however, be significant issues to be addressed such as territorial jurisdiction, exclusive jurisdiction, consistency of decision making across unified system, access to “senior” judiciary at first instance, need for redeployment of Outer House judiciary, and formation of a hierarchy within a unified system in the image of the existing previous system (maybe with extra layers rather than fewer). We wonder if there would be an impact on status of judges and therefore on recruitment of appropriate members to the bench of the reformulated court.

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?

Within a unified system cases of high value or complexity could be directed to the members of the first instance judiciary with most appropriate experience and expertise as could cases where external factors create the expectation of decision making by a small and expert judiciary (e.g. child abduction). We favour central gatekeeping decisions for such cases on the merits rather than on fixed financial limits such as applicable for High Court proceedings in England, but with a clear statement of criteria to be applied by the gatekeeper.

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

We do not favour the retention of the present structure, but if it is to be retained, we favour a situation where cause must be shown for any action being taken to the Court of Session at first instance, so the privative jurisdiction of the sheriff court (assuming a Scotland wide jurisdiction) would apply in all cases at first instance.

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

There is a sense that the court first seized of the action may be unwilling to give it up. Perhaps decisions should be taken at national gatekeeper level to promote consistency and avoid proprietorial decisions.

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?

See chapter 2 responses..

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

See chapter 2 responses.

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

The perceived regional advantages (local knowledge, regional management cultures, some good practice initiated by Sheriffs Principal) are counterbalanced by inconsistency between regions and artificial regional boundaries. We think that on balance its advantages do not exceed disadvantages, and favour a national system with a clear aim of consistent experience for litigants wherever in Scotland they may need to litigate.

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

We believe that they are, with the possible exception of divorce actions on which you will have received other detailed responses.

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

We do not have an impression of problems in this area. We are aware that many issues of public or administrative law fall within the remit of administrative tribunals. Statutory appeals against administrative decisions occur quite frequently in the sheriff court under summary application procedure and seem to operate quickly and efficiently.

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?

We favour clear acknowledgement of “signing” functions within a civil justice system and attention could be paid to identifying functions that could be carried out by a well-trained and experienced clerk rather than a judge.

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?

Yes – as our previous answers will have indicated. Appeal should be to the Inner House on points of law, and with scope for appeal to a single Inner House judge on interlocutory matters.

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

Yes we favour this strongly. That is not to say that sheriffs would not be located routinely within a particular part of Scotland. However all-Scotland jurisdiction would allow for most effective and flexible use of the experience and expertise of sheriffs and allow the specialism of certain sheriffs to be brought to the correct cases by the sheriff traveling to the parties or more often engaging with the parties and their agents by tele-conferencing or video-conferencing.

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?

In theory yes, but see answer to question 10 in this Chapter. Clear criteria are needed for transfer decisions by a central gatekeeper.

20. Are the existing appeal arrangements satisfactory?

No. Appeals to the Court of Session are very costly and can take an inappropriate period of time. Appeals to the Sheriff Principal are speedy and deal reasonably well with interlocutory matters, but final judgement appeals to the Sheriff Principal are of little value when the outcome is not authoritative and can be appealed again to the Inner House. It is more logical that final

judgement appeals go directly to the Court of Session, but we suggest that the appeals should be held outside Edinburgh not least so that the civil appeal court is seen to engage with the whole country. Greater use could be made of video-conferencing, but not to put remote areas of Scotland off limits for the court sitting there.

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?

We do not see a role for the office of sheriff principal within the new model of civil justice. It is a relic of history, and although in recent times the administrative function has expanded, and additional appellate roles added from certain tribunals, the functions could readily be embedded within a national system.

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

It is not our understanding that the majority do operate in the Court of Session. A significant part of this activity happens in the sheriff court, appeals against licensing decisions being particularly prevalent. We favour the inclusion of such appeals within sheriff court jurisdiction unless cause is shown (see answers 8 and 9 in this section).

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?

Two levels of appeal (including House of Lords) on any given question is sufficient. References to the ECJ would not be included within that limit.

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

There are advantages in members of the judiciary being alert to the demands of current practice and client concerns. The disadvantages include inconsistency of decision-making, and practical difficulties in keeping a sheriff or judge involved throughout the case. The involvement of part-time judiciary expands the multiplicity of decision-makers through the life of any case. We do think that there is a role for part-time judiciary at various levels (see our answers in Chapter 2) but that it is essential that they are carefully selected, trained and accredited for specialism rather than mere generalism, are subject to careful appraisal and have scope for advancement based on experience and expertise.

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?

Yes they should. It is difficult to state objectives without sounding trite, but we consider that the procedures must embrace fairness, openness, simplicity of expression, efficiency of proceedings, and proportionality.

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 court should encourage and facilitate mediation but on balance we feel that the court should rarely, if ever, require mediation or other dispute resolution external to the court. We acknowledge the difficulties that a court may find in requiring a party to submit to the skills of a person or agency not in itself responsible to the court (although there is considerable use of such referrals in criminal cases). Thought might be given to the court itself offering a mediation or dispute resolution service through trained court staff and, possibly, specialist judiciary (although a judge involved in providing mediation could not then act in a determining role within the same case).

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

The rules of procedure should require the parties to certify at all key stages in the case what they have done as at that stage in terms of negotiation, mediation or dispute resolution. That information would be relevant to the court's decision on other matters, particularly in case management and assessments of proportionality.

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.

Bearing in mind that we do not propose mandatory referral to mediation, we note that cases in which there is a history of abusive relationships between the parties (whether physical, financial or emotional) may not be appropriate for mediation (although mediators are trained to work with power imbalance). Courts should note this in considering whether to encourage or facilitate mediation, and take account of its non-use when making other decisions. Clearly actions requiring determination on issues of status, remedies in rem, and cases requiring a re-examination of the law are not suitable for mediation on those particular issues, but remain suitable for mediation on other issues in the case so that the court's time in determination can be focused on the issues that only the court can handle.

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

Systems for delivery should be flexible, encourage party choice rather than court-dictated referral to a particular service, but aim to promote and display the court's confidence in the process (as compared to a particular provider). The parties should pay for the service. In-court services might be provided with these aims in mind. If training and redeployment of court staff for in-court services is put in place that would be a potential lateral step in process for an appropriate court fee.

6. In what respects can modern communications and information technology be harnessed to improve access to the civil courts?
Technology can be used to a very significant degree to streamline and improve access to the civil courts. We favour a greatly enhanced role for email, electronic files and processes, tele-conferencing and video-conferencing.
7. To what extent should the court control the conduct and pace of litigation?
We favour court intervention early in the case to set a realistic timetable for the litigation to which all parties will be expected to adhere. The court should exercise oversight of the case at certain key stages (which are clearly set down in rules of procedure) and at those stages the parties as well as agents should be present. Use of technology to achieve this “presence” should minimise inconvenience. We consider it essential that the parties are engaged in these key monitoring stages of the case so that they retain ownership of the proceedings but subject to the court’s oversight, and can participate in setting realistic goals for the conduct of the case to conclusion.
8. What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?
All cases would benefit from a combined process of (a) and (b).

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

1. What are the advantages and disadvantages of pre-action protocols?
PAPs encourage early exchange of information before court involvement and in turn allow the early stages of case management by the court to be better informed and more realistic. They should not be applied in a didactic manner, but can help to keep agents focused on moving the case forward.
2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?
Yes, in all courts and actions.
3. Should compliance with pre-action protocols be voluntary or compulsory?
We do not think that they should be compulsory but expected, in that failure to engage with them would be a factor able to influence other decisions of the court in the case: for instance, the award of expenses; enhanced amounts of time given to opponents preparing a response to “ambush” litigation, etc.
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?
We do not agree that leave should be required in order to bring proceedings in court except in the unusual situation of a vexatious litigant. We do agree that certain activities in a case should be subject to leave, applying principles such as stated in our answer 1 to Chapter 5, particularly in order to ensure proportionality of the activity.

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

The fragmentation of rules councils is not satisfactory and in general their membership is too heavily dominated by those who are so familiar with the court system as it already operates that radical thinking is made more difficult. We favour a new single body for recommending the content of all civil procedure rules operating in Scotland. That body should in the main be representative of those who resort to civil justice for remedies but balanced with expertise of those already within the justice system as lawyers, judges and administrators.

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

Yes, albeit low-value cases should be dealt with under expedited proceedings and within the set of rules governing actions in general special provisions are likely to continue to be required for certain types of proceedings e.g. Family proceedings.

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?

There should be a single initiating document for each level, and as far as possible the format should be the same across levels. The document should be expressed in plain English. It should be available electronically and all professional users of the document would be expected to work with it electronically.

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

It seems absurd that an otherwise good case may be lost by the failure to make a blanket denial in pleadings or some other “technical” pleading error. That being said having full pleadings provides a “road map” for the parties and court, and parties are entitled to know the claims/defences of the other litigants. Nor do abbreviated pleadings systems necessarily lead to simpler litigation. Systems which operate with more expedited systems of pleading commonly require supplemental information to be provided by alternative means – e.g., written witness statements. That said, one weakness of the present system of written pleadings is that although the opponent should give full particulars of what his or her case is to be, it is not easy to assess the strength of the opponent’s case well in advance of proof. The opponent offers to prove a particular assertion, but it is not easy to know how much evidence the opponent has at hand, or the quality of it. A system of abbreviated pleadings plus witness statements permits easier assessment of the respective strengths of a case.

9. Are the current arrangements for summary disposal satisfactory?

There should be equality of opportunity to have actions summarily disposed of by both sides. Assuming that the reforms improve access to the courts and therefore increase the number of actions being brought, it would be unfair to defenders to have to spend time and money litigating incompetent claims. Disposal based on certain matters of competence e.g. prescribed actions,

incorrect parties named, no right of action, should be able to be summarily dealt with at the motion of either party early on, although depending on the extent of the gate-keeping function on initiating of pleadings these issues might also be dealt with on the court's own motion (if the court is involved in case management these issues may also be discovered after initial stages but still fairly early in the litigation). Summary judgement should be available to both sides later in the proceedings – after adequate time for obtaining of evidence has passed.

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?

Taking 10 and 11 together –there could be a lower level of judges dealing with the procedural aspects of the case (and the parties, if all consent, can have that judge try the case). One drawback to this would be an additional layer of judges which, given all the other potential reforms might be overcomplicating matters. Another drawback is that allocating duties in this way would make it impossible for one judge to see a matter through “from cradle to grave.” Sheriff Clerks could deal with procedural matters subject to being adequately trained to do so, perhaps with common practice guidelines and appeal to the judge in charge of the case. We are unsure from a practical perspective of how much of a difficulty arises from current arrangements, and whether it would warrant another level of judicial intervention as to procedural matters.

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

See 10.

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?

Length of hearings should be a matter of discretion by the judge – seems undesirable to place arbitrary time limits on hearings as what is required will vary from case to case. It may be possible for the judge hearing the matter to place time limits in advance of hearing if she is fully aware of the issues involved – this would be aided by the same judge being responsible for the entire case. Greater use of written arguments would assist in saving time, but may increase the expense of litigation. Encouragement by the court to have the parties stipulate to the veracity of certain evidence etc. before hearing may also assist in saving time.

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

See 12. In addition to saving courtroom time, greater use of written arguments may allow the parties and the court to better understand the issues in advance of the hearing and for the parties (lawyers and clients) to see the strengths and weaknesses of their case which may in turn aid successful mediation.

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

Early disclosure of evidence should be encouraged, with the early exchange of certain basic evidence (identity of persons with knowledge of relevant facts, relevant documents or at least descriptions thereof, computation of damages being claimed) being mandatory unless all parties agree they do not wish to do so [following US federal rules of civil procedure]. Case management orders should impose deadlines for disclosure of evidence including expert evidence. A conference with the judge shortly after early exchange of basic information would be desirable to establish how long the parties need to obtain information. As to “width” of disclosure, it would be undesirable to allow parties to use the seeking of evidence to harass or bully their opponents or to go on time wasting “fishing expeditions” – what may competently be requested will have to be a matter for the judge to decide applying the principle of proportionality [another function for the Sheriff clerk or procedural judge?]

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

Theoretically parties should be allowed as many experts as they want – subject to the court’s ability to exclude cumulative or repetitive evidence. It may be though, that this question really comes down to money – who is paying for the experts? Based on the section of the consultation paper on this topic, this question seems only to address quantity and not quality of experts. If an overhaul of expert witness evidence was to be made, it seems desirable to add in procedures for the court to be able to ensure that “experts” are qualified to be treated as such. The gate-keeping function should not be limited to the number of experts allowed.

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

Yes – pursuers and defenders should have the same incentive to reach a settlement and suffer the same consequences if reasonable settlement offers are rejected.

17. Should civil jury trials be retained?

All the usual problems regarding criminal juries apply here also, not least the time and expense involved in assembling them only to dismiss them when the case settles at the last minute. As a method of involving the community in civil justice they have symbolic value, and there was a minority opinion that they are still desirable in cases such as defamation or where a reasonable behaviour component was involved, although it was felt that the jury determining quantum led to absurd awards. On a majority we favour abolition.

18. Should written judgments be required in all cases?

Reasons should be given for all decisions at least in a very abbreviated form to aid the parties in understanding the outcome and to decide whether to lodge an appeal..

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

Those powers already exist and so if there is a problem it lies with the reluctance to exercise these powers.

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

The already mentioned reforms of good gate-keeping, early involvement by the judge with the parties, good scheduling especially with respect to the exchange of information and legal positions, applying proportionality.

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

No reform needed.

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?

Current situation is adequate. Although aim is to simplify the system, appearance by certain persons without an appropriate training would slow down the conduct of business in the court.

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

Assuming that there are claims over which the Scottish courts have jurisdiction involving large numbers of people, then it would be desirable. This would allow access to justice in cases where it is currently financially unfeasible for individuals to bring their claims individually. It is also theoretically cheaper for the defender than defending the actions individually, although this isn't borne out by practice since it generally increases the number of claimants (see below).

It may be that the best course would be to follow the U.S. federal example here with three types of procedure: one for actions arising from a discrete event (mass disaster), one for actions arising from a single cause, but where the individual circumstances of those damaged varies (e.g. product liability), and one for actions where all those affected are affected in the same way (e.g. consumer credit).

The first can work essentially as a consolidated action. The final type would be similar to the U.S. class action with all of those affected bound by the judgement – notice is given of the suit and any settlement and those who wish to opt out and bring their own action may do so.

The second type of action differs and would take account of the objection that it would be unmanageable to have group litigation where there are individual circumstances involved – a model could be adopted which essentially allows for rulings of law and the exchange of evidence to be applied to the whole group, but for determination of individual damage i.e. there is a class action type of procedure at the outset of the litigation, but where settlement cannot

be reached there can be trial of the merits of the individual case. While not perfect, it at least allows for consistency and streamlining of the initial stages of the case. The current Group Litigation procedure in England and Wales appears to be a hybrid of the class action and MDL approach.

With group litigation there are legitimate concerns of encouraging “blackmail litigation,” however, good gate-keeping and case management can be employed to ensure those joining the action have meritorious claims or those with unmeritorious claims are removed early. The other major concern is that lawyers are the ones who benefit the most from this type of litigation. That can be controlled by requirements of judicial scrutiny and approval for settlements, and by disallowing speculative fees for the group’s lawyer(s) thereby removing the conflict that the lawyer(s) is/are interested in the outcome of the case – most likely allowing legal aid to fund multi-party actions (per SLC’s 1996 recommendations). It should be less expensive to fund one of these actions than individual actions by all those affected.

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

We do not have personal experience of such proceedings. We favour relatively simple procedural access to the court and an approach similar to that proposed by us for other civil litigation. We consider judicial review to be a specialism within civil business.

31 March 2008