SUBMISSION OF THE SCOTTISH LEGAL ACTION GROUP TO THE SCOTTISH CIVIL COURTS REVIEW CONSULTATION

Introduction

SCOLAG was formed in 1975 with the aim of explaining the law and promoting legal services and changes in the law and the legal system so as to benefit the disadvantaged members of society. It is the publisher of the SCOLAG Journal. The Group wishes to congratulate all those involved in preparing the Consultation for the wide ranging but clear analysis of the major issues involved in what clearly intended as a thorough review of the civil courts system.

The purpose of any modern justice system in an open and democratic society should be to provide equal access to justice and just treatment to all. SCOLAG believes that there are certain key principles which underlay all aspects of such a justice system. These key principles are: transparency; impartiality; accessibility; accountability; consistency; fairness; and sustainability. The Group firmly believes that these principles should apply to those who use any part of the system or who might need to use it, and to those who form any part of any such system. These principles should therefore apply to the structure and operation of the civil court system, its structure and its operation.

The Group has not responded to every issue raised, and this response is intended to concentrate only on those aspects of the Consultation which are of particular concern to the Group. In some places the Groups response deals with more than one of the specific questions asked. The specific questions we have answered are set out, along with the number of the question in each Chapter.

Chapter 1

1.1 Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? (Question 1)

1.1.1 The question appears to be self evidently such common sense that it is not possible to give a negative answer to it. SCOLAG believes that it also needs to be recognised that there will always be cases where litigation, or some other formal process of dispute resolution will often be necessary in order to achieve resolution of a dispute or allow a party to vindicate their legal rights and entitlements. In an ideal world this would be done by parties recognising the rights and wrongs of their

own and others positions and making informed decisions which lead to a rational outcome.

1.1.2 In practice there are many people who do not know what their legal rights truly are and who never get the opportunity to vindicate these. There are others who genuinely believe in the merits of their own position and it may require the judgement of a third party to force them to depart from that view. In the experience of members of the Group there are often situations where nothing will be achieved until there is a litigation process put in play because a mistaken understanding of the facts, mistaken advice, deliberate procrastination, tactical position taking or a myriad other reasons can lead to the need for litigation.

1.1.3 In the opinion of the Group a fundamental starting point has to be easy access to informed advice so as to encourage everybody to have a better understanding of their rights and obligations, and that without this basic building block then all other systems and procedures for dispute resolution will be seriously undermined. Following on from that then the Group believes that the civil justice system should make a variety of dispute resolution procedures available, with the possibility of engaging in litigation if it becomes apparent that there is a dispute that cannot realistically be resolved by an alternative process such as mediation or arbitration.

1.2 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? (Question 2)

1.2.1 The principles and assumptions discussed do appear to be commonsense in the abstract. The Group does have some concern though about the extent to which they are based on value judgements, and how these value judgements might be applied in practice. Who is to decide what is a meritorious case, and what is the standard to be applied? For example there is a perception amongst some practitioners and their clients that immigration and asylum cases are not always dealt with in the same way as other cases because of an unconscious disinclination on the part of those dealing their cases from the Home Office onwards to be sympathetic to the claimants. The correctness or otherwise of that perception is not what matters, but what is important is that there is still a route open to those who wish to challenge the decisions of decision makers.

1.2.2 A different example might be the decision of the House of Lords in *Pepper v Hart*, [1993] AC 593. The majority of the original judges who heard the appeal had been

of the view that it should be refused (as had the first judge who heard the case on appeal from the Special Commissioners, as had the Court of Appeal), but having been made aware that there might be relevant Parliamentary material to be considered a court of seven judges then decided unanimously that the appeal should succeed. One of those judges, Lord Mackay of Clashfern, decided on the basis of statutory construction without the aid of the Parliamentary materials. However he dissented from the rest of their Lordships as to the permissibility of making reference to that material. The original majority in favour of refusing the appeal all changed their minds once they had seen the additional material. The final outcome of the case was decided therefore as a result of the House of Lords convening an enlarged court which overturned an established principle that Parliamentary materials were not to be considered when interpreting legislation. Who would have anticipated that outcome, and without that unexpected development in the House of Lords would the case have been seen as having merit?

1.2.3 The commercial courts in London are soon to open a new set of 29 purpose built courts with state of the art technology for the purpose of providing top quality facilities for the prompt resolution of commercial disputes. The reason for this investment is to help support the place of London as one of the leading financial centres in the world. The aim is to make sure that in a competitive world market for legal services and international commerce, those businesses will be attracted to and remain based in London rather than relocate their decision making centres to New York, Paris, Frankfurt or any of the other potential rivals. Scotland is not ever going to be offering that sort of service, but the point which the development of new commercial courts in London illustrates is universal, which is that in developing a civil justice system which meets the needs of users other values and decisions come into play. Where there are limited legal resources does Scotland decide to give up any prospect of retaining serious commercial litigation? If it does should we be surprised by the decision of any Scottish based business of any significance moving its headquarters and other operations to London? Alternatively should there be a proactive investment of resources into the development of a commercial court where there are sufficient judges who can hear cases promptly and courteously, and issue their decisions within days or weeks rather than months after the hearing is over?

1.2.4 A similar question arises in terms of the general aims and purposes of SCOLAG. These would support the development of fairer, better and speedier resolution of social welfare, employment and related issues. Why should a homeless person have to wait six to nine months to get a judicial review first hearing? A pensioner of modest means may not be able to challenge the decision of a Private Rented Housing Committee's decision to increase the rent due to the fact that the landlord is increasing the rent for every tenant and there will be a hundred other potential persons affected by the same decision and legal aid is not available due to the application of rules about community of interest, there is an expectation that there ought to be other persons who will fund an appeal, and where the sums involved are very modest but may be relatively significant to the individual. The existing scheme for legal aid already builds certain value assumptions into the scheme, and the Scottish Legal Aid Board has discretion as to how the value judgements which follow on should be applied.

1.2.5 It is ultimately a political decision as to how resources are allocated. In the view of the Group it is a necessary component of the exercise being undertaken that there is open debate and discussion about the implications that might follow from any decision as to how resources are allocated and that any recommendations from this Review also set out the implications of its recommendations as regards competing claims on these resources.

Chapter 2

2.1 What contribution can public legal education make to improving access to justice? (Question 1)

2.1.1 The Group has previously expressed its views on this matter and its support for the initiative undertaken by the Public Legal Education and Support Task Force. The Group reiterates its belief that this type of development ought to be given a priority status in the Review.

2.2 Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal aid advice or representation? (Question 2)

2.2.1 The Group's understanding of this is based on the observations and comments of its members but is not supported by any detailed research. What is apparent to the Group is that the work of the law centres based in and around Glasgow illustrates that the communities served by these law centres have a legal need which is not

readily served by the normal private sector law practice. There is no reason to believe that the communities in those parts of the country where there is no equivalent law centre operating have legal needs which are any different or less than in and around Glasgow. As a result it seems apparent to the Group that there is considerable unmet legal need for social welfare, housing, benefits and employment advice amongst other matters in most parts of Scotland. The provision of Part V funded projects by the Scottish Legal Aid Board supports this because there is no reason to suppose that a specialist service funded for one geographical location would not have a similar demand and use if made available throughout the country. The funding of a single solicitor based in Inverness to cover the whole of the north of Scotland, including Orkney and Shetland, cannot possibly hope to provide an equivalent service to match the dozens of law firms in the area who no longer do legal aid work. Whilst we expect that the Review will gather piecemeal anecdotal evidence of the unmet need in particular geographical or subject areas, in our view there ought to be a more thorough research commissioned into the nature and extent of the problem taking the information provided to this Review as the starting point. The purpose of such a research would be to enable fully informed decisions to be made about the extent of unmet legal needs and to consider strategies for resolving the issues which arise.

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

2.3.1 Research shows that many party litigants are drawn to representing themselves due to necessity, a lack of adequate legal aid provisioning and a genuine inability to afford the cost of instructing legal representation (Moorehead, Sefton, *Litigants in Person: Unrepresented litigants in first instance proceedings*, Cardiff Law School, Cardiff University, 2007). Research into administrative internal review procedures reveal that those persons who make use of an internal review procedure without legal support are generally less successful than those who do have that support. The research also shows that without legal support many people do not make use of the internal review procedures. It is also widely recognised that many individuals believe that the courts and the legal system are shrouded in a mystique which they find difficult to understand, and that this perception in itself acts to perpetuate the problem. SCOLAG believes that this along with the research concerning internal

reviews in an administrative decision making process means that, in most cases, people who have to represent themselves tend not to understand what is required in order to be successful, they fail to make full use of the procedures, and they are less able as a result to protect their rights through the courts than those who are legally assisted. As a consequence the Group believes that designing court procedures with a view to enabling party litigants to take part without legal representation is a necessity in order to ensure proper access to justice. In addition the Group believes that doing this will also reap positive benefits for the court services and the wider administration of justice by enabling people to be better informed and better able to represent themselves. This would have the positive benefit of reducing wasted time and the extra demand on resources which can happen at present where people do not know what to do or where to turn to for help when representing themselves.

2.3.2 However this is not something which can be developed in a vacuum. There are many issues which interlink. How do people know what their rights are? Where can they get information about procedures? How user-friendly are those materials? Where can they get advice and information about how to present their side of the argument? How accessible are the court forms, and how complex are they? How intimidating or accommodating are the court members? It often seems to members of SCOLAG that in the heritable courts around the country there are a number of sheriffs who have little patience or sympathy for individuals, and an inclination to accept the word of the landlords representatives who appear regularly before them. That perception might not be correct, or it may be accurate and reflect a cynicism or boredom on the part of the sheriff who has difficulty seeing the dispute from an alternative perspective. What sort of monitoring is there of judicial behaviour in court? Is there a natural inclination in any person who is part of a process to unconsciously formalise procedures, and what ongoing training and support is given to discourage or prevent this? In the Group's view any simplification of procedures would be welcome so long as appropriate opportunities are available to allow all parties to understand what is taking place, why it is taking place and to state before an independent and impartial tribunal their position on any issue which might be in dispute. It will be the detail of any proposal that is significant rather than the likely consensus on the principle of making court procedures as straightforward as possible for unrepresented and represented litigants.

2.3.3 In our view there is much that could be learnt from a study of the approaches developed in Canada, Australia and New Zealand. These jurisdictions provide examples of how court provisioning and resources can be used to assist party litigants. This can range from specific devoted web sites, funded from the public purse, to guides ready for download from the web as regards; various court forms / styles, what to expect in a specific court, guides to the law in specific areas, specially trained court staff, training / court guidelines for the judiciary on dealings with party litigants/McKenzie Friends before the courts. In Australia the McKenzie Friend concept is a sophisticated one, again with dedicated web sites, court trained staff, case law supporting the concept, all levels of legal training encompassing the concept and guidelines on McKenzie Friends at local and federal level. The Australian Institute of Judicial Administration (AIJA[i]) has published *Litigants in Person Management Plans: For Courts and Tribunals*, a comprehensive guide and management plan for court and tribunal system dealing with party litigants. The said document covers litigants in person, strategies for representation, non-legal support, information strategies, and the impact of party litigants on court staff.

2.4 What contribution, if any, can (a) "self help" services for party litigants and (b) court based advice services make to improving access to justice? (Question 4)

2.4.1 SCOLAG believes that these could be of considerable benefit in improving access to justice and that they are part of what ought to be treated as a holistic approach to the civil justice system. In particular the best form of "self-help" must be help at an early enough stage to prevent litigation. For many pursuers litigation will be a last resort. There may be large scale bodies for whom litigation costs are less significant as a proportion of resources and who may resort to litigation earlier, but we believe that these will be in the minority. In either case, by the time litigation is embarked upon by the pursuer it will often be because of a failure to achieve a satisfactory result by normal negotiation procedures. In social welfare cases, typically housing where the main issues raised by the pursuer are arrears of rent or the conduct of the tenant, the die will already have been cast.

2.4.2 It is in the nature of the in-court advice projects that their intervention is late in the day. It is noted that the existence of the in-court advice has shown a reduction in the number of decrees in absence, but it would be interesting to know to what extent, if at all, the existence of such projects has reduced the number of decrees

granted as a percentage of actions raised, and whether there is any uniformity of outcome in this regard.

2.4.3 SCOLAG believes that it would be better to put resources into systems and procedures which reduce the need for the major causes of litigation in cases involving social landlords in particular, and that this ought to have just as much a priority as resourcing projects where intervention may come too late and result in an avoidable burden on the resources of the civil courts. We would also commend the developments we referred to in paragraph 2.3.3 above as developments which could make a significant improvement to ensuring access to justice.

2.5 Are there any other issues which impact on access to justice in Scotland? (Question 5)

2.5.1 SCOLAG believes that there are significant problems with legal aid funding and that there is a need to fund a country wide network of law centres, as previously referred to. The whole issue of legal aid funding is a significant issue – ranging from problems as to lack of support from private practitioners due to poor remuneration to concerns about what types of cases receive funding and decisions as to whether particular cases should be funded or not. Our members frequently report that they consider there to be meritorious cases which do not receive funding. Where cases do receive funding there are concerns that in complex cases these often do not receive the degree of preparation that is required because of work by solicitors which will not be paid for, or because the costs of expert reports and other necessary preparatory work is not sanctioned. As a result a number of cases are under-funded, under prepared, and eventually fail. One example, not uncommon, is the need to employ an expert witness. This expenditure may be refused before the litigation commences, or there is a financial cap. In some cases a suitable expert has been identified, but refuses to do the work for the sanctioned amount. An expert is then found who will prepare a report for the sanctioned amount, but it subsequently transpires that the expert report obtained has fatal weaknesses because the person employed is less skilled and able than the person originally identified as suitable. While cost-effective help can be provided to unrepresented litigants through, for example, on-line initiating documents(discussed elsewhere in this submission), withholding legal aid funding for meritorious cases, either by not funding them at all or by not funding the necessary work for more complex cases may be a false economy. The presence of

party litigants comes at a cost in terms of court time. On principle this Group has long campaigned for a larger civil legal aid budget, but from the taxpayer's point of view there is a case for research into the impact of party litigants on (a) the cost of running the courts and (b) the cost to, and the effect on, opponents, compared to where they are provided with representation from public funds. These findings can then be compared with the extra cost of legal aid in such cases.

2.6 Is there a case for a new method of dealing with low value cases? (Question 6)

2.6.1 The Consultation does not define what is meant by low value cases, and instead focuses its discussion on types of case. The financial level at which the privative jurisdiction of the sheriff court may be set could be considered a somewhat rough and ready basis for splitting the jurisdictions of the different civil courts but it is one measure of the relative importance of a case. The current amount at which this is set is however quite low in real terms and we believe that it would be sensible to increase it. We do not believe that it is appropriate to distinguish cases according to their legal subject matter and classify one type of action as being of low value compared to another purely on this basis.

2.6.2 SCOLAG noted with interest the reference to developments in Ireland with regard to personal injuries cases and private residential tenancies. There are a number of points to note about the PIAB procedure. It was associated with the reduction in the limitation period to two years. It is possible for defenders not to accept the use of the PIAB procedure. Whilst the PIAB published statistics show a reduction in costs and time compared to the pre-PIAB costs and time for resolving litigation, no figures are given for the overall costs and time in cases where the assessment of the Board is not accepted. Nor is it clear in what percentage of cases where the Board makes an assessment this lead to a final acceptance of that assessment, or what percentage of cases overall result in litigation (either because they do not fall within the PIAB scheme or because one party or the other does not accept a PIAB assessment). In our view the most recent Scottish figures for the use of Chapter 43 procedure (which are given on page 113 of the Consultation document) and which are also referred to in paragraph 4.43 and 4.44 suggest that the existing Chapter 43 procedure for personal injuries actions in Scotland appears to compare well to PAIB procedure where it takes on average 10 months for the Board to complete an assessment. If a proof under the Chapter 43 procedure now takes place 10 months

after the lodging of defences, it must be the case that the vast majority of these cases are settled on a date before the proof takes place. Even if many of these settlements are not concluded until close to the date of the proof, the timing of such cases does not appear to be significantly different. The Group is not aware of what the overall cost is of running the Board and so cannot comment on whether there is any saving in terms of public expenditure.

2.6.3 As noted, the introduction of a Private Residential Tenancies Board was accompanied by other changes. It offers a mediation and adjudication service, with a right to a tribunal if the mediation is unsuccessful, or if the adjudication decision is not accepted by a party, or at any stage at the request of any party. The principal Act has been amended and we note that a recent report by Teri Griffin for the IAVA concludes that agents dealing with lettings feel that the legislation is cumbersome to negotiate and that much of it is still untested in court[ii]. The scheme does not apply to local authority and social housing landlords and the rights of such tenants are not the same as exist in Scotland. It seems apparent that whilst this kind of model might be a way of removing unnecessary litigation from the courts, in Scotland it would probably need to be accompanied by a number of other changes if it is to make any significant difference. These changes would include extending the scheme to local authority and social landlords, changing the manner in which private sector rents are fixed and determined, simplification of the system for giving notices to quit and other types of notices, further codification of the rights and responsibilities of tenants and landlords, and the provision of an early intervention mediation service to try to resolve disputes at an early stage.

Chapter 3

3.1 The Group would wish to comment generally on the availability of legal advice and assistance and legal aid, and the extent to which this affects access to justice. In paragraph 1.2.4 above we give one example of how the existing rules on legal aid may affect access to justice because the concept of there being a common interest can lead the Scottish Legal Aid Board to decide that if there is to be any litigation it should be funded by other persons who have a similar interest in the litigation and who would not be eligible for legal aid. Where the potential defender or respondent to a case is a commercial business or a public body then that organisation will often seek to make sure that it has access to good quality legal

advice and representation at an early stage. Individual consumers, tenants, claimants and the like often find it difficult to afford the equivalent. This can put them at an immediate disadvantage. As we have noted in paragraph 2.2.1 above there are parts of the country where there is not ready access to legal services because of the withdrawal of private sector solicitors, and there is no equivalent service available. Concerns about adequate case preparation in legal aid cases are noted in paragraph 2.5.1. It is our submission that these give rise to an obvious conclusion that access to justice is affected, although the true extent of the problem cannot be ascertained without a more comprehensive and focussed inquiry has taken place.

3.2 It is also the experience of SCOLAG members that particular areas of work will be undertaken by individuals with particular interests, with the effect that where that individual moves on there is no one who will continue this work in their absence. That happened in Ayr and Aberdeen where a series of successful challenges to local authority decisions in homelessness cases only started when certain individual workers started with local advice services, and those challenges stopped as soon as the individual either changed job or the funding for the service ceased. In each instance the replacement worker or advice service did not pursue the same area of work. These examples serve to illustrate the nature of the problem but they cannot measure it.

3.3 We believe that all solicitors who do social welfare work will be able to give examples from personal experience of decisions of the Scottish Legal Aid Board refusing to fund a litigation which they would consider to be irrational. We do believe that there is still an ongoing issue about the consistency and quality of decision making by SLAB which requires to be addressed.

3.4 During the course of our internal discussion an analogy was drawn with NHS dentistry provision. In the course of the internal discussion the suggestion was made that one possible solution to the problem of ‘legal aid deserts’ would be to fund a proportion of the costs of the office/ overheads of a local law firm in addition to payment for individual pieces of work, on the condition that they provided an agreed minimum amount of civil legal aid work, fixed by reference to a number of cases or as a percentage of their case load. SCOLAG has concerns about how strongly the analogy with NHS dentistry or medical services can be taken. In addition there would be an impact on the approach to the funding of

3.5 We note that there is also a separate Consultation exercise being carried out as regard court fees and it is the Group's intention to respond to that Consultation and further internal discussion is taking place to that end. As we have not yet concluded our views in relation to that Consultation we have decided not to make any specific comment at this point in relation to the court fees questions.

3.6 The final question of the Chapter (Question 9) raises questions about legal expenses insurance. This is a matter where we do believe that there is a wider role for such insurance, for example it has been suggested that there is no reason why legal aid should be made available in certain types of cases where legal expenses insurance might be made compulsory, possibly at little or no additional cost to the consumer. One area where this might be applied is in respect of claims involving motorists and their passengers.

3.7 One new matter we would wish to raise is the potential liability of counsel personally for litigation expenses. This subject can also be taken under reference to Question 19 of Chapter 6). The present state of the law is summarised by Sheriff K. Ross in *Bell v Inkersall Investments Limited*, 7 December 2007, Dumfries Sheriff Court, (unreported but available on the Scottish Courts website at www.scotcourts.gov.uk/opinions/A639_02.html). It is the view of the Group that there is no reason of principle why counsel should not in certain clearly defined circumstances be found to be personally liable for the expenses of litigation where they are found to be the cause of additional unnecessary expense as a result of the manner in which they have conducted the litigation, and this conduct is considered to be particularly blameworthy. In England a 'wasted costs order' has been available in certain circumstances and we believe that active consideration should be given to adopting an equivalent procedure in the Scottish civil procedural rules.

Chapter 4

4.1 Do you agree that the conduct of civil business of the courts is adversely affected by the pressure of criminal business? (Question 1)

4.1.1 In our view this is the case. Reference simply needs to be made to the amount of time devoted to civil business compared to criminal business which is noted at

paragraph 4.12 of the Consultation document, and also note at the same time the increase in the number of judicial appointments over the same period. It is plain that virtually all the additional resources provided to the Court of Session have been used to service the High Court of Justiciary.

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

4.2.1 Under the existing arrangements this already happens to some extent, although the arrangements are not in fact operated as intended. For example Rule 58.5 of the Rules of the Court of Session 1994 provides that a petition for judicial review shall be heard by a nominated judge. The annotations to the Rules of Court list a number of judges who are said to be so nominated. The list of names indicates how long it is since even nominal attention was paid to the Rule of Court. In practice any judge of the court has heard cases because of the lack of availability of a nominated judge. The use of nominated judges applies elsewhere. Similarly a Court of Session judge has always headed the Employment Appeal Tribunal in Scotland, and this function is presently carried out by Lady Smith. We see some merit in creating a middle tier in the criminal courts to deal with less complicated serious crime, as suggested in paragraph 4.11 of the Consultation document.

4.2.2 In our view it would also considerably strengthen the Court of Session (and therefore have other knock on benefits to the Scottish legal system) if the administration of judicial time to both civil and criminal business were rationalised so that nominated judges, and only nominated judges, dealt with particular types of business. That includes for example the Inner House of the Court of Session and the Appeal Court of the High Court of Justiciary, with the result that only full time sitting judges, sitting in permanent fixed divisions, heard appeal cases, and that all appointments to the Inner House and the Appeal Court were expressly made on merit. The use of retired judges and part-time judges should be confined to those judges sitting by themselves to deal with additional business, and only when necessary. Retired and temporary judges should not be used for certain priority cases (for example in the commercial court or in judicial reviews).

4.2.3 In the Sheriff Courts, the principle can be extended to the larger courts, such as Glasgow and Edinburgh, where there are sufficient judges for such an arrangement. Because of the case for local justice (referred to below) specialisation is less

desirable in other sheriff courts if they will mean a reduction in the extent to which the local bench is occupied by permanent judges who know local conditions, not to mention the individual agents who comprise local bar.

4.3 Should the sheriff courts be separated into civil and criminal divisions? (Question 3)

4.3.1 Whilst that suggestion has some attractions, and appears to follow on logically from other comments we make, a concern that we have is that at present an impression is sometimes created of highly intelligent people being bored by what to them seems like minor and routine disputes. To some extent the same seems true of the lower levels of crime. Unless steps were put in place to rotate people allocated to different divisions, a formal structuring of the sheriff court into civil and criminal business might encourage any such feelings due to a lack of variety of work.

4.3.2 We also anticipate that this would have major resource implications and require an increase in the number of sheriff appointments. In some locations it would also have implications in terms of the use and availability of accommodation and other resources.

4.3.3 One benefit we can see, if there was a commitment to allocate the resources needed is that there could be much prompter dispensation of justice. Changes of practice in the lower criminal courts to encourage swift resolution of cases alongside this measure could also make a significant difference to both the criminal and civil justice systems in the longer run.

4.4 Should there be a greater degree of specialisation within the civil courts in Scotland? (Question 4)

4.4.1 In our view it does make sense to have greater specialisation of the courts where the trend of legal practice within the jurisdiction and in other jurisdictions is also for specialisation. The areas deserving specialisation are ultimately a matter for political consideration taking into account other wider objectives and purposes. We refer to our discussion concerning commercial courts in paragraph 1.2.3 above to serve as an illustration. We also support the retention of local sheriff courts as a place where parties can resolve disputes locally. This clearly impacts on the degree to which specialisation of issues can be considered a realistic option. Outside of the major cities it is unlikely that there would be sufficient scope for specialisation due to the lower volume of business generated in those areas. In many instances

greater specialisation would mean a rationalisation of resources which would cause difficulties by requiring all those involved in having to travel greater distances. We believe that housing and family matters in particular are practice areas where it can be important that any dispute can be resolved without placing an undue burden on the parties in terms of requiring them to travel longer distances. However it may be that within each Sheriffdom it would be beneficial to create a commercial court for the whole Sheriffdom in order to deal with commercial cases before a specialised sheriff.

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

4.5.1 The extent to which the Court of Session has exclusive jurisdiction over particular types of case has not proved controversial or problematic. However, given the powers of a Sheriff under the Requirements of Writing Act, proving the tenor of lost or destroyed documents could be a sheriff court matter. We would oppose any restriction on the types of cases presently within the existing jurisdictions of either the Court of Session or the sheriff court. There are instances where a client is better served by a competent local practitioner taking a case conveniently and much less expensively in the sheriff court rather than being forced to go to the Court of Session. Similarly many practitioners have found that there are advantages to using the Court of Session because of the availability of procedures, or the overall better quality of service from practitioners and judges.

4.6 Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? At what level should the privative jurisdiction of the sheriff court be set? (Question 8)

4.6.1 In our view it would be better for the overall health and vitality of the Scottish legal system if the Court of Session retained a concurrent jurisdiction with the sheriff court over many areas of civil business, that they retain their separate identities, and that the Court of Session retains a first instance jurisdiction. We believe that this is important in order to allow access to a higher quality and standard of service than is generally available in the sheriff court. Without denigrating in any way the work done by sheriff's or by the practitioners in the sheriff court, it is undoubtedly the case that on average the quality of service provided to clients by judges and practitioners is higher in the Court of Session on average than the average for the

Sheriff Court. There are of course always notable exceptions amongst the ranks of both sheriffs and practitioners, but we believe that there is a requirement amongst the potential clients for access to the highest level of service which the Court of Session can provide, and that requirement is just as important at a first instance level as it is at an appeal level. There may be issues about where the boundary lines are drawn, but we do not believe that access to this type of quality of service should automatically be denied to those who believe they need it and would voluntarily chose to use the Court of Session. We see no reason why the Court of Session should not retain a first instance jurisdiction for the same types of action as it has at present, although it may be that any claim with a monetary value should have a minimum value of £50,000 in order to reflect more closely the intention that cases of lesser value, and likely to be of lesser relative importance in the overall scheme of litigation, are dealt with at a lower level of court.

4.7 Should there be a tier of civil court below the level of the local sheriff court? Alternatively should there be another level of judiciary within the sheriff court to deal with "third tier" business? ((Questions 11 and 12)

4.7.1 One suggestion that has been raised by various housing law practitioners previously is the creation of separate specialist housing tribunals. The purpose would be to remove housing cases from the sheriff courts to a lower tribunal that might be better suited to dealing with these cases and which can provide a more specialised and knowledgeable decision making process. We note that the Law Commission of England and Wales is expected to produce a report soon on whether a specialist tribunal should be established to resolve housing disputes. Other changes in England are being mooted for housing cases in terms of proposals for the implementation of the Tribunals, Courts and Enforcement Act 2007. We believe that some consideration should be given to establishing a locally based housing and property tribunal, which combines the functions of the sheriff courts, the Private Rented Housing Committee and the Lands Tribunal for Scotland. These tribunals should be locally based, and could share premises with the Sheriff Courts. They could be accommodated into an appeal structure to a Housing and Lands Appeal Tribunal based in Edinburgh or in regional centres, with a final right of appeal on a point of law only to the Inner House of the Court of Session. This procedure could also have built into it a mediation system at the outset to try to reduce the number of litigations being raised through the tribunal system. Apart from that change and

the change to the privative jurisdiction of the Sheriff Court as described at paragraph 4.5.1 above, we believe that the current general jurisdiction of the Sheriff Courts should remain as at present.

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

4.8.1 For the reasons given in the consultation paper under the heading "Territorial Organisation of the Sheriff Courts", the organisation of the courts into separate sheriffdoms cannot be justified in modern Scotland. We would, however, draw a distinction between territorial organisation of the courts and jurisdiction, referred to at paragraph 4.10 below.

4.9 Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory? ((Question 15)

4.9.1 In our view the present arrangements are not satisfactory. We have long argued that it takes too long for petitioners in judicial reviews to obtain a hearing, and that we are aware of instances where this delay means that it is pointless to even attempt to challenge decisions of a public authority because the point will become moot by the time any hearing takes place. We believe that there are a number of public authorities who are aware of that as well, and can be confident of never having their decisions on certain types of matter subject to challenge.

4.9.2 These types of cases can often be of the greatest importance for an individual and their family, and have serious consequences for their daily lives. We would like to see the judicial review rules in the Court of Session amended so that a respondent has a maximum of three weeks before being faced with a first hearing before a judge. The first hearing should be purely a procedural hearing lasting no more than an hour. At this hearing the respondent will advise the court of whether or not they wish to defend the action, or what parts of the action they are prepared to concede. If they intend to oppose any part of the application they should provide an outline of their defence and advise the court whether they anticipate that the matter can be dealt with by way of submissions or whether an evidential hearing may be necessary. The court should have the power and expect to be in a position to fix an evidential hearing or any other hearing on the date of the first hearing, and to order written answers and any other order as seems appropriate to the court at that stage. Evidential or other substantive hearings should be fixed as a matter of routine and it

should be intended that they take place no later than three months from the date of the first hearing. Written answers could be required within a further two weeks of that hearing and any further final adjustment of pleadings could be permitted at a continued first hearing following the lodging of Answers and within an overall six week period of the lodging of Answers.

4.9.3 We believe that whilst this would give judicial review applicants a priority of treatment over most litigants, we consider that the types of issues raised justify this approach. In addition it will require petitioners and their advisers to be well prepared before bringing any judicial review, and it will save time on the court lists because a single judge could deal with each weeks first hearings in the course of a single day, leaving other court days free for those cases that were most likely to proceed, and where the issues had been identified. The same judge could then hear the case throughout and time would be saved in explaining the issues and familiarising the judge with the background to the case.

4.10 Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? (Question 17)

4.10.1 We believe that existing jurisdictional criteria which currently protect the interests of parties, and in particular consumers, must not be relaxed. There is already some flexibility between courts, in that parties can prorogate another court's jurisdiction, but we would be loath to have any central administration moving cases between courts because of some perceived "greater convenience to the greatest number of persons involved". Local communities value local services, and access to a local court is in our view an important aspect of access to justice. Every care should be taken not to slide into the "call-centre" mentality where the court user is forced to deal with some distant, centralised and impersonal administration because of some misplaced perception of value for money. Not only should sheriffs continue to be appointed to specific courts on a permanent basis, but registration of cases and the full sheriff clerk service should remain local.

4.10.2 One submission to the review suggested that there are too many small sheriff courts. We take a contrary view. Few local issues have created more indignation in recent years that the closure of village schools or cottage hospitals to provide "better" services for the money expended. There would be similar unrest if sheriff courts were to close. If legal firms exist locally because that is what clients want,

so should the courts. It is an extra burden on lawyers and their clients if they have to travel some distance to seek justice. There is a case for the provision of some more sheriff courts, for example:

• in Fife, there could be courts in Leven (which has 8 solicitors' offices) and Glenrothes (which has 11) instead of all cases being centralised in Kirkcaldy; and

• if it was thought appropriate to establish a court at Livingston, a "new town" (which has 14 solicitors' offices) it is difficult to see why the same facility has been denied to East Kilbride (which also has 14 solicitors offices despite there being no court) and Cumbernauld (which has 12).

All these localities generate substantial criminal as well as civil business. If the number of legal firms indicates the demand for local legal services, we submit that this indicates a similar demand for local justice. Moving a single permanent sheriff (the value of which we refer to elsewhere) to a neighbouring court to "mop up" the available business is less onerous than having the parties, their witnesses and agents travel to a more distant town.

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

4.11.1 There is a case for continuing to have a Sheriff Principal with administrative powers although some of the boundary problems mentioned would then reappear. It would be good governance to have a superior judge, who knows local needs and resources, in charge of a group of sheriff courts. Such a judge could then allocate sheriffs within his area and deal with some court administration which would be better handled locally than by the Scottish Courts Service in Edinburgh.

4.11.2 Litigants should continue to have the benefit of access to an appellate court sitting, usually, in the same court house as the court of first instance.

4.12 Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session? (Question 22)

4.12.1 In our view the Inner House of the Court of Session should continue to deal with the majority of statutory appeals. Our reason for this is that we believe that in those instances where there is a statutory right of appeal to the Inner House the issues involved will be of particular significance to the appellant, or of some general

importance. Removing such cases from the Inner House would be seen as devaluing these aspects. In asylum appeals, to take one example, it has often been the case that an appeal to the Inner House of the Court of Session (or the Court of Appeal in England) has resulted in an earlier decision of the Asylum and Immigration Tribunal or its predecessors being overturned. In appeals from what was once known as the Rent Assessment Committee (now the Private Rented Housing Committee), to give another example, the Inner House has given valuable legal guidance to what is intended to be a specialised tribunal whose decision makers are not lawyers and who operate with the advice of a legally qualified clerk. The Inner House of the Court of Session therefore plays a vital role in the checks and balances of the legal system and we believe that this role should not be reduced. The wider benefits obtained by consideration of these cases by highly experienced and knowledgeable judges and practitioners deserves to be recognised and should not be undervalued.

4.12.2 This role may change to some extent if there are other significant structural changes to how appeals in particular types of cases are dealt with. For example if our suggestion for a possible change in the way that housing cases were dealt with (paragraph 4.6.1 above) we believe that this would lead to a better quality of justice and outcome, but would also ensure that only the most significant cases ever reached the Inner House on appeal.

4.13 Should there be a limit to the number of levels of appeals through which an action can progress? (Question 23)

4.13.1 It is a fact of life that sheriff, and judges can make errors when deciding cases. SCOLAG believes that is not appropriate to set a pre-determined number of appellate levels. Experience has shown that cases dealt with a first instance by a Sheriff can run through the whole appeal system to the House of Lords, and the House of Lords will allow the appeal. In doing so they may restore the original decision of the Sheriff, or they may overturn all the previous decisions. A pre-determined limit to the number of appeal levels can therefore result in a restriction which leads to a reduction in the overall standard and quality of justice.

Chapter 5

5.1 Should the rules of civil procedure have an over-riding objective or statement of philosophy? (Question 1)

5.1.1 Given what is widely recognised as the failure of the Woolf Reforms in England to achieve their objectives, questions might be asked about the merits or value of adopting an overriding objective. However we would commend to the Review what we consider to be the key principles of a civil justice system, and which are noted in the Introduction to this Response document.

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

5.2.1 SCOLAG believes that mediation can have a valuable role to play, but that mediation which is not undertaken voluntarily will not be effective. Other forms of dispute resolution may also result in the settlement of disputes, but that recommendations for the form of dispute resolution will need to be tailored to the different types of cases and the different issues raised by that type of case.

5.2.2 In crude terms, litigation and the services of the courts can be seen as part of the means by which a modern civilised state encourages dispute resolution as an alternative to parties taking matters into their own hands and using brute force. The modern state therefore supports, and should support, the rule of law and the use of courts as the appropriate way to resolve conflicts between individuals. Litigation therefore can be seen as having a civilising effect on society and produces results which give guidance to others about the future conduct of their affairs. Mediation has a role to play in reducing social conflict and resolving disputes, and in our view is deserving of the same type of state support. If mediation can produce satisfactory outcomes at an earlier stage and at lower cost then this would be beneficial overall.

5.2.3 Some cases cannot be solved by mediation because the parties simply require an independent person to look at the circumstances, determine who is right and what the correct outcome should be. Case law also sets useful precedent to guide other people and can also assist in the overall goal of reducing social conflict. The cost of legal services and litigation are widely understood by the public. In our view it is doubtful that many peoples first inclination is to resort to litigation because they are aware of the costs involved. Much of a lawyers time is spent trying to negotiate

settlements of disputes prior to their coming to court. Most lawyers in practice will tell the client at an early stage that litigation should be avoided if possible because of the expense and uncertainty of outcome.

5.2.4 We would support a system where mediation of disputes was encouraged, and where litigants prior to raising an action should be actively asked whether they have sought to negotiate or mediate a solution. More information about the availability of mediation services should be made available to the public, and consideration should be given to publicly subsidising mediation services. We would not support a move to compulsory mediation prior to litigation. Given the findings concerning fairness of outcome referred to in paragraph 5.27 of the Consultation document (which is a matter which we believe any civil justice system requires to give priority to over questions of pure cost) we do not consider that the overall results outweigh the individuals right to choose the best method for them of determining how a dispute should be resolved. Nor is the mediation process necessarily a cheap option, and the cost of mediation could be just as prohibitive to an individual as a litigation process. Issues as to the funding of mediation services would be require to be considered along with any suggestion that mediation was somehow to become a pre-requisite of litigation. In straightforward claims for payment, or claims of low financial value where no other issues arose, the need for mediation and the cost of mediation might become an unnecessary burden if there was any question of compulsion. For example, in a clear case where there is an unpaid debt and there is no justification for non-payment why should the pursuer be required to engage in a mediation process which might only become a further means of delaying payment? Therefore very careful consideration would require to be given as to why and in what types of cases it was being suggested that mediation was an appropriate step as to justify its compulsory introduction. Furthermore we believe that if mediation is properly to be considered as a successful option for dispute resolution then it requires to be entered into by all parties willingly.

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

5.3.1 The ways in which modern technology can assist the court system are constantly evolving and we can only point in the general direction of ways which occur to us at this time.

5.3.2 To assist both party litigants and their representatives, the fullest range of initiating documents should be offered on line, with appropriate guidance. The present range of documents is patchy, to say the least. Thorough research of what has been done elsewhere, particularly in other Commonwealth jurisdictions, is required.

5.3.3 The use of dedicated private websites accessible only to the parties or their representatives, such as with Wiki software, might be used to construct pleadings and host other court documents that are readily accessible. It is recognised that issues as to the security of such websites and their documentation would be of paramount concern.

5.3.4 Legal debates and submissions could at the option of the parties and the judge be conducted by e-mail, telephone or video link. Transcripts or recordings should immediately be available to the public on request, in view of the loss of an "open court". The small claim and summary cause rules allow for a live television link or such other arrangement by which the witness is able to be seen and heard in the proceedings or heard in the proceedings and is able to see and hear or hear the proceedings while at a place which is outside the court room. We do not know how far this provision has been used so far, but experience in immigration and asylum cases does nothing to instil confidence that justice is being done, so we would not wish at present wish to see these facilities used for proofs.

Chapter 6

6.1 Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views? (Question 5)

6.5.1 SCOLAG does not consider that the current arrangements are satisfactory because there is too little input from, and consideration, of the customer/user perspective (this is not the same as the practitioner's perspective). We believe that there is also a problem arising from the fact that the promulgation of rules in the Court of Session and the sheriff court are considered separately, leading to a disjointed and haphazard development of court rules. The fact that this Review has had to consider a number of fundamental issues and improvements is a demonstration that the present arrangements do not meet the requirements of a changing world. A new

Scottish Courts Council to cover both the Court of Session and the Sheriff Court with appropriate specialist committees should be established with a remit to take a more pro-active stance. It should have as its primary aim the continuous improvement of the court system, including issues affecting jurisdiction, the judiciary, rights of audience, rules of procedure, protocols, formats, the use of information technology and its capability for bringing about procedural innovation, the Scottish Courts Service, interest rates, and consumer interests, It should be continuously monitoring developments in other jurisdictions. It should put out its proposals to court users for consultation whenever they are significant. Where there is a requirement for legislation, or approval by the Lord President, to bring certain changes into effect it should have the power to make recommendations for change whilst allowing the existing legislative or approval functions to remain.

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

6.2.1 SCOLAG believes that for reasons of efficiency and to assist in the wider understanding of court procedures there should be a set of common procedural rules which apply to actions of the same type, whether they are raised in the Court of Session or the sheriff court, and that the only need for a particular set of procedural rules for particular courts should be in cases where that court has an exclusive jurisdiction or provides an exclusive form of procedure (such as judicial review) or remedy.

6.2.2 In the Sheriff Court, there are four basic sets of procedure rules: Small Claim, Summary Cause, Summary Application and Ordinary Action. Within the Ordinary Action there is extensive provision for family actions. Summary Causes now apply to actions where the sum sued for is between £3000 and £5000. This is now too narrow a band to merit its own set of rules. We recommend that the Summary Cause be abolished and that Ordinary Actions should take over when actions fall above £5000, with actions for lesser amounts being catered for under the Small Claims procedure. It should be noted, however, that the Group strongly believes that a there should be a concomitant change to the legal aid rules to allow for assistance by way of representation in Small Claims. Legislative changes would

also be required in respect of summary cause heritable actions to accommodate such a move.

6.3 *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? ((Question 7)*

6.3.1 Initiating documents should be user friendly, and available for completion on line or on paper by party litigants. This means that they will contain appropriate questions about the basis of the action, the evidence available and the remedies sought. Thus initiating documents for the various types of family action, for accident claims, for guardianships etc must of necessity be remedy-specific.

6.4 *To what extent should a system of abbreviated pleadings be introduced? (Question 8)*

6.4.1 Resolving relevancy issues before proof encourages a disciplined approach to litigation by the parties and their representatives. While such procedures can in formal terms be dispensed with in Small Claims, they are worth keeping for actions for greater value. There may be more legal work at the earlier stage, but court time and the time of witnesses later will be saved.

6.5 *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? (Question 12)*

6.5.1 In our view there is a case for doing this. The threat of a long-drawn-out action can discourage pursuers, and there are concerns that the potential length of complex litigation has had an adverse impact on the availability of legal aid. While this may lead to longer written submissions and written evidence, and greater pre-trial preparation, it brings an element of control to the cost of cases which may otherwise run for longer than is necessary in the interests of justice.

6.6 In the conduct of substantive hearings should there be greater use of written rather than oral arguments? (Question 13)

6.6.1 We believe that there is scope for greater use of written arguments as a means of better focussing legal issues. If the system is considered to work well in virtually every superior court, such as the House of Lords, the European Court of Justice and the United States Supreme Court, then we believe the same overall benefits should be applied in all our domestic courts.

6.7 To what extent should there be an earlier and/or wider disclosure of evidence? (Question 14)

6.7.1 The over-riding aim – and compulsion – must always be for fullest disclosure and as soon as possible.

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

6.8.1 The Group believes that parties should be encouraged to settle their disputes, that it is generally in the parties own personal interests for this to happen, and that the court procedures should find ways of encouraging this. To that end we draw attention to websites such as www.wecansettle.com and www.theclaimroom.com, online claims settlement systems using 'blind bidding' as an alternative to negotiating monetary settlements in insurance claims. Parties could be automatically put into a system administered by the court service where they can pitch the figure at which they will settle – and amend them as the case progresses - so that when the two parties' tenders "meet" the case is settled. The web sites do not seem to have been a great success due, it is suspected, to a lack of motivation on the part of parties' agents. However we suggest that such a system might encourage a culture of early settlement, thereby speeding up the process and minimising both public (state) and private (party) costs.

6.9 *Should civil jury trials be retained? (Question 17)*

6.9.1 Where complex issues do not arise parties should have the option of a jury.

6.10 *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? (Question 19)*

6.10.1 We refer back to paragraph 3.7 above concerning the merits of making specific rules in respect of wasted cost's orders against counsel. If such rules were made we assume they would apply to all professional representatives. Particular care would need to be taken that unrepresented litigants were not unfairly penalised under such a regime.

6.11 *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? (Question 22)*

6.11.1 SCOLAG's believes that there is in principle no reason why a party litigant should not be able to obtain assistance from a person who does not have rights of audience (known in England as a McKenzie Friend'). We also consider that this should

extend in carefully controlled circumstances to being able to address the court. We note the observation by Justice Neuberger in the English cases of *Izzo v Philip Ross & Co (a firm)*, [2002] BPIR 310 that '… in these days of human rights consciousness, the courts would want a good reason before it required a person to present his own case inarticulately when there was someone with relevant abilities who was ready to speak for the litigant'. Such a person should not be able to trade or offer services as a 'McKenzie Friend', nor assist party litigants on a commercial basis, nor advertise his or her service(s) as a 'McKenzie Friend' save on a purely non-profit and voluntary basis, with the only financial remuneration for this 'person' (or 'McKenzie Friend') being for 'reasonable' or 'normal' travelling expenses, accrued in his or her role as a 'McKenzie Friend' of the party litigant(s) in question. SCOLAG believes that there should be an adoption of the 'McKenzie Friend' principle in Scots law with regards assisting party litigants, as happens in commonwealth jurisdictions such as Canada, New Zealand and Australia. We especially noting the English case law: *McKenzie v. McKenzie*, [1970] 3 All ER 1034 (the McKenzie Friend concept expanded in family law / confidential matters). *Re O (Children) (Hearing in Private: Assistance)*, [2006] Fam. 1, *Re: H (McKenzie Friend: Pre-Trial Determination)*, [2002] 1 FLR 39.

6.11.2 In our view the definition of a 'McKenzie Friend' and the 'circumstances' he or she would operate with a party litigant would be that of a traditional 'McKenzie Friend' role, namely:

- No right to appear or act on behalf of the party litigant (save where granted leave by the court to do so in exceptional circumstances);
- No remuneration of a financial nature for assistance as a 'McKenzie Friend' save that of 'reasonable' travel expenses;
- That of providing moral support;
- Non-legal advice;
- Suggesting questions to ask the witness's'
- Consulting with the party litigant during the proceedings;
- Makes notes during the proceedings as well as assisting with sourcing legal forms and various court administrations.

In our view the 'McKenzie Friend' concept should be introduced without delay in Scottish courts and we propose that urgent consideration is given to introducing a court form for a party litigant to register an individual as a McKenzie Friend

(detailing the rules and responsibilities to be undertaken as a McKenzie Friend) for this form to be lodged with the court by the party litigant. In the spirit of access to justice and equality of arms, we would expect that no charge would be levied for the registering of this form.

6.11.3 While the courts must be mindful of the potential problem of vexatious litigants when introducing the 'McKenzie Friend' concept, the principal purpose is to assist party litigants and improve access to justice. This should assist both litigants and the court as it ought to mean that less time is lost in cases where party litigants do not have the capability to handle their own affairs without some form of assistance. In our view there is no need for any special rules to deal with vexatious litigants, and that the normal procedures for dealing with vexatious litigants would be robust enough

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

6.12.1 The availability of multi-party actions is a development in many jurisdictions. We draw attention to the work done by the Scottish Consumer Council, developments taking place in England, and the work done by Oxford and Stanford Universities. In particular we refer to the Global Class Actions Clearinghouse website (http://globalclassaction.stanford.edu), launched by Stanford Law School. This contains materials from a conference at Oxford University in December 2007 on the globalization of class actions and group proceedings, and is also intended to become a repository for statutes, rules and important cases; articles and commentary; and news of developments and events related to the evolution of representative litigation, class actions and group proceedings worldwide.

6.12.2 In our view there is no reason why such a procedure could not be introduced in Scotland. Which?, as a representative body, brings consumer actions for small sums, e.g. for over-priced football shirts (JJB Sports - settled before a full hearing in the Competition Appeals Tribunal). The procedure operates on an opt-in basis, under which Which? has to go out and find persons to join the action. By contrast, the British Airways/Virgin fuel price-fixing cartel have agreed to pay out following a US class action organised by a US legal firm, under which refunds will be made under US court supervision to all who now apply even when flights did not

originate or end in the US. An opt-out system as in the USA whereby everyone who is involved is assumed to be a claimant would be better.

6.13 Is the rule governing the procedure to be followed for judicial review satisfactory? (Question 24)

6.13.1 We have already stated proposals for improvements to the judicial review procedures in paragraph 4.8.2 above.

6.13.2 We do not believe that there are good reasons for introducing a filter mechanism or time limits. The use of a filter mechanism runs the risk of potentially successful cases being refused permission to proceed. We do not believe that the number of cases which are wholly unmeritorious which might be raised is at all significant in number. We do not believe that this alleged problem would justify the overall impact of such a move. Even if there was evidence of a need for some sort of judicial filter, the prospect of an early first hearing before a judge which we have proposed would also, we believe, be just as effective at discouraging cases which are wholly unmeritorious. Nor do we believe that delay is really a serious issue. The existing case law allows respondents to plead that the remedy sought should be refused if there is prejudice caused by delay. Depending on the circumstances of the case a delay of a days or a few weeks might be sufficient for that to happen. We believe that the introduction of a fixed time limit would provide a windfall benefit for some respondents in a handful of cases each year, and in some circumstances might also work to the disadvantage of respondents if there is a right to bring a review within a fixed period. Overall we see no real benefit to litigants or the court from such proposals.

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[i] The AIJA is an incorporated association affiliated with the University of Melbourne. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organizations interested in improving the operation of the justice system. The AIJA Secretariat, which has been in operation since February 1987, is funded substantially on a composite government-funding basis through the Standing Committee of Attorneys-General.

[ii] [ii]"*Is the Board delivering on its promise of a better system?*", available at http://magico.ie/files/admin/uploads/W153_Field_2_20878.pdf.