

The Civil Justice Advisory Group, in its Consultation questions, states "In order to inform the preparation of its report, the Civil Justice Advisory Group would welcome general comments on the issues raised in this paper as well as responses to the following specific questions".

I tender a few thoughts by way of general comments only. I offer as my credentials to make these brief comments that I was a sheriff for 30 years in Glasgow and Edinburgh and a former President of the Sheriffs Association.

1. It used to be, and probably still is, that a proportion of the order of 90% of cases settle: so the present proposals will be dealing with 10% of cases that go to proof.
2. May not that 90% indicate a useful purpose? One can envisage a desirable period after the action has been raised in which the parties can formulate their claims and defences, a period in which about 90% of these parties move from an initial emotional or optimistic view of their case to a realistic view (where all passion is spent); and they are persuaded that their best interests lie in a settlement in whole or part. And about 10% of the litigants, for right reason or none, opt to go on to proof. If that is true, may not it be desirable to accept a significant time for parties to let of steam, rather than steamroller them into an unnecessary premature proof?
3. Mediation seems to be regarded as the new magic bullet – cheap, quick and final. Perhaps it would be better to await more evidence before relying too much on mediation. Even if the mediation is successful, presumably parties have had to undertake the appreciable time and expense of formulating the issues. But apparently we do not know how successful or unsuccessful mediation is: the consultation document acknowledges that there is the "problem of lack of empirical evidence" about the operation of the system: para 3(f). If a mediation is not successful it will just have added the delay of an extra layer of litigation to the whole process, and that to no purpose. One would think that the chances of a mediation being successful must surely be small. If the parties are in good faith they do not need it; if a party is in bad faith, it seems that, in most cases, mediation is likely to be unsuccessful, because the faithless debtor will welcome the additional delay that a mediation would create. In that situation the procedure would not be alternative dispute resolution but addition dispute resolution.

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