THE GLASGOW BAR ASSOCIATION; Response in relation to the SCJC Consultation on Solicitors' Fees

The Glasgow Bar Association is an independent body that for over half a century has been active in promoting, representing and protecting the rights and interests of its members in the practice of law and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society. It advocates on behalf of access to justice. It considers and monitors proposals for law reform and, if necessary, formulates responses to such proposals. In addition, the Association operates an extensive professional development programme for members.

The Association currently represents the interests of around 450 members.

Our understanding is that the Consultation is in respect of the judicial or "party-party" expenses that are recoverable by a successful party from his or her opponent. These are distinct from the fees that a solicitor may reasonably charge his or her own client (agent-client expenses).

The Consultation asks whether the judicial fees are proportionate, could better reflect the work undertaken and reflect changes in practice.

As regards the first question, party-party expenses are generally never sufficient to cover agent-client expenses. There is nothing new about this shortfall, but the discrepancy is a feature of litigation that can lead to a perception by clients that they have been overcharged; a successful litigant may question why he is still out of pocket when it comes to his own lawyer's bill. So the sum recoverable through party-party expenses has to avoid lagging too far behind agent-client remuneration. We think that, on the whole, there is no serious disproportionality. But, there have to be realistic increases to take account of inflation. So there ought to be increases across the board to take account of that.

In addition, our research suggests that there may be a more significant disproportionality in relation to commercial actions.

As regards reflecting work undertaken, we think that the main factor that determines fees is the time reasonably spent. Reasonableness can be influenced by the responsibility and risk involved (eg it is worth spending more time in preparing to defend a summary decree motion in a £600,000 claim

than one for £6000). In respect of reflecting practice we do not see any great need to change the rules or add to them.

The Consultation asks about general modification. We assume that that question concerns the stage after that at which the sheriff or judge has been asked to modify expenses.

In principle it is sensible to include a modification provision in the Regulations and Tables of Fees. But we feel that it would be largely academic. This is because in our experience, the majority of disputed accounts of expenses are resolved not by the auditor (let alone by the sheriff hearing objections to the auditor's decisions) but by settlement. This is commendable in many ways, but the downside is that there is little or no authority on the interpretation of the Tables of fees. A good example of this (see later) is the extent to which the solicitor can charge for precognosing his own client; the tables just leave the matter open. Some of the block fee headings, eg. **Copying** refer to the auditor's assessment of what would be reasonable, but the reality is that the auditor is unlikely to even see an account**.**

We do have some observations to make about the specific Tables of Fees. Our membership practises principally in the sheriff court and we focus on that court.

We recognise that because a solicitor's work is different in the three civil courts concerned, particularly as between the Court of Session and the other two, it is impossible to avoid having distinct and different methods and systems for quantifying reasonable fees for the work undertaken by solicitors there. To take an obvious example, the first of the following Acts of Sederunt does not include an Adjustment fee for the simple reason that only counsel or solicitor-advocates may adjust pleadings there,

There are three bases for these party-party expenses.

1; **In the Court of Session**; the Act of Sederunt (Rules of the Court of Session) 1994 (Statutory Instrument 1994 No. 1443) Chapter 42.

In Part VI (Inner House Business) we would take issue with the heading **Appeals from inferior courts**, preferring the term "other courts" or, at worst "lower courts". The description of the sheriff and Sheriff Appeal Courts as inferior is, it is suggested, needlessly derogatory. Further, it is questionable

whether the Sheriff Appeal Court, whose decisions are binding on all sheriffs is inferior to the Outer House, whose decisions are not.

Our only other comment would be in relation to precognitions, and this is developed in our response later in relation to the Sheriff Court.

2; **In the Sheriff Appeal Court**; the Act of Sederunt (Fees of Solicitors in the Sheriff Appeal Court) 2015 (Scottish Statutory Instrument 2015 No. 387)

The structure of this table is that there are two schedules;

Schedule 1, which is headed "Detailed Fees" and Schedule 2, which is headed "Inclusive Fees" and which is divided into three parts.

Part 3 covers appeals from Summary Causes, Small Claims and Simple Procedure cases. We consider that the fees are very low indeed. Preparing for a hearing attracts a fee of just £156, the same as for enrolling a motion to amend in the Ordinary Court. The **Motions and minutes** fee is the same as in the Ordinary Court. The £39 per quarter hour fee is the same as for conducting a proof or debate in the Ordinary Court. Although this part of Schedule 2 concerns claims worth no more than £5000 they include housing cases, consumer credit disputes and other potentially complex and important cases. Decisions made by the court are binding throughout Scotland, and may relate to important points of law. The responsibility involved in appeals here is not properly reflected in the fees, we feel.

3; **In the Sheriff Court**; the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (Statutory Instrument 1993 No. 3080)

This is structured so that there is a set of General Regulations followed by 4 Chapters. These are as following;

Chapter I, which comprises "inclusive" ie block fees, and applies to undefended Ordinary Causes. Part II covers actions of divorce and separation and aliment. Part I covers everything else.

Chapter II, which applies to defended Ordinary Causes. It also consists of inclusive fees and is divided into two parts;

Part IIA; Personal Injury Actions proceeding under Chapter 36AI of the Ordinary Cause Rules.

Part II; All other Ordinary Actions

(There is no Part I)

Chapter III; this is of general application in relation to all Ordinary Actions, defended or undefended. It does not comprise inclusive fees. Instead, it is headed "Charges for Time, Drawing of papers, Correspondence etc" and is an itemised or detailed method of charging known as "time and line". Summary applications are chargeable under this chapter; General Regulation 4.

Chapter IV applies to Summary Causes; this applies to all summary causes unless the court otherwise directs (General Regulation 3)

General Regulation 7 states that, unless otherwise provided in the General Regulations, a solicitor may charge either under the block fees of Chapters I and II or the detailed fees of Chapter III.

We would make the following comments;

1) Parts I and II of Chapters I are structured in such a way that there is no clear provision for charging divorce actions which proceed to an undefended proof. These are rare but by no means unknown. One of our members undertook one in Edinburgh Sheriff Court this week.

2) The **Work before action commences** heading is capped at £624 in most types of Ordinary Action. This equates to about three hours' work (on an agent-client basis). That may be a completely inadequate amount of time to try to investigate a dispute, consider evidence, funding etc and to take steps to avert litigation. We do not think that this figure should be restricted to so low a maximum.

3) There is ambiguity over the interaction of the headings **Precognitions and reports** and other headings such as **Work Before action commences**, **Instruction** and **Adjustment**. In particular; it is permissible to recover a fee for precognosing one's own client in addition to charging under these other headings, or do they include precognosing the client? We have seen many accounts where there can be half a dozen precognitions of the client, and some of these can extend to many pages. For example the client can be re-precognosed after the other party has adjusted or lodged productions. They can produce a significant enhancement of an account. They are chargeable at £78 per sheet. In a recent personal injury case the Pursuer's agent included 5 precognitions

(totalling 15 sheets) of the Pursuer himself; this equates, with a 10% **Process Fee** and then VAT to a sum of over £1500. That dwarfs any of the block fees in the Table.

4) **Productions**; these are chargeable on the simplest basis imaginable; £78 each. This takes no account of the number or volume of productions within the inventory. This ought instead to be factored into the charge.

5) In our experience there is usually much more work involved in preparing for a **Debate** than for an **Options Hearing**, but the fees allowed are not hugely different, ie £312 and £273 respectively. We suggest that the figures should be more in the region of £400 and £185 respectively. We feel that the fee of £273 should remain in respect of Child Welfare Hearings.

The Glasgow Bar Association

17th November 2017