

COURTS REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Courts Reform (Scotland) Bill introduced in the Scottish Parliament on 6 February 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 46–EN.

POLICY OBJECTIVES OF THE BILL

2. The policy objective of the Bill is to address the problems identified in the Scottish Civil Courts Review¹ headed by Lord Gill, then Lord Justice Clerk, and now Lord President of the Court of Session. The Review concluded that the Scottish civil courts provide a service to the public that is “slow, inefficient and expensive”. It went on to say that “minor modifications to the status quo are no longer an option. The court system has to be reformed both structurally and functionally”.

3. The review made 206 recommendations for change. The Scottish Government has accepted the majority of these recommendations. Many of the recommendations of the Review will be implemented by court rules made by act of sederunt as they concern matters which either do not require primary legislation or are more appropriate for setting out in court rules as they concern the day to day routine workings of the courts. The Bill seeks to establish the framework for the civil courts in Scotland recommended by the Review, within which the detailed arrangements may be made by court rules.

BACKGROUND

4. The proposals and reforms set out in this Bill are part of the wider Making Justice Work Programme that the Scottish Government is working on in partnership with the Scottish Courts Service, the Scottish Legal Aid Board, the Crown Office and Procurator Fiscal Service, the Scottish Tribunals Service and others. This programme brings together a number of workstreams to secure high quality, affordable and accessible justice for people in Scotland. This includes improving support for victims and witnesses of crime, and changes to the system for criminal prosecution. Reform of the civil courts forms part of Making Justice Work Project 1 (Delivering efficient and effective court structures).

¹ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

The Civil Justice System in Scotland – a case for review?

5. In November 2005, the Civil Justice Advisory Group, formed under the auspices of the Scottish Consumer Council (later Consumer Focus Scotland), and meeting under the chairmanship of Lord Coulsfield, recommended that there was a need for a review of the civil justice system in Scotland.² The Group identified the following aspects of the system as requiring to be included in a Review:

- The problem of disproportionate costs, particularly in regard to cases of relatively low financial value
- The relationship between civil and criminal business and its impact on the organisation and administration of the courts
- Whether there was a need for specialisation among courts or judges and the manner in which specialisation might be organised
- Whether the conduct of court business could be improved by increasing the role of courts in case management
- The way in which lawyers' remuneration is assessed and particularly its impact on the costs recoverable in litigation
- Whether enforcement of court judgements can or should be left to the parties or whether there should be some public role in ensuring that judgements are observed.

6. The first four of these issues were subsequently considered in the Scottish Civil Courts Review led by Lord Gill. The costs recoverable in litigation has been considered by the Review of the Expenses and Funding of Civil Litigation in Scotland³ led by Sheriff Principal James Taylor and which reported in September 2013. The last was taken forward at least to some extent in regard to the relationship between debtors and creditors by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

7. A final report of the Civil Justice Advisory Group was published in January 2011.⁴

Scottish Civil Courts Review

8. In February 2007, the then Minister for Justice, Cathy Jamieson MSP, announced that a major review of the civil courts in Scotland was required and appointed the then Lord Justice Clerk, Lord Gill, now Lord President of the Court of Session, to lead that review.

9. The remit of the Review was as follows:

²“The Civil Justice System in Scotland – a case for review? The final report of the Civil Justice Advisory Group” <http://webarchive.nationalarchives.gov.uk/20090724135150/http://scotcons.demonweb.co.uk/accessjustice/document/rp11civil.pdf>

³ <http://www.scottishciviljusticecouncil.gov.uk/nav/news/2013/09/11/sheriff-principal-taylor's-review-of-expenses-and-funding-of-civil-litigation-in-scotland>

⁴ “Ensuring Effective Access to appropriate and affordable dispute resolution: The final report of the Civil Justice Advisory Group” <http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

“To review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to

- The cost of litigation to parties and the public purse;
- The role of mediation and other methods of dispute resolution in relation to the court process;
- The development of modern methods of communication and case management; and
- The issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts;

and to report within 2 years, making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised”.

10. The Scottish Civil Courts Review was published in September 2009⁵. All 206 recommendations of the Review were unanimously agreed by all of the members of the Review Board. Some of the recommendations have already been implemented, such as the establishment of a Scottish Civil Justice Council (SCJC), which was created by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The new Council was created in advance of implementation of the remaining recommendations which require primary legislation, because the Bill is intended to provide a framework for the civil justice system in Scotland, but much of the detail will be provided in new rules of court set out in acts of sederunt made by the Court of Session. The establishment of the new Council in 2013, with the appointment of members, the setting up of subject specific committees and the formation of working practices, means that it now stands ready to draft and recommend the necessary rules of court to the Lord President as soon as the Bill is enacted.

SCOTTISH GOVERNMENT CONSULTATION (GENERAL)

11. Three events were held in the summer of 2012 for stakeholders to discuss the various proposals in the Scottish Civil Courts Review. One of these events related to the proposed change to the exclusive competence of the sheriff court, another the criminal aspects of the Bill (including the proposed criminal competence of summary sheriffs and the Sheriff Appeal Court) and another on the impact on family law cases. A further three events were held in the summer of 2013 as part of the consultation process, one in Edinburgh on the family and children’s aspects of the Bill, one in Glasgow on the Bill more generally and another general event in Aberdeen.

12. These events were attended by representatives from law firms, the Law Society of Scotland, the Faculty of Advocates, the judiciary, consumer groups, advice and advocacy groups and insurance companies.

⁵ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

13. There have also been a number of meetings throughout this process between officials and key stakeholders including a number of legal firms of varying sizes, the judiciary including the sheriffs principal and the Sheriffs' Association, consumer groups including the now defunct Consumer Focus Scotland, Which?, Citizens' Advice Scotland, Money Advice Scotland, the Scottish Mediation Network, Scottish Arbitration Centre, the Law Society of Scotland, the Faculty of Advocates, the STUC (with its legal advisers Thompsons, Solicitors) and the Forum of Scottish Claims Managers.

14. On 27 February 2013 the Scottish Government published a consultation paper "Making Justice Work – Courts Reform (Scotland) Bill – a Consultation Paper"⁶. The consultation sought views on a draft Bill produced with Explanatory Notes. The document noted that the case for reform of the civil courts was already well established through the 2007 findings of the Civil Justice Advisory Group led by Lord Coulsfield and the 2009 Scottish Civil Courts Review led by Lord Gill. It invited views on proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. It explained that the proposals were intended to provide the legal framework for implementing the majority of the recommendations of the Scottish Civil Courts Review.

15. A total of 115 responses were received, 16 from individuals and 99 from organisations. On 27 June 2013 the Scottish Government published the non-confidential consultation responses and on 13 September 2013 it published an independent analysis by Why Research⁷. The analysis showed that there was very clear majority support for almost all proposals and concepts detailed in the consultation.

16. Amendments were made to the Bill as a result of consultation to extend the competence of the new summary sheriffs so that the whole of a case could be heard by either a summary sheriff or a sheriff and the possibility that some parts of proceedings are heard before a summary sheriff and some before a sheriff would be avoided. This was on the basis that many procedures were felt to be straightforward.

17. The Bill was also amended, as a result of consultation, to include an order making power in relation to expenses in simple procedure.

18. The provisions of the Bill were also extended after consultation in relation to the criminal competence of the summary sheriff and summary criminal appeals to the Sheriff Appeal Court, as it had not been possible in the time available to fully cover this in the consultation print of the Bill.

⁶ <http://www.scotland.gov.uk/Publications/2013/02/5302>

⁷ Courts Reform (Scotland) Bill – Analysis of consultation responses
<http://www.scotland.gov.uk/Publications/2013/09/8038>

19. A subsequent consultation on the treatment of civil appeals from the Court of Session was held from 31 May 2013 to 23 August 2013.⁸ 12 responses were received and two thirds of respondents favoured the proposed change.

20. Across both consultations there was a good range of responses from the judiciary, the legal profession, consumer and advocacy bodies, and public bodies.

21. Agencies who will be key to the implementation of the reforms have been kept involved in the developing proposals through regular meetings of the Making Justice Work Programme Board and the Making Justice Work Project 1 Board (Delivering efficient and effective court structures). The members of the MJW boards include representatives from the Scottish Court Service, the Scottish Legal Aid Board, the Crown Office and Procurator Fiscal Service, the Scottish Tribunals Service and the Judicial Office for Scotland, which supports the Lord President in his role as head of the Scottish judiciary.

22. A number of stakeholder workshops took place in 2012 on the exclusive competence of the sheriff court, criminal cases and family cases. They were well attended by the legal profession. Over 100 people attended three stakeholder events in Aberdeen, Edinburgh and Glasgow in April and May 2013, including family lawyers, personal injury lawyers, family stakeholder groups, consumer groups, insurers, the judiciary, the Faculty of Advocates, the Law Society, the Scottish Legal Aid Board, the Crown Office and Procurator Fiscal Service, the Scottish Court Service and local councils. The event in Edinburgh was specifically for family law stakeholders to discuss issues of interest to them.

SECTION 104 ORDER

23. In general the Bill is regarded as relating to the devolved matter of civil court procedure and Scots private and criminal law. Although the provisions of the Bill will have an impact on reserved matters in relation to court procedure, the provisions are general in nature and the reforms to court procedure apply across all subject areas.

24. The Government has, however, identified a few areas where an order under section 104 of the Scotland Act 1998 will be required to fully achieve the objectives of the Bill in relation to reserved matters.

- Provision to ensure that the rule making powers of the Court of Session in sections 96 to 99 can continue to be used to make bespoke provision in relation to reserved areas;
- Technical amendments to UK tribunal legislation in consequence of the new judicial review procedure in section 85 of the Bill:
 - to provide for the “second appeals test” to apply at the permission stage of judicial reviews of unappealable decisions of the UK Upper Tribunal in Scotland in the same way as it does for unappealable decisions of the Upper Tribunal for

⁸ Courts Reform (Scotland) Bill – consultation on the treatment of civil appeals from the Court of Session
<http://www.scotland.gov.uk/Publications/2013/05/6753>

Scotland under the new section 27B(3) of the Court of Session Act 1988 (as inserted by section 85 of the Bill);

- to provide for the permission stage to be dealt with by the UK Upper Tribunal where a petition is remitted from the Court of Session to the UK Upper Tribunal – in the same way as will happen if a petition is remitted from the Court of Session to the Upper Tribunal for Scotland under section 52A of the Tribunals (Scotland) Bill (presently before the Parliament) – inserted by paragraph 24 of schedule 4 to the Bill;
- Provision in consequence of the SCS and STS merger to provide for the administration of the reserved Pensions Appeal Tribunal to be dealt with by the SCTS;
- Provision to ensure that a specialist sheriff may be designated in a reserved area or give one sheriff court all-Scotland jurisdiction in a reserved area. As the court will be able to make specific rules for reserved matters it would seem strange that either of these options would not be available.

25. The Scottish Government is still engaging with the UK Government on some other aspects of the Bill and it is possible that one or two other minor section 104 proposals could emerge from those discussions.

ALTERNATIVE APPROACHES

26. An alternative approach would have been to retain the status quo and not implement the recommendations of the Scottish Civil Courts Review. However, such an approach would mean that the current state of the Scottish civil courts, which Lord Gill described as “slow, inefficient and expensive” would remain.

27. Lord Gill commented in the Scottish Civil Courts Review that the proposals of the Review “should not be seen as a series of good ideas, the easiest and cheapest of which can be cherry-picked for the purposes of legislation. That course would simply perpetuate the *ad hoc* approach that has obstructed true progress in civil justice for so long.” He went on to suggest that the proposals should be taken forward as “an integrated solution to our present problems”. The Scottish Government agrees that to take forward the Review’s recommendations on a piecemeal, *ad hoc* basis would risk the leap of true progress envisaged in the Review. The Scottish Government was persuaded of the benefits of implementing the recommendations as a package.

28. This Policy Memorandum sets out in more detail how the Scottish Government proposes to specifically implement the recommendations and any alternative approaches considered where this is not part of the overall package recommended by the Review.

PART 1 OF THE BILL

SHERIFF COURTS

Policy objectives

29. The provisions in Part 1 of the Bill are principally designed to give effect to those recommendations of the Scottish Civil Courts Review which relate to the sheriff court. The principal changes included in this Part involve:

- The increase in the privative jurisdiction, now to be called the exclusive competence, of the sheriff court from £5,000 to £150,000;
- The creation of a new judicial office in the sheriff court to be known as the summary sheriff with concurrent jurisdiction with sheriffs but in a more restricted range of both civil and criminal matters; and
- The ability for Scottish Ministers to confer an all-Scotland jurisdiction on a sheriff in a specified sheriffdom sitting at a specified sheriff court for the purposes of dealing with specified types of civil proceedings.

30. It was recognised at an early stage that the introduction of such fundamental changes by way of amendment to the Sheriff Courts (Scotland) Acts of 1907 and 1971 would almost inevitably result in a very unsatisfactory and fractured product which would be very difficult for legal practitioners and others. The opportunity has therefore been taken to reproduce the relevant provisions which will now sit together in this single Part of the Bill, though changes have been made to many of the provisions which are being re-enacted.

Chapter 1

Sheriffdoms, sheriff court districts and sheriff courts

31. The policy objective is to retain the existing structure of sheriff courts in Scotland. The Scottish Government has accepted the view of the Scottish Civil Courts Review that there is merit in continuing to manage the business of the sheriff court on a regional basis with the administration of the business being directed by sheriffs principal. Although the Review declared that there should be no artificial barriers which inhibit the efficient allocation of business between sheriff courts within the same sheriffdom or between sheriffdoms, it specifically rejected the idea of a national sheriff court or that sheriffs should have an all-Scotland jurisdiction and the Government agrees.

32. It is accepted that it may in the future become necessary to amend the boundaries of sheriffdoms or sheriff court districts because of changes of circumstances or policy and the Bill provides for this possibility. The policy of the Bill is that the Scottish Ministers may, by order:

- alter the boundaries of sheriffdoms and sheriff court districts;
- abolish sheriffdoms and sheriff court districts;
- amalgamate sheriffdoms and sheriff court districts;
- form new sheriffdoms and sheriff court districts; and

- provide that sheriff courts are to be held, or are to cease to be held, at any place.

Chapter 2

Judiciary of the sheriffdoms

33. The policy objective is to replicate the provisions in the Sheriff Courts (Scotland) Act 1971 setting out the judiciary who sit in the sheriff courts of Scotland and to implement the Scottish Civil Courts Review by providing for the introduction of summary sheriffs who will also sit in the sheriff court (see below). Chapter 2, therefore, provides a statutory basis for the offices of sheriff principal, sheriff, temporary sheriff principal and part-time sheriff, as well as establishing the offices of summary sheriff and part-time summary sheriff. Provision is also replicated for the re-appointment of part-time judicial officers, the re-employment of retired sheriffs principal, sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs and the abolition of honorary sheriffs. So far as the reappointment of part-time judicial officers is concerned, this covers part-time sheriffs and part-time summary sheriffs after the expiry of their five year appointments.

34. Although it is possible that the requirement for part-time judicial resource may lessen after sufficient numbers of summary sheriffs are appointed, the Government believes that there will continue to be a need for part-time sheriffs and part-time summary sheriffs for the foreseeable future. It is possible in the future that there may be more salaried judicial officers who work part-time (rather than working on a daily, fee paid basis). It is expected that this will provide a great deal more flexibility in the system and will greatly assist the desired goal of having a much more diverse judiciary in Scotland.

Summary sheriffs

35. The policy objective of the Bill is to ensure that cases are heard at an appropriate level in the court structure – the right cases in the right courts. This is essential so that the system, as a public service, is arranged so that needless delay and unreasonable cost are eliminated so far as possible. Most legal jurisdictions have three judicial tiers, but Scotland has traditionally only had two for civil cases, the Court of Session and the sheriff court. The Scottish Civil Courts Review concluded that too many straightforward or low value cases are being considered too high up the system by judicial officers who are over-qualified to deal with them. Those judicial officers should be hearing more complex cases which are currently being held up by straightforward or low value cases. It is accepted that low value cases, or those that may appear straightforward, can give rise to a complex or novel point of law, but this can be catered for by having a system for remitting such cases to a higher court.

36. The policy of the Bill is that this anomaly should be addressed in two ways. First, this will be done by a major transfer of litigation from the Court of Session to the sheriff court by means of a significant increase in the limit of the exclusive competence of the sheriff court (see Chapter 4 of Part 1), and second, by the creation of the office of summary sheriff to deal with a large part of the business of the sheriff court. The Scottish Civil Courts Review took the view that “The self-evident need is to ensure that cases are directed to the lowest level at which they can be competently dealt with”.

37. Although the intention is that cases should be dealt with at an appropriate level in the court hierarchy, which means that some cases will be heard in a lower court, this does not mean that the quality of justice will be lowered. All judicial officers at whichever level of the system will be fully qualified lawyers with suitable experience, recommended for appointment by the Judicial Appointments Board for Scotland and trained as required by the Judicial Institute for Scotland. It is likely, however, that if cases are dealt with at a lower tier, the cost to consumers of legal services will be lower, or parties are more likely to be able to represent themselves, particularly in the proposed new third tier within the sheriff court where it is envisaged that new simplified procedures will be adopted and the judge will adopt an investigative, inquisitorial or problem-solving role (see sections 70-79).

38. It can be argued that the present sheriff court system provides maximum flexibility in drawing up the court programme and is very efficient since the sheriff can do any type of work, civil or criminal. But the counter-argument is that the sheriff is vastly over-qualified to preside over minor criminal offences or low value debt collection work and the current arrangements do not make best use of highly paid and experienced practitioners who can deal with complex civil claims or serious crime. In most other jurisdictions, minor criminal offences and small claims are heard by a separate court or tribunal or by a more junior judge than a sheriff. The Scottish Civil Courts Review suggested that summary criminal business “could easily be done by a more junior judge than a sheriff, leaving sheriffs to concentrate on more serious crimes”. The same principle applies with equal force in civil matters, where it seems a misuse of resource to have a highly qualified and highly paid sheriff, who is capable of deciding complex civil cases, dealing with small claims or even the arrangements for the repayment of debt by instalments.

39. In pursuance of the broad policy that cases should be dealt with at the appropriate level in the court hierarchy, the Bill provides for the appointment of summary sheriffs and part-time summary sheriffs, who will sit in the sheriff court and will hear summary criminal business (and the initial stages of solemn cases) and civil claims of a modest value. The civil and criminal competence of the summary sheriff are set out in sections 43 and 44 of the Bill and schedule 1.

40. Although the Scottish Civil Courts Review suggested that the new judicial officers should be called “district judges”, the Scottish Government has suggested instead that they be called “summary sheriffs”. This is because the Review of Summary Justice⁹ under the chairmanship of Sheriff Principal McInnes recommended the introduction of “summary sheriffs” and the Government believes that the name reflects at least part of the intended jurisdiction of the new judicial officers, including summary criminal cases and civil cases which were dealt with under summary cause procedure (as well as small claims). The Government invited suggestions at consultation for alternative names for the new third tier of judiciary, but no better alternative was suggested.

41. The deployment of the judiciary is a matter for the Lord President and the sheriffs principal, and not the Scottish Government. The Scottish Court Service (SCS) is now an independent corporate body under the Judiciary and Courts (Scotland) Act 2008 whose board is chaired by the Lord President. SCS, in its response to its consultation “Shaping Scotland’s Court Services” has indicated that, as the body of summary sheriffs becomes established, the 16

⁹ Report of the Summary Justice Review Committee <http://www.scotland.gov.uk/Publications/2004/03/19042/34176>

mainland¹⁰ and four island sheriff courts identified as future sheriff and jury centres for criminal business will also become centres of shrieval specialisation for civil business, with the remaining sheriff courts dealing principally with business within the jurisdiction of the new summary sheriffs.

Honorary sheriffs

42. The policy of the Bill is abolish the position of honorary sheriffs. Honorary sheriffs are used in some courts to perform urgent shrieval functions (such as a custody court) in the absence (or possibly illness) of the resident sheriff, particularly in rural, remote and island courts. There are currently around 300 honorary sheriffs in Scotland, though many of them rarely sit on the bench. They are unpaid.

43. At present, honorary sheriffs have the same powers and competence of a “full” sheriff, even though there is no necessity for them to be legally qualified. Many are former sheriffs or solicitors, but some are not.

44. The use of honorary sheriffs was criticised in some consultation responses and their abolition was supported by some stakeholders, including Scottish Women’s Aid. It is considered that the need for honorary sheriffs will reduce, and then disappear completely, due to the advent of the new summary sheriffs and also as a result of the greater use of technology such as video links to remote locations. It is also desirable that Scotland should have a fully professional, legally qualified judiciary. Abolition will, however, be delayed until alternative judicial arrangements are put in place and this may take some time as it is envisaged that summary sheriffs will be introduced gradually. It should be possible to extend video links to a greater number of remote and rural courts more quickly.

Qualification and disqualification

45. The policy on qualification is to retain the approach in section 5 of the 1971 Act. It will be the same for all of the judicial offices in the sheriff court, including the new offices of summary sheriff and part-time summary sheriff – either the appointee must have held another judicial office or, on appointment, have been legally qualified for the previous ten years. This is to address concerns that the new offices will in any way be a downgrading of justice. It is expected that the summary sheriffs and part-time summary sheriffs will be recruited from the ranks of practitioners who have experience and expertise in the kinds of cases which will form the competence of summary sheriffs.

46. The introduction of summary sheriffs will bring proportionality to the system, and will permit sheriffs to concentrate on more complex casework and also greater specialisation at that level in the sheriff court. This means having the right people with the right level of experience and expertise in the right posts.

47. The policy is to continue the existing prohibition in the 1971 Act on sheriffs principal, sheriffs and now summary sheriffs from engaging in any other business which might

¹⁰ Glasgow, Aberdeen, Inverness, Edinburgh, Livingston, Paisley, Dumbarton, Kilmarnock, Airdrie, Hamilton, Ayr, Dumfries, Perth, Dundee, Falkirk and Dunfermline.

compromise their impartiality when sitting on the bench. It is, however, accepted that those who are appointed as part-time sheriffs and part-time summary sheriffs will still carry on their normal occupation, be it solicitor, advocate or other business. It will after all have been their experience and expertise in that activity which led to their appointment as part-time sheriffs or part-time summary sheriffs. It would, however, clearly be inappropriate for part-time sheriffs and part-time summary sheriffs to sit on the bench in the sheriff court district in which their normal business is carried on. It is possible that some part-time sheriffs and part-time summary sheriffs may also sit as part-time tribunal judges as a means of increasing their judicial experience.

Remuneration and expenses

48. The Bill replicates the provisions of the 1907 Act in relation to the remuneration of sheriffs principal and sheriffs, and the 1971 Act in relation to part-time sheriffs, but provides for the first time for the remuneration of the new summary sheriffs and part-time summary sheriffs. Provision is also made for the remuneration of sheriffs principal, sheriffs and summary sheriffs acting in another sheriffdom.

49. The policy of section 17 is to consolidate and simplify the regime for the payment of expenses to judicial officers by the SCS. The policy remains that the Bill should provide for the reimbursement of expenses incurred, but that there should be no further provision for the payment of allowances; that the test should be whether the expenses had been reasonably incurred by the judicial officer in the performance of duties; the same rules should apply to all judicial officers in the sheriff court; and the reimbursement of expenses should be a function of SCS.

50. The use of the words “in connection with” the judicial officer’s duties are intended to put beyond doubt the vires for the payment of relocation expenses which are reasonably incurred by judicial officers in the sheriff court who are moving to different courts and different sheriffdoms. The Judicial Office for Scotland operates a framework set out in policy documents for shrieval transfers and relocation of judicial officers and which provide for a range of circumstances and levels of assistance. Relocation expenses are not normally paid in relation to first appointment or voluntary transfers under the arrangements in these documents, though they may be made in exceptional circumstances, but relocation expenses will normally be paid if a judicial officer is transferred compulsorily.

Leave

51. The policy of the Bill is to replicate the leave provisions of the 1971 Act for sheriffs principal and sheriffs. This is necessary because leave entitlement is not stated in the Commissions which sheriffs principal and sheriffs receive on appointment and SCS does not issue contracts. Apart from their Royal Warrant and Commission, the only other official notification is their letter of appointment which is issued by the Scottish Government and it is not appropriate for this to be the only place where leave entitlement is specified. The intention now is to provide also for the leave of summary sheriffs, temporary sheriffs principal and sheriffs and summary sheriffs who are allocated temporarily to another sheriffdom.

52. The Bill provides for the leave of temporary sheriffs principal since the period of temporary appointment might conceivably stretch to some months in cases of illness and arrangements should be in place to cater for those periods. As this possibility applies equally to the temporary reallocation of sheriffs or summary sheriffs, provision is necessary for them as well.

53. “Recreational” leave is limited as at present to seven weeks in the year. The Lord President alone will be able to permit additional leave for sheriffs principal, sheriffs and summary sheriffs if there are special reasons for exceeding the limit, since he or she will be able to take an overview of the circumstances in which all of the sheriffs principal, sheriffs or summary sheriffs might take excess leave.

Residence

54. The Bill replicates the position under the 1971 Act to permit the Lord President to require a judicial officer to have their usual residence at such place as the Lord President may specify. It is normally expected that judicial officers will live within reasonable travelling distance to the court or courts where that judicial officer sits. This should not be considered as simply a matter of physical proximity to the court and distance to travel. It is important that a judicial officer should be aware of local circumstances in the area where the court is situated and any special factors which may have a bearing on business. The list of judicial officers affected by this provision now includes, for the avoidance of doubt, a temporary sheriff principal.

55. This power does not apply to part-time or re-employed retired sheriffs. Under section 15(3), a part-time sheriff is not permitted to act in a sheriff court district in which his or her place of business is situated (which will usually be where they live), so it is necessary for them to travel to the court at which they are to sit. In the latter case, it would be unreasonable to require a retired sheriff who has been re-employed for a temporary period to live somewhere other than where they have retired to.

Cessation of appointment

56. The Bill lists the circumstances in which an appointment to a particular judicial office in the sheriff court comes to an end, and includes for the avoidance of doubt when the incumbent resigns or is promoted to another judicial office.

Fitness for office

57. The policy objective of sections 21 to 25 of the Bill is to replicate the provisions of the Sheriff Courts (Scotland) Act 1971 in relation to the constitution of a tribunal to investigate and report on whether an individual holding judicial office in the sheriff court is unfit to hold the office by reason of inability, neglect of duty or misbehaviour. The range of judicial offices to which the provisions apply is now expanded to include summary sheriffs and part-time summary sheriffs, as well as sheriffs principal, sheriffs and part-time sheriffs.

Chapter 3

Organisation of business

58. The policy of the Bill in sections 27 to 28 is to replicate the administrative responsibility of the sheriff principal set out under the 1971 Act for the efficient disposal of business in the sheriff courts of their sheriffdom. Sheriff principal will now be responsible for summary sheriffs and part-time summary sheriffs as well as the other judiciary of the sheriffdom and will, therefore, be responsible for the allocation of casework between sheriffs and summary sheriffs for those cases which fall within the concurrent competence of the sheriffs and summary sheriffs. The allocation of casework will depend to a large extent on how many summary sheriffs and part-time summary sheriffs are deployed in a particular sheriffdom. This duty on the sheriff principal remains subject to the Lord President's overall responsibility for the efficient disposal of business in the Scottish courts under the Judiciary and Courts (Scotland) Act 2008, and the Lord President's power to rescind the sheriff principal's exercise of the function and to exercise the power under section 29.

59. The provisions do not now permit the sheriff principal to prescribe the number of sessions, the maximum length of vacations, the number of courts during vacations, etc. as the courts now operate on an all year round basis.

Deployment of judiciary

60. The policy of the Bill in section 30 is to replicate the powers of the Lord President under the 1971 Act to authorise a sheriff principal to act in another sheriffdom on a temporary basis. The Lord President is empowered to re-allocate sheriff principal, sheriffs and summary sheriffs to act in another sheriffdom on a permanent basis (section 32) and to re-allocate sheriffs and summary sheriffs on a temporary basis (section 31). This is to permit the maximum flexibility in the deployment of the judiciary of the various sheriffdoms in order to ensure optimum efficiency. The Lord President is also required to designate the sheriff court district or districts in which the sheriff or summary sheriff is to sit (section 33).

61. The opportunity is being taken to give the Lord President power to re-allocate a sheriff principal to another sheriffdom on a permanent basis – this was only possible on a temporary basis before. Such a power might be desirable in the future if the number or size of sheriffdoms were to be altered or if it were to be decided to move sheriff principal for personal or developmental reasons.

62. Consideration was given to the proposal that a general power might be given to sheriff principal to instruct sheriffs to sit in any court within a sheriffdom. However, the Bill provides for an appropriate division of responsibility between the Lord President and the sheriff principal, designed to ensure consistent leadership of judicial personnel and effective management of court business, across the Scottish courts as a whole, with sufficient flexibility to address local issues and short-term difficulties. The appointment of sheriffs on a centralised basis is an essential element of the effective supervision of this tier of the judiciary. Balance is achieved by providing that any localised issue of an urgent nature can be dealt with effectively under section 27(3). The Government does not think in consequence that it would be appropriate to permit sheriff principal to instruct sheriffs to sit in any court in the sheriffdom.

63. Consideration was also given to the idea that sheriffs in Scotland should have “universal jurisdiction” – i.e. they should be able to sit in any court in Scotland. The Scottish Government is not attracted to this idea as it believes that the structure of sheriffdoms is the best one for the administrative organisation of the sheriff courts in Scotland which allows sheriffs principal and sheriffs to take account of local circumstances and needs. Furthermore, the Government believes that the provisions of the Bill allow sufficient flexibility to permit judicial resource to be allocated on a permanent or temporary basis as made necessary by the pressure of judicial business.

Judicial specialisation

64. The policy of the Bill is that there should be greater specialisation in the sheriff courts. A number of commentators have in recent years advocated the introduction of greater specialisation, particularly in the sheriff court. They have argued that specialisation improves the quality of civil justice and that judges who have no specialist knowledge in particular areas have to be taken through a greater number of legal authorities in the course of a hearing and take longer to issue their decisions. This does not help the parties to get appropriate decisions from the court or indeed the efficiency of the court. Specialisation brings decision-making of higher quality and greater consistency.

65. The arguments in favour of greater specialisation are:

- The law is becoming more complex and it is unreasonable to expect judges to be able to be expert in all its facets;
- There is greater specialisation among members of the legal profession from whom judges are drawn and it is increasingly difficult for lawyers to offer the same level of expertise across the board – if legal practitioners are no longer generalists, it is unreasonable and impractical to expect judges to have a full breadth of knowledge and experience;
- Specialist judges are more likely to identify key issues in particular cases more quickly so that time is saved in court and a greater level of understanding of the background to the dispute will facilitate an improved quality of justice;
- Greater specialisation will give an opportunity to enhance the reputation of Scotland’s civil courts.

66. The work of the Civil Justice Advisory Group drew specific attention to the “need for specialisation among courts or judges and the manner in which such specialisation might be organised”. The Scottish Civil Courts Review considered the need for specialisation in relation to both the Court of Session and the sheriff court and came to different conclusions for each. The Scottish Government agrees with the view of the Review that Outer House judges benefit from a broader judicial experience and that further specialisation would not be appropriate in the Court of Session, though there was considerable support for retaining the Commercial Court.

67. The Review identified a “powerful demand” for greater specialisation in the sheriff court, however, and this view was reflected in the Scottish Government’s consultation. Some consultees linked a need for greater specialisation with the transfer of business out of the Court of Session to the sheriff court. Others noted that the operation of the commercial court in

Glasgow Sheriff Court suggested that active case management goes hand-in-hand with greater specialisation.

68. The policy is, therefore, to permit the Lord President to designate categories of specialisation. It is more appropriate for the Lord President to do this than Ministers since the Lord President will be able to judge, in consultation with the sheriffs principal, which cases will benefit from specialist judiciary and the demand in the various categories of cases. It is anticipated that the categories of designation may include personal injury, family and commercial. Other areas of specialisation may be desirable depending on the specific circumstances and requirements of particular sheriffdoms.

69. The Bill permits both sheriffs and summary sheriffs to be designated as specialist judiciary. Although it will be some time before there are very many summary sheriffs in post, it is envisaged that eventually summary sheriffs will also be capable of being designated in specialist categories, particularly as they will be recruited from the ranks of practitioners with experience and expertise in the kinds of casework which will form the competence of summary sheriffs.

70. It will be for sheriffs principal to designate sheriffs or summary sheriffs within their sheriffdoms and this power will be permissive, which will allow greater flexibility. Even if the Lord President designates a category of specialisation, the sheriffs principal will not be obliged, under section 35 of the Bill, to designate one or more sheriffs or summary sheriffs within their sheriffdom to deal with those cases. It is accepted that in some areas there will not be enough cases falling within certain specialist categories to justify the designation of one sheriff to deal with those cases. It is, however, expected that there will be a specialist sheriff in the categories of personal injury and family cases in all sheriffdoms.

71. It will be for the sheriffs principal to allocate casework between the sheriffs and the summary sheriffs within their sheriffdom. The designated judiciary may specialise in more than one category of specialisation.

72. It will, however, still be possible for cases within the designated categories to be dealt with by non-specialist sheriffs as it is inevitable that sometimes a specialist sheriff will not be available in certain locations. Sheriffs who have been designated to deal with one or other of the specialist categories will also still be able to deal with other casework.

73. Specialisation among sheriffs will have specific practical and financial implications for the SCS. Specialist courts will have to be accommodated in the timetabling of the courts in a sheriffdom and judicial posts may have to be relocated. It is anticipated that specialist courts are most likely to be located at the 16 mainland sheriff courts identified by SCS as future sheriff and jury centres of shrieval specialisation for civil business.

74. It will clearly not be possible to have designated specialist sheriffs or summary sheriffs in every sheriff court in rural areas and in small towns, where current service forms and standards of local delivery already differ from those in urban regions of central Scotland. The Scottish Government believes that an analogy may be drawn with the National Health Service, where patients have long been used to travelling to access specialist treatment. In the future, it is

anticipated that parties will have the option of raising an action which falls within one of the categories of specialisation designated by the Lord President either in their local sheriff court or at a centre of specialisation.

75. The Government anticipates that, when a vacancy arises in a sheriffdom, the sheriff principal should be required to assess what skills the person who will fill the vacancy should have, taking into account the specialist knowledge of the other sheriffs in the sheriffdom, and inform the Judicial Office which will then approach the Judicial Appointments Board for Scotland which would then be required to select a candidate who matches the required skills.

76. The move to greater specialisation will, therefore, have significant implications for shrieval appointments, but also for training. The process of judicial appointments will have to take sufficient account of the breadth of specialist skills required in each sheriffdom. The necessary judicial training programmes will be for the Lord President to determine, with the advice and support of the Judicial Institute for Scotland.

Chapter 4

77. The policy is to replicate the provisions of the Sheriff Courts (Scotland) Acts 1907 and 1971 in relation to the competence and jurisdiction of that court. The Bill substantially raises the exclusive competence of the sheriff court. It also provides for the competence and jurisdiction of the summary sheriff who will have a restricted competence within the sheriff court.

Competence and jurisdiction of sheriff

78. The civil jurisdiction of sheriffs, rather than the sheriff court, is set out in section 38 which is a restatement of the existing competence with the addition of actions for proving the tenor of documents and reduction.

Exclusive competence

79. The raising of the privative jurisdiction, now to be called the exclusive competence, of the sheriff court from £5,000 to £150,000 is in many ways the critical reform recommended by the Scottish Civil Courts Review and now to be provided for in the Bill. As noted above, the policy objective of the Bill is to ensure that cases are heard at an appropriate level in the court structure – the right cases in the right courts. Too many straightforward, low value cases are being considered too high up the system by judicial officers who are over-qualified to deal with them. Those judicial officers should be hearing more complex cases which are currently being held up by straightforward, low value cases. Part of this problem will be addressed by the introduction of summary sheriffs, and part by the introduction of the specialist personal injury court, but the main trigger is the raising of the exclusive competence of the sheriff court.

80. The Court of Session is currently flooded with low value claims because at present it is possible to raise an action in that court where a sum of more than £5000 is being sought. Many claims arising from relatively minor road traffic accidents are being raised in the Court of Session. 76% of the cases raised in the General Department of the Court of Session in 2011-12 were personal injury actions and a large proportion of these were for relatively small sums.

81. The main reason for the popularity of the Court of Session as a venue to litigate personal injury actions is Chapter 43 of the Rules of the Court of Session.¹¹ These are intended to promote early settlement of such cases and indeed the rules have proved so successful in this regard that some 98% of personal injury actions in the Court of Session now settle before proof (ie evidence taking) before a Lord Ordinary (which disposes of the argument that personal injury actions must go to the Court of Session so that they can benefit from the expertise of the judges in that court). Some 85 personal injury proofs are scheduled every week in the Court of Session but only a handful ever proceed, because they settle beforehand or at the door of the court, to the exclusion of other casework which might actually be more likely to proceed to proof. The consequence of this is that some court users are being discouraged from using the Court of Session because they believe that the Court is so crammed with personal injury actions that other business will be delayed sometimes for months until a proof date may be found.

82. Rules equivalent to the Chapter 43 Rules were introduced into the sheriff court in November 2009 and so the advantages of those rules in terms of the promotion of early settlement are now available in the sheriff court. It should be noted in this regard that 45% of personal injury actions in the sheriff court are currently dealt with by summary cause procedure.

83. The other main factor which suggests that too much low value casework is being dealt with in the Court of Session is disproportionate cost. As long ago as 2005, the Civil Justice Advisory Group chaired by Lord Coulsfield identified the problem of disproportionate costs (particularly in regard to cases of relatively low financial value). The Scottish Civil Courts Review agreed, and concluded that only the most complex and legally difficult cases should be heard in the Court of Session, whereas most routine litigation should be conducted in the sheriff court by sheriffs using enhanced case management powers. At present, the amount paid to the lawyers on both sides of a low value claim in the Court of Session almost invariably exceeds the settlement figure of a claim or the amount awarded by the Court.

84. The objective of ensuring that cases are dealt with at the appropriate level in the court hierarchy and at proportionate cost can only be achieved if there is a significant increase in the exclusive jurisdiction of the sheriff court, that is the financial limit below which cases can normally only be raised in the sheriff court and not the Court of Session. This will ensure that the resources of the court are used efficiently and that the cost of litigation is reduced for parties and the public purse. One practitioner told the Scottish Government that the average cost of raising a three-day proof in the Court of Session was £30,000-£40,000, whereas a three-day proof in the sheriff court will cost around £10,000. Actions where one party is suing another party for a sum of £150,000 or less will now have to be raised in the sheriff court. The raising of the exclusive competence goes hand in hand with the introduction of summary sheriffs and the establishment of a specialist personal injury court.

85. The Review pointed out, and the Scottish Government agreed, that if there were to be only a modest increase in this financial limit then the status quo would remain largely unchanged. Furthermore, a monetary threshold is open to abuse if parties can, without sanction, sue for a figure above the threshold even where this bears no relationship to the true value of the claim. For this reason the exclusive competence is pitched at a level which is significantly

¹¹ <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>

higher than its present level is to discourage claims being exaggerated simply to bring them within the competence of the Court of Session.

86. The Scottish Civil Courts Review estimated that, if the exclusive competence of the sheriff court were to be raised to £150,000, this would reduce the number of all actions initiated in the General Department of the Court of Session by 64% and the number of actions initiated in the Commercial Court of the Court of Session by around 26%. Apart from removing low value casework from the higher court, this will permit the Court of Session to return to its proper role of dealing with the most complex and important cases and the development of Scots law. The Scottish Government believes that the change will afford the Court – and counsel – an opportunity to adapt and diversify and to attract higher quality work to that Court.

87. With the introduction of better case management, the Court of Session should become a more efficient forum for dispute resolution and one which moreover offers the expertise of counsel who specialise in a variety of different areas of law. With the “churn” effect of low value business removed, it is hoped that higher quality work will be attracted to the Court of Session and the reputation of Scots law will be enhanced.

88. Statistics collated by the Government’s Analytical Services with the assistance of the SCS shows that 69% (2249) of cases would come out of the General Department of the Court of Session (Commercial (not Commercial Court), Ordinary and Personal Injury) if the exclusive jurisdiction is raised to £150,000. If Petition and other non-monetary value cases are included (which would remain in the Court of Session), it is actually only 47% of cases which will be transferred out of the Court. The vast majority of these will be personal injury actions and it is expected that the majority of these will in future be dealt with the new specialist personal injury court or courts.

89. It is accepted that there will occasionally be cases involving sums lower than £150,000 which will raise important points of law. *Donoghue v Stevenson*¹², arguably the most famous case in Scots law, began life in the sheriff court. For that reason, section 88 of the Bill provides that it will be possible for a sheriff at any stage to remit proceedings to the Court of Session if the sheriff concludes that there are exceptional circumstances which justify such a remit and the Court of Session allows the case to be remitted on special cause shown.

90. Some stakeholders have suggested that the exclusive competence of the sheriff court should be based on the actual value of a claim rather than the sum sued for. This might be possible if the claim were to be based on a sum clearly established in a contract between two parties, but in personal injury actions in particular, the Scottish Government wishes to avoid artificial and exaggerated inflation of the claim by pursuers. Claims are inflated on the basis that the eventual settlement figure or award is likely to be considerably less once expert evidence or contributory negligence is taken into account. The Government is unaware of any other jurisdiction where the actual value of the claim is used to determine jurisdiction limits, since this figure cannot be known for certain until the matters mentioned above are taken into account and produced in evidence exchanged between the parties.

¹² *Donoghue v Stevenson* [1932] UKHL 100

91. A great deal of the opposition expressed at consultation to the proposed raising of the exclusive competence of the sheriff court came from practitioners involved with personal injury claims, including the Faculty of Advocates and the Association of Personal Injury Lawyers. Many of these practitioners wish to raise personal injury actions as a matter of course in the Court of Session, while others are content to raise such actions in the sheriff court. Some practitioners in the west of Scotland in particular have expressed a desire to conduct more personal injury litigation in Glasgow before a specialist personal injury sheriff rather than in the Court of Session, on the grounds that a great deal of personal injury casework originates in that area. These practitioners feel that they have the expertise and the experience to conduct even catastrophic personal injury cases in the sheriff court before a specialist sheriff.

92. To raise an action in the Court of Session necessarily involves the employment of counsel, either an advocate who is a member of the Faculty of Advocates or a solicitor-advocate. Sanction for the use of counsel may also be granted for cases in the sheriff court. Sheriff Principal James Taylor, in his Review of the Expenses and Funding of Civil Litigation in Scotland, noted that “actions raised in the sheriff court are very often conducted by solicitors in a most efficient and competent manner. I do not accept the argument advanced by some respondents [to the Review’s consultation document] that, by definition, all personal injury claims are of such importance and value to the pursuer that counsel requires to be instructed in every case.”. He went on to state that “it would be disproportionate if sanction for the employment of counsel was automatically granted in such actions”.

93. Sheriff Principal Taylor went on to comment that “the decision as to which court should be the forum seems, on occasion, to be based not upon considerations of the particular case, but upon the business model of the firm of solicitors. The latter should not be a relevant factor in the decision to sanction the employment of counsel.”. Sheriff Principal Taylor’s Review recommended that the test currently applied in the sheriff court for granting sanction for counsel, namely, whether the employment of counsel is appropriate by reason of circumstances of difficulty or complexity, or the importance or value of the claim, should remain, with a test of reasonableness also being applied. He also considered that, when deciding a motion for sanction for counsel, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them. These are matters for the Scottish Civil Justice Council to consider and for the Court of Session to provide for in rules of court.

94. There has been criticism that the proposal to raise the exclusive competence of the sheriff court to £150,000 will deny people access to counsel since there is no automatic right to counsel in the sheriff court as there is in the Court of Session, and that this will mean that people will be denied access to justice. The Scottish Government does not, however, believe that its proposals will interfere with access to justice. Furthermore, as up to 98% of personal injury cases settle in the Court of Session, the advocacy skills in court of counsel are rarely being deployed in these cases. Experienced solicitors are likely to be equally capable of conducting negotiations leading to a settlement as counsel.

95. Parties will still be able to instruct counsel for cases in the sheriff court if they wish to do so. The issue is, however, whether it is appropriate that a successful party should be able to recover the higher fees charged by counsel from the unsuccessful party in all such cases. The Scottish Government believes that it is right that the most complex cases which are raised in the

sheriff court should benefit from the expertise of counsel, and that counsel's fees should be recoverable by a successful party in those cases. But it cannot be right that the costs of employing counsel are recoverable in all cases, including even low value or straightforward claims in the sheriff court.

96. In summary, it will continue to be possible for litigants to seek sanction for employment of counsel in individual cases to allow them to recover counsel's fees from the unsuccessful party and it will be for the sheriff to decide whether it was appropriate for counsel to be employed in the case, and accordingly for the fees to be recoverable.

97. The reforms proposed in the Bill are actually about making the system fairer for all those litigating and propose no changes to access to counsel. The aim is simply that cases should be dealt with at an appropriate court level.

Power to confer all-Scotland jurisdiction for specified cases

98. The Scottish Civil Courts Review argued that, although the reforms to procedure for personal injury actions introduced by Chapter 43 of the Rules of the Court of Session have been successful in promoting early settlement and reducing the amount of judicial time spent on personal injury actions in the Court of Session, the amount of judicial time spent on procedural business and the amount of administrative work involved in dealing with personal injury actions was considerable. Although relatively few proofs or jury trials proceed, the number that are scheduled but do not proceed reduces the capacity for non-personal injury business in the civil programme and increases the waiting times for such business which ironically may have a higher likelihood of proceeding to proof.

99. The Scottish Government accepts that there are economies and efficiencies of scale that accrue through centralising personal injury litigation in the Court of Session quite apart from the Chapter 43 procedure advantages. Practitioners acting for both pursuers and insurance companies consider that these economies would be lost if much of the personal injury litigation were to be dispersed throughout the sheriff court system when the exclusive competence of the sheriff court is raised. They claim that moving more personal injury cases to the sheriff court will make it uneconomic for the profession to provide the current level of service and access to the Court of Session that claimants currently enjoy.

100. The Review, therefore, recommended that, if most personal injury actions would no longer be competent in the Court of Session because of the proposed rise in the exclusive competence of the sheriff court, a specialist personal injury court with an all-Scotland jurisdiction should be established in Edinburgh Sheriff Court.

101. The Scottish Government has agreed that it is important for Scotland to retain a central court of expertise around which there is a professional cluster of expert practitioners and associated infrastructure and this will be an acceptable replacement for the current virtually unrestricted access to the Court of Session even for low value personal injury actions. This is particularly the case since rules equivalent to the Chapter 43 rules were introduced in the sheriff

court in November 2009¹³ and the Bill proposes to introduce civil jury trials in the new specialist personal injury court. The argument that personal injury cases must go to the Court of Session is therefore no longer sustainable.

102. The policy of the Bill is to permit the Scottish Ministers to provide by order that the jurisdiction of a sheriff in a specified sheriff court extends throughout Scotland for the purpose of dealing with specified types of civil proceedings. This would permit the establishment of a specialist personal injury court in Edinburgh Sheriff Court, but it would also allow a similar court to be established in Glasgow as many practitioners from the west have advocated, (citing the number of personal injury actions which originate in that area) or indeed any other sheriff court. It would also permit Ministers to establish specialist courts in other types of civil proceedings if it were thought in the future that there was a need to do so.

103. Injured parties who wish to raise personal injury actions in their local sheriff court will, however, be able to continue to do so and, with the advent of greater specialisation among sheriffs, this option would seem to hold attractions for those who do not wish to travel to Edinburgh. Such actions will be allocated to the designated personal injury sheriff in the sheriffdom in which they originate. It is important to remember that, of the 7846 personal injury cases raised in Scotland in 2011-12, over two-thirds were raised in the sheriff court and so it is expected that the majority of personal injury cases will continue to be heard in sheriff courts around Scotland. These proposals will, however, provide claimants with a choice between the central specialist court or a specialist sheriff in their local sheriff court.

104. It is estimated that, if all personal injury cases raised for less than £150,000 which were no longer to be competent in the Court of Session were to be heard in the specialist personal injury court and not before the designated personal injury sheriff in other sheriffdoms, two specialist sheriffs will be required to staff the new specialist personal injury court which will be a division of whichever sheriff court it is established in.

105. The proposal for a new specialist personal injury court goes hand in hand with the proposal to raise the exclusive competence of the sheriff court to £150,000. If the exclusive competence were not to be raised to the proposed level, then the justification for the specialised personal injury court would disappear.

106. The amended version of the Chapter 43 rules which was extended to actions raised in the sheriff court will apply to the specialist personal injury court.

Summary sheriffs: civil competence and jurisdiction

107. The rationale for the introduction of summary sheriffs is that they should undertake work in the sheriff court to relieve sheriffs of the burden of dealing with the more routine, low value civil cases and to thus permit sheriffs to be available for more complex casework. The Review suggested that the advent of summary sheriffs will help to promote the development of specialisation at shrieval level while maintaining, where practicable, the principle of access to local justice.

¹³[http://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-36---actions-of-damages-\(3\).doc?sfvrsn=14](http://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-36---actions-of-damages-(3).doc?sfvrsn=14)

108. It will be some considerable time before summary sheriffs are deployed widely (following recruitment and training), and in rural areas there may not be enough work for both a summary sheriff and a sheriff, so there may never be a summary sheriff deployed in some remote areas. All of the cases will remain with the resident sheriff in those areas. It is for these reasons that the policy is that summary sheriffs should have concurrent civil competence with sheriffs, but only insofar as they have competence. Their restricted competence is listed in schedule 1.

109. The Scottish Civil Courts Review recommended that summary sheriffs should have jurisdiction in the following areas: actions with a value of £5000 or less, housing actions, family actions and appeals and referrals from children's hearings. Following consultation, concurrent jurisdiction between sheriffs and summary sheriffs has been extended to adoption and permanence cases and all relevant provisions within the Children's Hearings (Scotland) Act 2011 relating to court procedures arising from the children's hearings system. This decision has been taken to address concerns that, unless summary sheriffs were given full concurrent competence in these areas with sheriffs, it would mean that although some procedures might be dealt with by a summary sheriff, some procedures would still have to be heard before a sheriff, leading to confusion among court users and inevitably greater expense to litigants and to the court system through duplication of proceedings.

110. By giving a wider concurrent competence, it will be possible for the whole of a case to be heard by either a summary sheriff or a sheriff and the possibility that some parts of proceedings are heard before a summary sheriff and some before a sheriff will be avoided.

111. Some cases may raise complex questions of fact or law, while others may be relatively straightforward. Ideally the straightforward cases should be dealt with by summary sheriffs, and the more complex by the sheriff, but it will not be immediately obvious when a case arrives in the sheriff court whether it is going to be complex or straightforward. It is proposed that sheriffs principal should allocate cases between summary sheriffs and sheriffs in particular sheriff courts by reference to the categories of cases which fall within the competence of summary sheriffs.

112. Clearly there will be occasions when cases which have been allocated to summary sheriffs will turn out to be more complex than they first appeared. The Government considered whether to make provision on the face of the Bill for the transfer of such cases from summary sheriffs to sheriffs, but it was concluded that this should be left for court rules under the powers in sections 96 and 97 of the Bill. The Scottish Civil Courts Review recommended (paragraph 206 of Chapter 4 and paragraph 97 of Chapter 5, which specifically relate to children's hearings) that there should be a mechanism for a summary sheriff to transfer a case to a sheriff, on the application of one or more of the parties or on the summary sheriff's own initiative, subject to consultation with and approval of the sheriff principal, should a case prove more complex than it seemed at the outset.

Summary sheriff: criminal competence and jurisdiction

113. The Scottish Civil Courts Review recommended that sheriffs, who are sufficiently experienced and qualified to deal with trials for serious crimes, should no longer have to deal with minor offences dealt with under summary procedure. The Review suggested that to employ sheriffs in this way does not make best use of expensive and scarce shrieval resource.

114. The policy of the Bill is that the new summary sheriffs should have jurisdiction to deal with less serious criminal matters dealt with under summary procedure in accordance with the principle that business should be dealt with at the appropriate level of the court hierarchy. The summary sheriff will have concurrent jurisdiction as the sheriff to preside over a summary prosecution under Part X of the Criminal Procedure (Scotland) Act 1995. It is necessary to provide for concurrent jurisdiction as there will not be many summary sheriffs at first and in some parts of the country there may never be summary sheriffs depending on how they are deployed. It is estimated that 70% of the work of summary sheriffs may be summary criminal cases. This will lessen the impact of summary crime on ordinary civil business in the sheriff court and increase the availability of sheriffs to deal with civil business.

115. Responses to consultation, however, suggested that the criminal competence of the summary sheriff should extend beyond summary crime. The policy is, therefore, that the new summary sheriff should also have a limited jurisdiction over certain aspects of solemn procedure. These aspects are essentially procedural and at the initial stages of solemn proceedings. This is to facilitate and expedite the handling of solemn business, particularly in courts where there may be no sheriff. The efficient disposal of solemn criminal business, and particularly the initial procedural stages, should not be delayed because no sheriff is immediately available.

116. The policy is that summary sheriffs should have competence over procedural matters in solemn cases up to the first trial diet. This would include for example: the granting of warrants for arrest and production of documents; custody hearings (which include bail and bail review hearings); and powers to grant orders in relation to mental disorders.

117. Criminal procedure can be complicated in practice, with a number of procedural matters and matters for decision for a sheriff up to and including the first diet. Following discussions with the SCS and the Crown Office, the Scottish Government concluded that the neatest way to address the summary sheriff's solemn competence was to provide that only the sheriff should have exclusive competence for certain solemn matters, with the summary sheriff sharing all other aspects of the sheriff's criminal competence.

118. The intention is, therefore, that the sheriff should have exclusive competence in solemn proceedings before a sheriff court to hear a trial and to sentence a person. Summary sheriffs will only be able to conduct summary trials and to sentence in summary proceedings. The sheriff will also have exclusive competence at the first diet over any matter other than adjourning the diet by virtue of section 75A of the Criminal Procedure (Scotland) Act 1995 and at preliminary hearings, again over any matter other than appointing a further diet by virtue of section 75(2)(a). A summary sheriff will be able to adjourn the first diet to another diet if for any reason a sheriff were not able to physically attend court and also similarly to adjourn a solemn trial diet or a diet under section 76(1).

119. Essentially, the summary sheriff will have the same criminal competence as the sheriff and be able to exercise all the functions of a sheriff in criminal proceedings save that the summary sheriff may not try, convict or sentence a person accused of a crime or offence which is triable on indictment. In all other respects, the summary sheriff should share the same competence as the sheriff in criminal matters.

PART 2 OF THE BILL

THE SHERIFF APPEAL COURT

Chapter 1

120. Almost one third of all civil appeals to the Inner House of the Court of Session come from the sheriff courts. Almost two thirds of civil sheriff court appeals are appeals direct from the sheriff to the Inner House rather than to the sheriff principal. There have been long delays in waiting periods for appeals to be heard in the Inner House with the SCS targets being exceeded by a considerable margin.

121. At the time of the Review, summary criminal appeals from the sheriff court, stipendiary magistrates and justices of the peace accounted for 61% of all appeals to the High Court. There has been a reduction in such appeals in recent years (1393 in 2010-11 and 1213 in 2012-13), though such numbers are still substantial and the proportion vis-à-vis solemn appeals is roughly the same.

122. The Summary Justice Review Committee¹⁴ chaired by Sheriff Principal McInnes noted that targets for disposal of criminal appeals were being missed by a substantial margin and commented that if “summary justice is to be truly summary, appeals should...be dealt with significantly more quickly than they are at present”. Sheriff Principal McInnes suggested that one way of assisting the High Court to achieve its targets would be for a new court to relieve it of much of the summary criminal appeal work.

123. There are clearly problems in dealing with the volume of civil and criminal appeals in the Inner House and the High Court respectively and appeals are being delayed excessively, though at present it is understood that the delays are not quite as long as they were, possibly partly due to the drop in civil business before the courts. The question remains, however, as to whether a different appeal structure is required. Many who responded to the consultation of the Scottish Civil Courts Review wanted to keep the right of appeal to the sheriff principal in civil cases since it was considered to be an inexpensive and prompt form of appeal which removes the need to go to the Inner House with all its inherent expense and delay.

124. There are, however, difficulties in relation to the status of a decision by a sheriff principal. Sheriffs principal are not bound by a decision of another sheriff principal in another sheriffdom, though they may treat it as persuasive. The status of decisions of sheriffs principal is, therefore, not as clear as it might be and this may result in conflicting practice between sheriffdoms.

125. The view of the Scottish Civil Courts Review was that “litigation should be conducted only in the court that is appropriate for it by reason of its nature, value or importance. Without such a basic principle, the system is bound to deploy its resources wastefully, to inflict needless expense on the litigants and to fail to deliver justice promptly. Decision-making in our courts is of a good standard; but in many cases the decisions are being made at a needlessly high level.”.

¹⁴Report of the Summary Justice Review Committee <http://www.scotland.gov.uk/Publications/2004/03/19042/34176>

The Review went on to argue that cases should be directed to the lowest level at which they can be competently dealt with.

126. The same arguments apply with equal force to appeal arrangements. There is no justification for appeals of summary (i.e. less serious) cases to go automatically from the lower criminal courts (sheriff, stipendiary magistrate or justice of the peace) to be dealt with in the High Court. Such matters do not require the attention of Scotland's leading judges. Such appeals could and should be dealt with lower in the criminal court structure, unless, in exceptional circumstances, issues of legal complexity arise, when they may be transferred to the High Court. Sheriff Principal McInnes recognised that summary appeals could be dealt with much more quickly in a new court below the High Court.

127. By the same token, since it is felt that appeal to the sheriff principal in civil cases provides an inexpensive and prompt form of appeal, it seems an obvious way of diverting cases from the Inner House of the Court of Session by introducing a new intermediate appellate court which will replace appeals to the sheriff principal in civil cases.

128. The policy of the Bill is, therefore, that there should be a new Sheriff Appeal Court. This will reduce the number of criminal and civil appeals which require to be dealt with in the High Court and Inner House respectively. The new court will hear summary criminal appeals from justices of the peace, summary sheriffs and sheriffs. It will also hear civil appeals from the sheriff court.

129. This will be a national Sheriff Appeal Court whose decisions will be binding on all judges in any sheriff court, on any justice of the peace and the Sheriff Appeal Court. Its decisions will create a consistent and coherent nationally applicable body of case law at the first level of appeal from the initial decision. As a consequence, the appellate function of sheriffs principal will cease in civil appeals as will the right to take an appeal directly from the sheriff court to the Inner House. All civil appeals will lie to the Sheriff Appeal Court in the first instance.

130. The new Court will have a full range of powers to deal with appeals as it sees fit, though the Bill contains a non-exhaustive list of disposal powers including the power to grant incidental or interim powers relating to those disposals.

131. For the majority of civil appeals it is expected that the Sheriff Appeal Court will sit as a bench of one. This will replicate many of the benefits that are realised from the current situation of appeals being heard by a sheriff principal. However, there will be the flexibility for a larger bench to be used for appeals that are novel or complex. All of these matters will be set out in the rules of court that will be developed to establish the procedures in the Sheriff Appeal Court.

132. The Sheriff Appeal Court will have the power to remit an appeal which raises a complex or novel point of law to the Inner House. Where a case has been determined by the Sheriff Appeal Court, onward appeal to the Inner House will require the permission of the Sheriff Appeal Court. If this is not given, it will be possible to apply for permission to the Inner House. In both cases permission will only be given if the "second appeals" test is met. This is a high threshold – the Sheriff Appeal Court or the Inner House may grant permission only if the court

considers that the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Session to hear the appeal. This is to stop the Sheriff Appeal Court becoming merely an intermediate stage of appeal, rather than the final forum of appeal in the vast majority of cases which is the intention.

133. This is in keeping with the rationale for the establishment of the Sheriff Appeal Court, that it will deal with virtually all civil appeals from the sheriff court because these do not merit the attention of Inner House judges except in very exceptional cases. This will free up Inner House judges to deal with more complex matters.

134. In summary criminal cases there will no longer be a right of appeal directly to the High Court against conviction or sentence or, on the part of the Crown, against acquittal or sentence. Such appeals will again be to the Sheriff Appeal Court in the first instance although there will be a corresponding power to remit complex appeals to the High Court. Bail appeals will also be taken to the Sheriff Appeal Court in both summary and solemn cases. A new part will be inserted into the Criminal Procedure (Scotland) Act 1995, providing that an onward appeal to the High Court on a point of law only will be available, but this will require permission of the High Court itself. This will only be granted if the “second appeals” test is satisfied. In this way the High Court will not have to hear appeals from minor criminal cases and the High Court judges will have more time for complex first instance cases and appeals.

135. The Sheriff Appeal Court should lead to significant improvements in the time required to dispose of summary criminal and civil appeals. The McInnes committee also believed that such an appeal court would enhance sentencing consistency in summary criminal courts across Scotland.

136. The decisions of the Sheriff Appeal Court will be automatically binding on all summary sheriffs, sheriffs (including when sitting with a jury), sheriffs principal (when sitting as a court of first instance) and the Sheriff Appeal Court itself throughout Scotland in both civil and all criminal matters. The only exception will be if the Sheriff Appeal Court has a larger bench than the decision it is considering and section 56 of the Bill provides that the Appeal Sheriffs may decide that an appeal may be reheard by a larger panel of their number if the appeal is one of particular difficulty or importance or if they are equally divided on a matter of fact or law.

Chapter 2

137. The six existing sheriffs principal will automatically become *ex officio* members of the Sheriff Appeal Court. When sitting in the Sheriff Appeal Court, the sheriffs principal will be known as “Appeal Sheriffs” like the other members of the Court. The Scottish Civil Courts Review suggested that the volume of civil and criminal business which would come before the Sheriff Appeal Court would mean that the new court would require more members. The original recommendation of the Review was that a small number of judicial officers of equivalent rank to sheriffs principal should be appointed with no administrative role in relation to any sheriffdom and who would simply work in the Sheriff Appeal Court.

138. As a result of discussion with the Lord President and the sheriffs principal, the Scottish Government has, however, agreed that the Lord President should establish a pool of experienced

sheriffs who can be called upon to act as Appeal Sheriffs in the Sheriff Appeal Court. These individuals will, therefore, sit as sheriffs when hearing sheriff court matters and Appeal Sheriffs when hearing appeals as part of the Sheriff Appeal Court. Sheriffs who have held office for at least five years may be appointed to be Appeal Sheriffs in the Sheriff Appeal Court. The number of appointed Appeal Sheriffs will be a matter for the Lord President, but in order to ensure that the Court is fully staffed wherever it may be sitting, provision is made for retired Appeal Sheriffs to be appointed for such periods as the Lord President may determine.

139. Appeal Sheriffs who are not sheriffs principal will not be paid additional remuneration for acting as such (though they may be paid expenses) since sheriffs who act up as temporary Court of Session judges are not paid extra and such deployment will be considered a development opportunity.

Chapter 3

140. The Scottish Civil Courts Review did not address the issue of whether there needs to be a member of the Sheriff Appeal Court with responsibility for determining matters such as the composition and chairing of courts, where and when courts will be held, the scheduling of business, etc. It is, therefore, proposed that a President and Vice President of the Sheriff Appeal Court will be appointed by the Lord President from the ranks of the sheriffs principal. It is intended that the role of the President and Vice President will be purely administrative and will be concerned solely with the organisation of sittings of the Sheriff Appeal Court.

141. The President of the Sheriff Appeal Court will be responsible for the organisation of the efficient disposal of business in the Court along the same lines as a sheriff principal is responsible for this in a sheriffdom. It is anticipated, however, that the President may delegate some functions to the Vice President. The President's duties in this regard are subject to the Lord President's overall responsibilities for the efficient disposal of business in the Scottish courts. Under section 97 of the Bill, the Court of Session may by act of sederunt provide rules for the procedure and practice of the Sheriff Appeal Court and it is expected that these will cover matters such as the quorum of Appeal Sheriffs who will sit for particular kinds of procedure.

142. The Scottish Civil Courts Review made specific recommendations about where the Sheriff Appeal Court should sit in its civil and criminal modes. The Bill is intended to provide maximum flexibility to allow the Court to sit at any place in Scotland designated for the holding of sheriff courts. That does not limit the Court to sitting in sheriff court buildings and would, for example, permit the Court to sit in Parliament House in Edinburgh. Although it may sit centrally in Edinburgh for, say, criminal appeals, there will remain the possibility of civil appeals being heard in the sheriffdom in which they originated, which would allow the new arrangements to replicate the right of appeal to the sheriff principal in civil cases since it was considered to be an inexpensive and prompt form of appeal. It is, therefore, envisaged that the Sheriff Appeal Court may sit in different places at different times.

Chapter 4

143. Clerks and Deputy Clerks to the Sheriff Appeal Court will be provided by members of staff of the Scottish Courts and Tribunals Service and the intention is that they will be able to rotate staff in the Sheriff Appeal Court for developmental purposes.

PART 3 OF THE BILL

CIVIL PROCEDURE

Chapter 1

Civil jury trials

144. It has not been possible for a civil action in the sheriff court to be tried before a jury since the enactment of section 11(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. This was because, even though the number of jury trials in the sheriff court was small, it was considered that the procedure had a disruptive effect on the work of the court. Civil jury trials have, however, continued to be available in the Court of Session and in recent years these have almost invariably been applied for in relation to personal injury actions under Chapter 43 of the Rules of the Court of Session.

145. The Scottish Civil Courts Review noted that “experience in other jurisdictions suggests that where damages for non-pecuniary loss are determined by judges alone, awards of compensation fall below a level that the public would consider reasonable”. The argument against jury trials is that a fair system of compensation requires predictability, openness and transparency. The choice is therefore between a system which:

- relies on awards in comparable cases and which should, therefore, be more predictable, but may fall behind levels of award which ordinary people might consider reasonable in the circumstances of the case; or
- permits ordinary people serving on juries, and not professional judges, to make the assessment of award, with inevitable variations in the level of awards.

146. In the case of *Hamilton v Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486, the Lord President observed that the current absence of judicial guidance on levels of damages was unsatisfactory. He proposed that, at the conclusion of evidence, the parties should, in the absence of the jury, address the trial judge on their suggestions as to the level of non-pecuniary damages. The trial judge would then, taking account of those submissions and his/her own experience, address the jury, suggesting to them a spectrum within which their award might lie. The spectrum would be for their assistance and would not be binding upon them. It was noted that rules of court may need to be devised to fix procedural steps, but the Lord President stated that the implementation of these changes should not preclude this practice from commencing immediately. It is expected that this procedure will go some way towards addressing concerns about inconsistencies in awards in similar cases.

147. The Scottish Government has accepted the recommendation of the Scottish Civil Courts Review that the right to a civil jury trial in the Court of Session should be retained since, if damages for compensation are determined by judges alone, the likelihood is that the level of damages will fall below a level that would be considered just and reasonable by the general public. The decision in the *Hamilton* case would appear to address the lack of predictability and inconsistency which will inevitably arise occasionally.

148. The Review went on to say that “if it is right to retain civil jury trial [in the Court of Session], then it is wrong that it should not be available to those pursuers whose actions will now

have to be raised in the sheriff court” due to the substantial increase in the exclusive competence of that court. The availability of civil jury trial in the Court of Session, along with the Chapter 43 procedures, was one of the reasons why many personal injury actions were raised in that court. The Review therefore recommended, and the Scottish Government has accepted, that civil jury trials should be available in the new specialist personal injury court, but not in other sheriff courts.

149. The intention is that the existing Court of Session practice and procedure in relation to jury trials will be transplanted in its entirety into the new specialist personal injury court. The jury will consist of 12 members and the rules for the allowance of issues and conduct of the jury trial will be the same as those in the Court of Session. Sections 61 to 69 of the Bill are therefore based on sections 9, 11, 12, 13, 14, 15, 16, 17, 29, 30 and 31 of the Court of Session Act 1988.

150. Because the possibility of a civil jury trial in the sheriff court will be restricted to proceedings before a sheriff sitting at a sheriff court with an all-Scotland jurisdiction, which is expected to be the new specialist personal injury court, it is not anticipated that this will disrupt sheriff court proceedings, even in the venue of that new court, as was the case before 1980.

151. A majority of respondents to consultation agreed that civil jury trials should be available in the specialist personal injury court. A number of respondents referred to the need to allow for counsel, with some of these asking for access to counsel for all cases. This is not a matter for the Bill, and, as noted in paragraphs 92 and 93 above, Sheriff Principal James Taylor recommended in the Review of the Expenses and Funding of Civil Litigation in Scotland that the current test for granting sanction for the employment of counsel in the sheriff court should remain based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied. He went on to suggest that, in deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, among other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them.

152. Some respondents to consultation suggested that the decision in *Hamilton* makes civil juries redundant. The Government believes, however, that it is correct to permit civil juries in the circumstances described but the guidance from the trial judge will avoid awards which are wildly out of step with what might be expected in a particular case.

Simple procedure

153. The policy objective of the Bill is that there should be a new single set of rules for cases for £5000 or less which will be called “simple procedure” and which it is proposed will be dealt with mainly by the new summary sheriffs. There is no justification for continuing two separate procedures for cases under £5000 (summary cause and small claims – the latter applicable to actions up to £3000) which are both intended to be quick and cheap so as to be convenient for party litigants. The most significant differences between the two procedures are that legal aid is not available for small claims and the expenses which can be awarded in small claims are limited. Personal injury, aliment and defamation cases below £5000 – including those up to £3000 – are exceptions and are currently dealt with under summary cause procedure rather than as small claims. They will be dealt with under simple procedure in the future. These actions are

not subject to the limits on expenses awarded under small claims and the Bill sets out that they will not be subject to these limits under the new simple procedure either.

154. Under the existing procedures for small claims and summary cause in the sheriff court, sheriffs find it difficult to help party litigants (in what is to the vast majority a stressful and strange environment) because of their duty to act as the “referee” in what is still essentially an adversarial encounter. It is in the interests of justice, the efficient disposal of business in the courts and, by extension, the public purse, that judges at whatever level of the court structure assist party litigants to present their cases, though clearly they must do so in a way which does not prejudice the other side. This is clearly of most concern in those courts where it is the norm for parties to represent themselves.

155. Even reasonably articulate party litigants find it difficult to pursue or defend actions themselves in the intimidating setting of a court room. Some raise spurious or irrelevant issues while matters which are fundamental to their case may be ignored or not given due or sufficient prominence. The less well-informed, educated or otherwise legally empowered may consider it impossible to take forward a case themselves, contributing to the proportion of those with justiciable problems described in *Paths to Justice Scotland* by Paterson and Genn¹⁵ as the “do nothings”. The Scottish Government believes that both categories of party litigants require more assistance from the bench.

156. References in existing legislation to the existing summary cause and small claims procedures will in future be construed as the new unified simple procedure. The Bill refers to this new procedure as “simple procedure” rather than the “simplified procedure” referred to in the Review since the use of “simplified” seems to imply that it is simpler than another procedure, whereas this is intended to be a new and straightforward approach to such low value casework. The Scottish Government is aware that not all stakeholders are content with the name “simple procedure” but no better name has been suggested.

157. The rules for simple procedure will be made by rules of court under section 97 of the Bill. The Scottish Civil Courts Review recommended that the rules for the new procedure should be written in as clear and straightforward language as possible. Accordingly, the rules must reflect as far as possible the principles set out in section 72 of the Bill. The rules will, therefore, be based on a problem-solving or interventionist approach, closer to the inquisitorial approach taken in some other jurisdictions. The new approach to be adopted should permit the court to identify the issues and specify what it wishes to see or hear by way of evidence or argument. This is clearly a fundamental shift away from the adversarial approach where the parties control evidence and argument. The intention is that the court should be able to help the parties to settle the dispute and the procedure adopted should reflect the circumstances of the case.

158. There will be concurrent jurisdiction between summary sheriffs and sheriffs for simple procedure cases as it will be some time before enough summary sheriffs are appointed and deployed and in some parts of the country there may never be a summary sheriff. It is, however, envisaged that, when sufficient numbers of summary sheriffs are deployed, sheriffs principal will

¹⁵ “Paths to Justice Scotland – what people in Scotland do and think about going to law” by Hazel Genn and Alan Paterson. <http://www.hartpub.co.uk/books/details.asp?isbn=9781841130408>

allocate cases under simple procedure to them thus freeing up sheriffs for more complex civil and criminal casework.

159. The Scottish Government has considered whether the monetary limit for simple procedure might be £10,000 which is the small claims limit in England and Wales. As the present limits for small claims and summary cause procedure (£3000 and £5000 respectively) were only set at those levels in January 2008, the Government believes, therefore, that it would be premature to recommend a higher limit for the new procedure. The Government will, however, keep the monetary limit for simple procedure under review.

160. The overall policy intention is that the simple procedure should enable and empower party litigants, with the help of explanatory material in hard copy or online, provided by the SCS or another advice agency and/or support from an in-court adviser or other advice agency, to raise or defend an action and conduct their cases to a conclusion themselves. A party may also have the case presented by a suitable lay representative if the court permits. Some parties will still wish to have qualified legal representation and this will also be permitted.

Interdict and other orders

161. The Scottish Civil Courts Review recommended that “The sheriff court legislation should be amended to provide that an interdict or interim order granted in one sheriff court should be enforceable throughout Scotland”.

162. If a sheriff grants an interdict at present it only applies within the sheriffdom where that sheriff sits, albeit there has been some academic discussion about whether it can have effect outwith that sheriffdom. The Review pointed out that this can create difficulties in cases involving domestic abuse and in regulatory and enforcement proceedings at the instance of local authorities or public bodies.

163. The policy of the Bill is to remove any doubt and to make it clear that a sheriff or summary sheriff may grant an interdict or interim interdict which applies beyond the boundaries of the sheriffdom, i.e. the person or body to whom the interdict is addressed does not require to be within the sheriffdom in order to be prohibited from carrying out a certain action or actions. This will be called “extended interdict”. For example, it seems pointless that an interdict granted in Glasgow Sheriff Court should arguably not be enforceable outwith the relatively small area of the Glasgow sheriffdom, for example in Paisley or Dumbarton. An interdict should be able to apply as far as it requires to and the interdicted party should be prohibited from carrying out the specified action(s) insofar as that interdict extends.

164. The Bill will have no effect upon “ordinary” interdicts.

165. Although an extended interdict will have effect outwith the sheriffdom, it is envisaged that an action for enforcement will be capable of being raised by the person who wishes to rely on the interdict only in (1) the sheriffdom in which the defender is domiciled, (2) the sheriffdom in which the interdict was granted or (3) the sheriffdom in which it is claimed that the interdict was breached or may be breached. A sheriff will, however, be permitted to transfer the proceedings to any other sheriffdom if thought appropriate. It will not be necessary for the

sheriff or summary sheriff who is considering the breach proceedings to look again at whether the interdict was properly granted. It will be accepted that the sheriff or summary sheriff who granted the interdict did so in accordance with the law and there will be no question that the interdict is valid and enforceable.

166. Actions other than the issue or breach of interdict, such as recall of interdict or damages for wrongful interdict were not covered by the Scottish Civil Courts Review. The Scottish Government believes that actions for recall of interdict should only be capable of being raised in the sheriffdom where the interdict was granted. It would not be appropriate to ask a judicial officer in one sheriffdom to overturn a decision made by a judicial officer in another sheriffdom. This is different from actions of enforcement in another sheriffdom where the judicial officer is being asked whether the facts constitute a breach of interdict.

167. The Scottish Government thinks that actions for damages for wrongful interdict are separate from interdict actions and that they should simply be subject to the general rules on territorial jurisdiction.

168. The policy behind section 82 is to permit specified orders and interim orders, other than interdict, to be enforceable throughout Scotland and not just the sheriffdom in which they were granted. This would be effected by means of the Scottish Ministers setting out, by means of an order subject to negative procedure, the types of order which would be capable of having effect outwith the sheriffdom in which they were granted and enforced outwith the sheriffdom.

169. It should be noted that the power in section 82 applies to all orders, not just those which are interim, which goes beyond the recommendation in the Scottish Civil Courts Review. The Scottish Government believes that it would be odd to permit judicial officers to have power to make interim orders which have effect outside their sheriffdom, but not the orders themselves. Section 86 makes further provision about interim orders.

170. It would, of course, be possible to deal with interdicts in the same manner by using an order making power. The Scottish Government believes, however, that there is an advantage in dealing with interdicts separately as under sections 80 and 81, as it provides an illustration of how the power in section 82 could be used for other orders and interim orders.

Chapter 2

Judicial Review

171. The Scottish Civil Courts Review considered whether the rules governing the procedure in petitions for judicial review were satisfactory and made a number of recommendations. The Bill takes forward those recommendations. The Bill does not deal with the substantive aspects of judicial review in relation to the scope and grounds of judicial review in Scots law established in case law.

172. The Review recommended that “The general rule should be that petitions for judicial review should be brought promptly and, in any event, within a period of 3 months, subject to the exercise of the court’s discretion to permit a petition to be presented outwith that period.”

173. It further recommended that “A requirement to obtain leave to proceed with an application for judicial review should be introduced, following the model of Part 54 of the Civil Procedure Rules in England and Wales. The respondent should be entitled to oppose the granting of leave. The papers should be considered by the Lord Ordinary, who will not normally require an oral hearing. If leave is refused, or granted only on certain grounds or subject to conditions, the petitioner should be entitled to request that the matter be reconsidered at an oral hearing before another Lord Ordinary. There should be a further right of appeal to the Inner House. For urgent cases provision would be made for appeal to be made forthwith.”.

174. The Review stated that “The test that should be applied in deciding whether or not to grant leave should be whether the petition has a real prospect of success.”.

175. At present there are no time limits set out in the rules of court for raising proceedings for judicial review, nor is there any requirement to obtain leave to proceed. A petitioner who delays in bringing proceedings may be met with a plea of mora, taciturnity or acquiescence, but in Scots law mere delay is not currently a sufficient ground for rejecting an application for judicial review.

176. The Scottish Government agreed with the Review on the issue of time limits. In its response to the Review it stated: “It is not in the interest of the courts or the wider public interest if judicial review becomes a tactical device to frustrate or to delay proper public policy decisions, or a vehicle to articulate what are essentially political arguments in the judicial sphere. The balance is struck by the Review is, in the Scottish Government’s view, probably correct.”.

177. The Scottish Government, therefore, consulted on the draft Bill with provisions setting a time limit for raising proceedings for judicial review of three months after the grounds giving rise to the application for review first arose. The court would have the power to extend that period if, when considering all the circumstances, it regarded it as equitable so to do.

178. The views of the consultees who responded were relatively polarised. A three-month time limit was perceived by some as resulting in efficient and effective remedies for individuals or that this would provide greater certainty in outcomes. For those in disagreement with this proposal, a key issue was that this period is too short to resolve issues before bringing a claim and thus could restrict access to justice.

179. The Scottish Government considered these responses and concluded that three months struck the right balance of avoiding necessary delay whilst maintaining access to justice. It considers that the power given to the court to extend the period in certain circumstances is an adequate safeguard. The Bill, therefore, provides for a three-month time limit for applications for judicial review starting from the date on which the grounds giving rise to the application first arose. The Scottish Government has not taken forward the suggestion in the Review that petitions should be raised promptly or within three months. Case law has established that in the context of EU law a requirement that proceedings should be raised promptly and in any event within three months was not sufficiently certain (*Uniplex (UK) Ltd V NHS Business Services Authority* [2010] 2 C.M.L.R. 47, *Buglife v Medway Council* [2011] EWHC 746(Admin)). The Bill does not attempt to make different provision for cases raising matters of EU law and sets out a fixed time period of three months for all judicial reviews.

180. The Review's recommendation on standing was that "The current law on standing [to bring a petition for judicial review] is overly restrictive and should be replaced by a single test: whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings". The Scottish Government considers, however, that the decision of the Supreme Court in *AXA General Insurance Ltd & others v The Lord Advocate & others* [2011], has since clarified the legal position relating to "standing", and that the Bill does not require to make further provision in this respect. The requirement to have a sufficient interest in the subject matter of the proceedings should, however, be a condition of being granted permission to proceed with a petition.

181. The general "sufficient interest" test will encompass the cases in which legislation sets out what categories of claimants have interest to bring proceedings, as in regulation 22A of the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/323)¹⁶ and regulation 46 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139).¹⁷

182. The Government's consultation asked: "Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?" There was a high level of support for this proposal, with 44 respondents in favour (one of which was a qualified "yes") and only six against.

183. Most respondents agreeing with this proposal simply noted that the introduction of the leave to proceed with an application for judicial review will help to filter out unmeritorious cases or that this is an appropriate route to take. Some of these respondents suggested, however, that the sifting process needed to be open, transparent and accountable to court users; there should be safeguards in place to ensure that claims that should be allowed to proceed are not filtered out; or that applications for leave to proceed must be dealt with in a fair and consistent manner.

184. A small number of respondents argued that the current procedure works effectively, with no apparent issue over excessive court time being taken up by these cases in Scotland, and questioned the need to make these changes.

185. For those respondents opposed to this proposal, the key concern was that there is no hard evidence that the Court is burdened with large numbers of unmeritorious cases and that there is no cause to justify this change.

186. Section 85 of the Bill makes provision for a new permission stage for judicial review and sets out the procedure that will apply including relevant safeguards. It is envisaged that court rules will require the petitioner to serve upon the respondent and any other interested party, within seven days of lodging the petition, the petition itself, a time estimate for the permission hearing, any written evidence in support of the petition, copies of any document on which the petitioner proposes to rely and a list of essential documents for advance reading by the court. The respondent would have 21 days to answer the petition and would be entitled to oppose the granting of permission.

¹⁶ <http://www.legislation.gov.uk/ssi/2000/323/contents/made>

¹⁷ <http://www.legislation.gov.uk/ssi/2011/139/contents/made>

187. The procedure provided for in the Bill allows a Lord Ordinary to take the initial decision on permission on the basis of the papers lodged either as a paper exercise or after an oral hearing. If permission is refused or granted subject to conditions and an oral hearing was not held, the petitioner is entitled to request an oral hearing. The request and the oral hearing that is heard if the request is granted will be dealt with by a different Lord Ordinary. There is a right of appeal to the Inner House in relation to a refusal of permission or the grant of permission subject to conditions following an oral hearing.

188. As set out by the Scottish Civil Courts Review, the permission approach will require the petitioner to demonstrate more than that the case is merely stateable. Under the proposals the Court will have a much fuller picture of the strengths and weaknesses of the parties' cases and will be in a position to assess whether the petition has a real prospect of success. This marks a departure from the current position where petitions can be presented if, in the opinion of those representing the petition, there is a stateable case. The Review's recommendation envisages that it should be for the Court to make the assessment having heard both parties of whether a case has sufficient merit to be permitted to proceed to a full hearing.

189. It is also the intention that the introduction of the new permission stage will provide an opportunity that does not currently exist for an early case management hearing to ensure that the issues are properly focussed at the subsequent hearing on the merits. Where permission is granted under the new procedure in the Bill, court rules will make provision for the procedure that should apply thereafter. The Review envisaged that this would enable a hearing on the merits to be fixed no later than 12 weeks from the lodging of answers.

Chapter 3

Remit of cases between courts

190. The provisions of the Bill which govern the remit of cases between the Court of Session and the sheriff court go hand in hand with the proposals to raise the exclusive competence of the sheriff court. The Government believes that this facility is an important safeguard which counters the argument that personal injury cases in particular must be raised in the Court of Session in case they raise complex or novel points of law. If a matter involves sums of less than £150,000 then it should normally be litigated in the sheriff court, which is intended to be the forum for most litigation in Scotland. The provision to permit remit to the Court of Session provides reassurance, however, that complex, but lower value, cases can receive the attention of the expertise of Court of Session judges. The provision in the Bill to permit remit from the Court of Session ensures that artificially inflated claims may be dealt with in the sheriff court.

191. A case (to which the exclusive competence of the sheriff court under section 39 does not apply, i.e. cases with no monetary element, or which are of a value in excess of £150,000) may be remitted to the Court of Session if the sheriff considers that the importance or difficulty of the case makes it appropriate. This replicates the existing law for monetary actions.

192. In relation to cases to which the exclusive competence does apply, however, the sheriff will be permitted to request the Court of Session to allow proceedings below £150,000 to be remitted to that Court if there are exceptional circumstances. The Court of Session may permit the proceedings to be remitted "if special cause is shown". The test in section 37 of the Sheriff

Courts (Scotland) Act 1971 for remits of cases to the Court of Session if they were above the privative limit was that “the importance or difficulty of the cause make it appropriate” to remit. The Government believes that remit of a case below the exclusive competence would seem to require a more stringent test. The Court of Session will have the power to decline a proposed remit if the judge is not satisfied that there is special cause that the case is one that should be heard there.

193. For the first time, the Court of Session will be able to take into account the business and operational needs of that Court as well as the interests of the parties in considering remits and indeed the Review considered that the fact that the business position of the Court is not at present a relevant consideration is a serious weakness in the system. The Review did not make any recommendation about the business and operational needs of the sheriff court being taken into account. The Scottish Government believes that the needs of the superior court must take precedence and concluded that there should be no provision for the business and other operational needs of the sheriff courts to be considered.

194. Where the value of an action raised in the Court of Session is likely to be below the exclusive competence, as assessed by the judge at a case management hearing or at any other time during the proceedings, the Review also recommended, and the Scottish Government has accepted, that there should be a presumption in favour of a remit to the sheriff court. The Government believes that this is another essential tool to prevent artificially inflated claims from being raised in the Court of Session, albeit with safeguards for exceptional cases, and section 89 makes the necessary provisions. The Court will not have to reach any view on liability or contributory negligence and “likely value” is to be assessed on the assumption that liability will be established. It will, however, be open to the parties to submit that there are special reasons, including factual or legal complexity, or issues of wider application or public interest, why the presumption should not apply. In considering whether or not to remit, the Court would again be entitled to take into account the business and operational needs of the Court as well as the interests of the parties.

Chapter 4

Lay representation for non-natural persons

195. The Inner House of the Court of Session ruled in *Apollo Engineering Ltd. (in liquidation) v James Scott Ltd* ([2012] CSIH 4) that limited companies must have legal representation by a solicitor or counsel. This case is one of a series which continues the position that non-natural persons may not be represented by a “lay” person.

196. Representations have been made to the Scottish Government arguing that this position has grave consequences for small business. It was suggested that a small company defending or pursuing a claim must incur irrecoverable legal costs when disputing a claim, whereas an individual need not instruct a solicitor and can appear as a party litigant at no cost. It has been alleged that for small business, the consequence is that debts within the small claims limit in particular are not worth pursuing or defending and that this effectively disenfranchises a limited liability company. The Government also fears that small companies, partnerships and unincorporated associations may be disadvantaged by this restriction, at least insofar as cases under the new simple procedure which will replace summary cause and small claims are

concerned, because the cost of legal representation may be disproportionate to the value of the claim.

197. The Scottish Government is also concerned that there may be extreme circumstances outwith simple procedure cases where this rule may require to be loosened, allowing judicial discretion to be applied.

198. The law preventing arrangements whereby companies can represent themselves through an employee or director is summed up in the *Apollo* case and the case of *Secretary of State for Business Enterprise and Regulatory Reform petitioner (The UK Bankruptcy case)*, ([2010] CSIH 80).

199. In the *Apollo* case in the Supreme Court, Lord Hope expressed his view on lay representation, stating (*obiter*) that:

“There may be grounds for thinking that the rule which disables a company from being represented other than by counsel or a solicitor with a right of audience needs to be re-examined...the rule on representation ought not to be applied in cases where they do apply in a way that disables a company which is unable to pay for a lawyer from obtaining the view of the court on such issues.”

200. In view of the concerns which have been expressed by stakeholders about the economic effect of the inability of directors and other lay representatives to represent companies and partnerships, and to empower the court in this area, the policy of the Bill is that it should be possible for companies, partnerships and unincorporated associations (“non-natural persons”) to be represented in court by one or more of their directors or other lay representatives in the limited circumstances described in Chapter 4.

201. Chapter 4, together with court rules made under the provisions of the Bill, aims to address concerns expressed in the *UK Bankruptcy* judgement relating to:

- the protection of the interests of the opposing party, the court and the body being represented by the lay representative;
- the need for the lay representative to be duly authorised by the non-natural person;
- the need for the court to be able to prevent ‘misbehaviour’ by the lay representative;
- the possible complexity of casework;
- the unsuitability of the lay representative;
- the possibility that the representative has been made an employee or director just to take the case, or been at personal fault in the case of a winding up or liquidation action.

202. The provisions in Chapter 4 differentiate between simple procedure and other proceedings. In simple procedure cases, the “non-natural person” may be represented by a lay representative who is not a solicitor, advocate or otherwise entitled to conduct litigation. That

lay representative will be able to conduct proceedings on behalf of the non-natural person only if:

- the lay representative is (1) a director or company secretary of the company, (2) a member or partner in the partnership, (3) member or office holder of the association or (4) an employee of the non-natural person;
- the responsibilities of the lay representative do not consist wholly or mainly of conducting legal proceedings on behalf of the non-natural person or anyone else;
- the lay representative is authorised to do so by the non-natural person; and
- the lay representative has not been prevented from acting as such by order of the court.

203. In proceedings other than simple procedure cases, the greater complexity of the cases may provide an argument against cases being conducted by lay representatives. Furthermore, as the complexity of the case increases, this makes it more likely that Article 6 of ECHR may require some form of legal representation. An increase in value does not, however, always correspond to an increase in complexity, and the Bill therefore gives the court the power to permit lay representation where it wishes to.

204. Part of the rationale for the change to the law is that small companies, partnerships or associations who are not able to pay for professional legal representation should be capable of being represented by an authorised lay representative. Such cases, where the legal issues are genuinely straightforward and would be suitable for self-representation if the litigant were a natural person, should be considered by the court as being suitable for non-natural persons on similar terms.

205. There should not, however, be parity of appearance rights between natural and non-natural persons: what a non-natural person lacks in terms of a right to appear must be balanced by the possibility that they will have access to better resources and an ability to call upon skilled employees to carry out that role for them.

206. The court will be able to grant permission for a lay representative to conduct proceedings on behalf of a non-natural person in proceedings other than simple procedure if (a) the non-natural person is unable to pay for legal representation, (b) the lay representative is a suitable person to conduct proceedings and (c) it is in the interests of justice to grant permission.

207. A lay representative will be considered to be a suitable person if:

- the lay representative is (1) a director or company secretary of the company, (2) a member or partner in the partnership, or (3) a member or office holder of the association;
- the responsibilities of the lay representative do not consist wholly or mainly of conducting legal proceedings on behalf of the non-natural person or anyone else;
- the lay representative is authorised to do so by the non-natural person;

- the lay representative does not have a personal interest in the subject matter of the proceedings; and
- the lay representative has not been prevented from acting as such by order of the court.

Any personal interest would be one that the lay representative has other than one derived from their position with the non-natural person.

208. The court, in deciding whether it is in the interests of justice to grant permission, must have regard to (1) the prospects for success in the proceedings and (2) the likely complexity of the proceedings.

209. The policy intention is that the tests for permitting lay representation in proceedings other than simple procedure are higher than for simple procedure to reflect the court's concerns reflected in the *UK Bankruptcy* case.

Chapter 5

Jury service

210. The policy of the Bill is that the same rules should apply in relation to excusal from civil jury service as apply in relation to excusal from criminal jury service. Consistency between the civil and criminal rules is a long-standing policy objective which was not achievable in the Criminal Justice and Licensing (Scotland) Act 2010 for reasons of scope.

211. Persons who have attained the age of 71 years of age (rather than those who are more than 65) will be able to claim excusal from service in relation to civil proceedings. The person claiming excusal must respond within seven days of receipt of a requirement to provide information under section 3(2) of the Jurors (Scotland) Act 1925, rather than being able to claim excusal by appearing in response to a jury citation or by writing to the clerk of the court at any time before the scheduled appearance.

Chapter 6

Regulation of procedure

212. The Lord President of the Court of Session, who led the Scottish Civil Courts Review, has said that “the reforms – which have been devised as an integrated solution to our present problems – will be made effective through new rules of court”. While the Bill sets out the reformed framework for the civil courts system in Scotland, the detail will be provided in rules of court. The objective is that the Bill will facilitate modernisation of the civil court system – for example, in relation to case management – and to that end the powers which are granted by the Parliament to the courts to make rules about their procedures require to be updated and supplemented where necessary to ensure that the courts have all of the powers that they require.

213. Sections 96 and 97 provide powers for the Court of Session to make rules of court by act of sederunt to regulate procedure in the Court of Session (section 96) and in the sheriff court and the Sheriff Appeal Court (section 97). The powers to make rules of court are intended to be

broadly similar, but with specific variations required to take account of the different jurisdictions of the courts. The policy is that very general powers are given to the Court of Session which are intended to remove any doubt that that Court has the *vires* to make any rules relating to the procedure and practice in civil proceedings, including ancillary and incidental matters, and particularly those flowing from the Scottish Civil Courts Review. This includes matters relating to encouraging the settlement of disputes and the use of alternative dispute resolution and action to be taken before proceedings are commenced in court. This will specifically permit the Court to make rules relating to pre-action protocols. Without limiting the overall generality of the power granted to the Court, the Bill sets out lists in both sections of the kinds of matters on which the Court may make court rules. This is illustrative only and is not intended to be in any way taken to be an indication of a restriction on the power of the court to regulate civil proceedings.

214. Rules of court will, therefore, have a central role in implementing many of the recommendations of the Scottish Civil Courts Review. The Scottish Government believes that the Court of Session is the most appropriate body to take forward these rule making powers since the Court is most familiar with its practices and procedures. The Scottish Civil Justice Council will make recommendations on such court rules. The Lord President has a statutory duty under the Judiciary and Courts (Scotland) Act 2008 for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts and Lord Gill has already indicated his intention to implement through court rules those parts of the Review which do not require or are inappropriate for primary legislation. The provisions of the Bill on regulation of procedure are intended to ensure that the Lord President and the Court have all the powers to do so.

Case management

215. Chapter 5 of the Scottish Civil Courts Review is devoted to case management. An overwhelming majority of respondents to the Review's consultation endorsed the proposition that the court, and not the parties to litigation, should control the conduct and pace of litigation. Stakeholders have also expressed concerns to the Government about delays in court and lack of judicial continuity. The Review recommended that there should be explicit recognition of the principle that the court should have power to control the conduct and pace of all cases before it. It concluded that some degree of case management by the court of all types and values of case is an essential feature of an effective civil justice system, particularly one where it is envisaged that there will be greater specialisation in the sheriff court. It recognised, however, that a single model of case management for all types of case was unlikely to be appropriate.

216. Greater case management is a critically important part of the reforms to the Scottish civil courts. The Review therefore made detailed recommendations for the implementation of case management in the Court of Session and the sheriff court, including cases heard before summary sheriffs. It would not, however, be appropriate to attempt to provide rules on case management for all of the different kinds of litigation in primary legislation. Sections 96 and 97 of the Bill have been framed in such a way as to ensure that the Court of Session, advised by the Scottish Civil Justice Council, has wide powers to make whatever rules are thought to be necessary to implement case management for different kinds of cases and to avoid any possibility that such rules might be *ultra vires*.

217. The Scottish Government understands that the Scottish Court Service is commissioning a new IT system which will operate the new case management systems proposed by the Review. Clearly court rules will have to be developed which take into account any new computerised system.

Judicial continuity

218. The Scottish Civil Courts Review agreed that judicial continuity is critical to efficient case management. It, therefore, recommended that a docket system be introduced whereby a case is allocated to a judge at the outset and remains with that judicial officer until concluded. The docket system is thought to produce savings in time and money resulting from the judicial officer's familiarity with the case, fewer hearings, early fixing of trial dates and maintenance of those dates. In particular, the system avoids the need to explain the case again every time it comes before a different judge and leads to earlier settlement.

219. The Review concluded that a docket system should be introduced in the Court of Session and the sheriff court which should operate on the basis that a case is allocated to a judge prior to the first case management hearing. There will be a presumption that, wherever practicable, the case will thereafter be dealt with by that judge.

220. Judicial continuity, like case management, will be introduced by rules of court rather than primary legislation as the Court should govern its own procedures. The Review made extensive recommendations for the introduction of a docketing system and case management. The Bill departs from the recommendations of the Review on one detail of implementation, however. The Scottish Government believes that case allocation in the sheriff court should be a matter for the sheriff principal (section 27(3) of the Bill), based on the allocation of different kinds of case to sheriffs or summary sheriffs, rather than being left to the parties to decide at which judicial level to raise a case.

221. Under section 76 of the Bill, it will be possible to transfer cases from simple procedure, though this will hopefully just change the procedure under which the case is considered, not the judge (in other words, the sheriff or summary sheriff will continue to hear the case). It is expected that rules will be introduced to permit the transfer of other, non-simple procedure cases from summary sheriffs to sheriffs which turn out to be more complex than first anticipated, as recommended by the Review.

222. The Review considered how family business should be programmed and suggested that where the resident judicial officer in a court is a summary sheriff, specific days or half days should be set aside for the conduct of civil business, and in particular family actions.

Alternative dispute resolution ("ADR")

223. The acronym "ADR" is usually held to stand for "alternative dispute resolution" or "appropriate dispute resolution". These expressions relate to methods of resolution of disputes which do not involve going to court. Proponents of ADR argue that it avoids the delays, stress and expense which they consider is inherent in litigation. Mediation and arbitration are the two best known methods of dispute resolution outwith the courts in Scotland, though expert determination, expert neutral evaluation, conciliation and adjudication (in the field of

construction) are also used. All of these forms can only be used if the parties to the dispute agree.

224. The view of the Scottish Civil Courts Review was that ADR was “a valuable complement to the work of the courts”¹⁸, but supplementary, rather than a complete alternative, and quoted approvingly the view of Professor Dame Hazel Genn of University College London that “a well-functioning civil justice system should offer a choice of dispute resolution methods”.¹⁹ The Review did not recommend that primary legislation might be used to promote ADR.

225. The Court of Session Rules Council has considered introducing provisions on ADR in the past though they were never adopted. It recommended that the Court of Session rules should provide for specific recognition of the role of ADR in the resolution of all types of disputes; that the court should be able to invite parties to consider the possibility of using ADR at any stage of a dispute, including appeals; that parties should be required to set out in their initial pleadings what steps, if any, they had taken to attempt to resolve the dispute by ADR and if no such steps had been taken, why not; and that the court should have express power to make awards in expenses against a party who has acted unreasonably in refusing to attempt ADR or delaying unreasonably in doing so.

226. The final report of the Civil Justice Advisory Group, headed by Lord Coulsfield, recommended in January 2011 that “Court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action”.

227. The Scottish Government has long supported and encouraged the use of alternative methods of dispute resolution in appropriate cases. It, therefore, agrees with the recommendation of the Scottish Civil Courts Review that ADR is a valuable complement to the work of the courts and of the Civil Justice Advisory Group that court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action.

228. The Bill makes clear in the rule-making provision in sections 96 (inserted section 5(2)(b)(i) of the Court of Session Act 1988) and 97(2)(b)(i) that the Court of Session will have an unambiguous, clear power to consider and make rules which will encourage the use of methods of non-court dispute resolution in circumstances where it is felt that settlement might be achieved quicker than by court process. It is intended that this will apply to both cases where court action has already been instigated and cases where proceedings are still being contemplated.

229. This approach was approved by a majority of respondents to the consultation, though over half of those in agreement noted that ADR should not be compulsory or mandatory and/or that there should not be sanctions to compel individuals to make use of ADR. A significant number of respondents noted that ADR was not appropriate in some types of cases and personal injury cases were particularly identified in this regard.

¹⁸ SCCR, Chapter 7, page 169, paragraph 20.

¹⁹ SCCR, Chapter 7, page 170, paragraph 22.

Regulation of procedure and fees

230. The Bill provides for the Court to have the ability to regulate fees in the Court of Session, as it does in the sheriff court and Sheriff Appeal Court, and the powers from the various acts have been rationalised into the Bill to achieve this, clearly conferring on the Court power to regulate the fees of certain persons in the exercise of their functions in the Court of Session. This will bring together the powers of the Court of Session to regulate fees and remove the need to rely on the meaning of section 5 of the Court of Session Act 1988, particularly when regulating fees with regard to messenger-at-arms and shorthand writers.

231. The fees of advocates are not included in the power as this would be a departure from current practice. The Scottish Government would wish to deal with this separately and possibly as part of the Government's response to Sheriff Principal Taylor's Review of the Expenses and Funding of Civil Litigation in Scotland.

232. A power is, therefore, provided under section 99(1)(f) to add persons by order to the list of persons whose fees may be regulated, which should permit the fees of other skilled persons whose expertise may be utilised by the court to be regulated under this provision.

Chapter 7

Vexatious proceedings

233. The Scottish Civil Courts Review identified litigants who conduct their cases in an unreasonable manner as a growing problem for the administration of justice. Their conduct was said to impact not only on their opponents but also on the efficient use of court resources and on other litigants with cases of more merit and substance. The Review proposed changes in this area to permit the courts to have greater control over litigants whose behaviour took advantage of the court process to frustrate the efficient resolution of cases or who used the raising of actions as a weapon itself.

234. The Review did not recommend that the Vexatious Actions (Scotland) Act 1898 be amended, but the Scottish Government has taken this opportunity to bring its provisions up to date and to re-enact it. The re-enactment retains provisions for an order to be granted by the court, preventing a vexatious litigant from instituting new proceedings without first obtaining the permission of a judge of the Outer House of the Court of Session. In addition, an order will be able to be granted by the court under sections 100 and 101 providing that a litigant may only take a specified step with permission in proceedings which are already underway. This is similar to the provisions of section 42 of the Senior Courts Act 1981 which permits similar orders in England and Wales.

235. The Scottish Civil Courts Review recommended that the court itself should be able to make civil restraint orders (CRO) similar to those which may be imposed in England and Wales, but adapted for Scots law and Scottish courts. The Scottish Government believes that Ministers should be able to make regulations empowering the courts to make such orders. It believes that doing so by regulations will ensure flexibility and adaptability to meet the behaviour of challenging litigants. Ministers will, however, require to consult the Lord President prior to making regulations.

236. Introducing a power to provide for CROs, the Bill is intended to give the Scottish courts similar powers to the English courts to make orders in similar circumstances.

237. Evidence of behaviour outwith Scotland is specifically permitted to be led as recommended by the Review.

238. In addition to the re-enactment of the 1898 Act and the provisions allowing CROs, the general power in the Bill for the Court of Session to make provision for or about the procedure and practice to be followed in the Court of Session, Sheriff Appeal Court or sheriff court will now include a power to make provision for or about the steps the court may take where there has been an abuse of process by a party to such proceedings.

239. This confirms and arguably expands the case law position on the Court's inherent powers. It leaves the phrase deliberately undefined to allow judicial development of the concept of abuse of process through use of the wide new enabling powers for act of sederunt. "Abuse of process" is a wider term than just vexatious behaviour or applications without merit and while the CROs will empower the courts to deal with a litigant's general behaviour across various cases, this power allows the court to make act of sederunt for a wider range of misbehaviour within a case itself.

240. The Scottish Government is conscious that there may be an appearance of overlap between the re-enacted and updated Vexatious Actions (Scotland) Act 1898 and the provisions on CROs. While it is possible that they could both be used and applied to similar behaviour in some cases, it is proposed that the power of the Lord Advocate to petition the court should be retained for two distinct purposes. First, to preserve the Lord Advocate's role in safeguarding the public interest, and, second, to allow intervention where a vexatious litigant has not troubled one court sufficiently to trigger the CRO sanction, but has, in his or her behaviour overall, troubled the system or one litigant in a variety of courts. That said, now that the courts will be given this power, it is expected that the number of actions taken by the Lord Advocate will decrease.

PART 4 OF THE BILL

CIVIL APPEALS

241. Because of the establishment of the Sheriff Appeal Court, the existing right of appeal to the sheriff principal of a sheriffdom in civil proceedings is abolished by the Bill. This only applies to appeals from the sheriff to the sheriff principal and does not affect any statutory appeals or applications to the sheriff principal from tribunals or other bodies. The Bill allows for the Sheriff Appeal Court to be held in different locations across Scotland so that the advantages of sheriffs principal hearing appeals locally will not be lost.

Appeals to the Sheriff Appeal Court

242. The policy is that the new Sheriff Appeal Court should deal with all civil appeals from sheriffs and summary sheriffs in the sheriff court. Currently appeals may go to the sheriff principal or to the Court of Session. Comments from consultees suggested support for the Sheriff Appeal Court and agreed that it would bring greater certainty and consistency for

pursuers and defenders as decisions of the Sheriff Appeal Court will apply across Scotland (rather than the current arrangement that decisions from appeals to sheriffs principal are not binding Scotland-wide).

243. A decision of a sheriff or summary sheriff which is a final judgement will be appealable to the Sheriff Appeal Court without the requirement for permission as well as decisions taken during the course of civil proceedings specified in section 104(1)(b). Leave to appeal is, however, required for any other interlocutor of a sheriff in civil proceedings.

244. It is recognised that some appeals will raise issues which should be considered by the Court of Session and so it will be possible for the Sheriff Appeal Court to remit an appeal on the application of a party to the appeal if it raises a complex or novel point of law.

Appeals to the Court of Session

245. With certain exceptions set out in section 106, direct appeals from the sheriff court to the Court of Session will cease to be possible. All appeals will go instead to the Sheriff Appeal Court. In order to address concerns that the Sheriff Appeal Court might in some cases simply be seen as an extra and unnecessary layer of appeal which merely adds to the cost of appealing an action, the Scottish Civil Courts Review recommended that there should be a restricted right of appeal from the Sheriff Appeal Court to the Court of Session. The appeal will be to the Inner House even though the provision does not expressly say this. It is not intended that parties should be able to bypass the Sheriff Appeal Court since the rationale for having such a court is that not all civil appeals merit the attention of the Inner House. It was felt that the right should be restricted since 80% of appeals to the Inner House upheld the decision of the court of first instance. Civil appeals from a decision of the Sheriff Appeal Court to the Court of Session will, therefore, only be granted with the permission of the Sheriff Appeal Court or, if refused, with the permission of the Court of Session.

246. As an appeal to the Sheriff Appeal Court is available as of right in most cases, the Scottish Civil Courts Review considered that the further right of appeal to the Court of Session should be subject to a more stringent test and proposed that the same test should be used as for appeals to the Court of Appeal in England and Wales. The Scottish Government agreed that the threshold should be more difficult to achieve. The Bill, therefore, provides that the Sheriff Appeal Court or the Court of Session may only grant permission to appeal if the appeal raises an important point of principle or practice or if there is some other compelling reason for the Court of Session to hear it (this is often called the “second appeals” test).

Appeal from the sheriff principal to the Court of Session

247. There remain some proceedings where there is a statutory requirement for initial proceedings to be brought before a sheriff principal rather than a sheriff. In such cases, it is considered more appropriate for the appeal to lie to the Court of Session rather than the Sheriff Appeal Court. If legislation has provided that initial proceedings merit the attention of a sheriff principal rather than a sheriff due to their complexity or importance, then it seems appropriate that any appeal of such proceedings should go directly to the Court of Session, rather than the Sheriff Appeal Court where it would be heard by other sheriffs principal or sheriffs sitting as Appeal Sheriffs. This is provided for in section 108.

Granting of leave and assessment of grounds of appeal

248. Lord Penrose published a Review of Inner House Business in 2009²⁰ in which it was set out that there should be a sift mechanism under which a single judge of the Inner House should consider grounds of appeal. The amendment made to the Court of Session Act 1988 by the Judiciary and Courts (Scotland) Act 2008, which permits a single judge of the Inner House to dispose of business, restricts the role of the single judge to procedural matters. That power is considered sufficient to provide for a single Inner House judge to deal with applications for permission or leave to appeal, but not for a single judge to consider whether appeal proceedings should be allowed to proceed and if so on what grounds. Lord Penrose recommended that the decision of the single judge should be final, albeit with the safeguard that a decision could be reviewed by a three-judge Division of the Inner House.

249. The Scottish Civil Courts Review indicated that it considered that it would not be an efficient use of resources for a first sift to be undertaken by three members of the Inner House and noted that the sift mechanism proposed by Lord Penrose would be the equivalent of a requirement to obtain leave in other jurisdictions. A decision on whether to grant leave or permission, and an assessment of the grounds of appeal, both require some consideration of the merits and will ordinarily affect whether an appeal or part of it can proceed. Notwithstanding the existing procedures for dealing with leave or permission, the Scottish Government has decided that the Bill should provide a power for both of these matters to be dealt with in a consistent way. Section 109 of the Bill, therefore, gives the Court of Session a new power to provide by act of sederunt for any applications for leave or permission to the Inner House to be determined by a single judge of the Inner House. Separately section 109 provides a similar power to make provision for the initial appeal proceedings to be dealt with by a single judge with reference to whether the grounds of appeal or any of them are arguable. The Government agrees with the Review that the opportunity to reopen a determination by a single judge on both of matters provides a valuable and adequate safeguard. The Bill, therefore, requires the act of sederunt providing for these matters must include provision for the procedure to be followed in the proceedings before the single judge, including for the parties to be heard and for the review of the decision of the single judge by a Division of the Inner House, among other matters.

Appeals to the Supreme Court

250. Section 40 of the Court of Session Act 1988 provides that it is competent to appeal to the United Kingdom Supreme Court (UKSC) against certain judgements without requiring leave from the Inner House.

251. The only restriction is that the appeal must be certified by two counsel as “reasonable” before it can be heard in the UKSC.

252. The current arrangements have been the subject of adverse comment in a number of cases²¹, most recently by the UK Supreme Court in *Uprichard v Scottish Ministers*²². Lord Reed observed in a postscript to this judgement (at paragraph 58):

²⁰ *Review of Inner House Business* http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/lord_penrose_inner_house_business_report?sfvrsn=2

²¹ *G Hamilton (Tullochgribban Mains) Ltd v Highland Council* [2012] UKSC 31; *Wilson v Jaymarke Estates Ltd* 2007 SC (HL) 135.

“Although of importance to those affected by the outcome, the appeal did not on examination raise any arguable point of law of general public importance. It was not an appropriate use of the time of this court. This is not the first occasion in recent months when the court has made observations to this effect in respect of a Scottish appeal.”.

253. Lord Reed went on to discuss the comparative position in the rest of the UK (beginning with an explanation of the current arrangements):

“...subject to certain statutes under which an appeal from the Court of Session lies only with the permission of the Court of Session or the Supreme Court, the general rule is that an appeal against a judgment on the whole merits of a cause lies to this court from the Inner House of the Court of Session without leave. That is a privilege which is not enjoyed by litigants in any other part of the United Kingdom. Appeals against any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court. In practice, the Court of Appeal normally refuses permission so as to enable an Appeal Panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues.

The public interest is served, in relation to appeals from England and Wales and Northern Ireland, by the rule that permission to appeal is granted only for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground: Supreme Court Practice Direction 3.3.3. The reasons for adopting that approach were explained by Lord Bingham of Cornhill (at paragraphs 59 and 60), at the time when the final court of appeal was the House of Lords, in *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228:

‘In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.’ ”

254. The consultation on proposals to implement the majority of recommendations of the Scottish Civil Courts Review did not consider what was to happen to civil appeals from the Court of Session to the UKSC.²³ Professor Neil Walker was commissioned separately to set out a range of options for the development of final appellate jurisdiction in the Scottish Legal

²² [2013] UKSC 21: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0034_Judgment.pdf

²³ At the time of commissioning the SCCR, the then (Labour/Liberal Democrat) Scottish Executive did not ask Lord Gill to consider this matter.

System.²⁴ Of the various options discussed, Professor Walker favoured a “quasi-federal” model where cases would be eligible for appeal to the Supreme Court only where they raised issues of wider relevance within the UK.

255. In its response to the Scottish Civil Courts Review, the Scottish Government stated that it was considering Professor Walker’s report, noting that one of the aims of the Review was to focus the Court of Session on the most important business. It went on to say that:

“It may be consistent with this affirmation of the status and significance of the Court of Session that appeals onward from that Court should be restricted to cases of real significance. Furthermore the approach Lord Gill adopts generally is of proportionate allocation of judicial resources with appeals subject to sifts and tests of legal merit. In principle, the Scottish Government believes that this approach should also be adopted in relation to appeals onward to the Supreme Court.”²⁵

256. In the context of appellate work, the Scottish Government thinks that the current arrangements - allowing for admission of civil appeals from the Court of Session to the UKSC on the certification of two counsel - do not satisfy the principles outlined above: instead, the Government considers the decision on leave to appeal should be taken by the courts.

257. The Scottish Government conducted a consultation on the proposed changes to the arrangements for appeals to the UKSC in the summer of 2013. Analysis of consultation responses shows that there is majority support for the proposal to introduce a leave to appeal stage for those civil appeals from the Court of Session to the UKSC - this would replace the current arrangements. Some of the respondents raised the issue of a potential widening in the appeals that can be taken forward to the UKSC without the leave of the Inner House. Where the Court of Session is currently the sole gatekeeper in determining whether an appeal can be made to the Supreme Court, the policy intention is to retain that position. Many respondents commented that the test for leave to appeal should be granted where a case raises arguable points of law of public importance and this is reflected in the Bill.

258. The policy of the Bill is therefore:

- the current provisions for appeals under section 40 of the Court of Session Act 1988 which can be taken forward on the certification of two counsel are being replaced with provision that requires the permission of the Inner House, or, failing such permission, permission of the UKSC;
- the new right of appeal is subject to any other enactment restricting an onward appeal to the UKSC;
- the new right of appeal would not interfere with rights of appeal under other enactments which confer rights to appeal to the UKSC directly.

²⁴ “Final Appellate Jurisdiction in the Scottish Legal System”, Professor Neil Walker, 2010 <http://www.scotland.gov.uk/Resource/Doc/299388/0093334.pdf>

²⁵ Scottish Government response paragraph 114. Available at: <http://www.scotland.gov.uk/Publications/2010/11/09114610/0>

259. The Scottish Government believes that these proposals would properly respect the role and standing of the Court of Session and, in line with the principles of the Scottish Civil Courts Review of proportionality in the civil justice system, would ensure that only cases which are properly within the countenance of the UKSC are heard by that court. They would also result in the Court of Session being treated similarly to the Court of Appeal in England and Wales and in Northern Ireland.

260. Moreover, the proposals would align the leave procedures with the procedure for determination of civil and criminal devolution issues under paragraph 13 of Schedule 6 to the Scotland Act 1998 and the new compatibility appeals introduced by the Scotland Act 2012.

261. In drafting the new provisions, the Scottish Government has also taken the opportunity to update the language and modernise terminology noting that the Supreme Court in the recent judgement of *Apollo Engineering Limited (Appellant) v James Scott Limited (Respondent)* (Scotland) ([2013] UKSC 37) made some criticism of the language of section 40.

PART 5 OF THE BILL

CRIMINAL APPEALS

Appeals from summary criminal proceedings

262. The Scottish Civil Court Review recommended that “the Sheriff Appeal Court should have jurisdiction to deal with all summary criminal appeals by an accused on conviction or conviction and sentence; appeals by the Crown on acquittal or sentence; and bail appeals”. The Summary Justice Review Committee also recommended that there should be an intermediary appeal court before the High Court. This is to ensure that High Court judges may devote time to the most complex and difficult appeals and to speed up the appeal process. While such an appeal may result from a summary criminal case, such cases by their nature should not normally merit the attention of the country’s most senior judges. They may be remitted if they do raise important or novel issues.

263. The policy of the Bill is that the Sheriff Appeal Court will take over the jurisdiction of the High Court of Justiciary in relation to appeals from courts of summary criminal jurisdiction, currently provided for by Part X (appeals from summary proceedings) of the Criminal Procedure (Scotland) Act 1995. In other words, appeals of summary criminal matters from justices of the peace, summary sheriffs and sheriffs should be appealed to the Sheriff Appeal Court in the first instance. Thereafter there will be an appeal to the High Court of Justiciary against any decision of the Sheriff Appeal Court in criminal matters, but the appeal will be on a point of law only and with leave of the court, or if it refuses, the High Court of Justiciary itself. When deciding on summary criminal appeals, the Sheriff Appeal Court should, however, be able to remit complex or novel points of law to the High Court for determination.

264. The policy is that, as at present in summary appeals to the High Court, the quorum of the Sheriff Appeal Court for hearing and determining any summary appeal should be three members of the court, except in relation to any appeals against sentence by a person convicted of an offence, for which the quorum should be two members of the Sheriff Appeal Court. Appeals by a prosecutor against the leniency of a sentence should be heard and determined by three court

members. The determination of any appeal heard by three Appeal Sheriffs is to be made according to the votes of the majority. If a matter is to be determined by two Appeal Sheriffs and they cannot agree or consider it appropriate for some other reason they can remit it to three Appeal Sheriffs for determination by the majority.

265. It is the policy intention that all matters which may currently be referred to the High Court under sections 174 (preliminary pleas), 175 (right of appeal) and 191 (miscarriage of justice) of the 1995 Act should now be referred to the Sheriff Appeal Court.

266. It is not the policy intention to adjust the *nobile officium* of the High Court in any way (ie its inherent jurisdiction to grant, in extraordinary or unforeseen circumstances in which no other remedy is provided for by law, such orders as may be necessary for the purposes of preventing injustice or oppression).

267. Appeals which are currently made to the High Court under Part X of the 1995 Act by way of stated case will now be made to the Sheriff Appeal Court by way of stated case. Any appeal by a person convicted of an offence under section 175(2)(a) or (d) of the 1995 Act (i.e. against the conviction or the conviction and the sentence) and any appeal by a prosecutor under section 175(3) of the 1995 Act (i.e. against an acquittal or a sentence passed on conviction (both on a point of law) will continue to be made by an application for a stated case under section 176(1) of the 1995 Act but to the Sheriff Appeal Court as opposed to the High Court.

268. Leave to appeal in appeals made by stated case will remain as currently provided in Part X of the 1995 Act save that the decision whether to grant leave to appeal under section 180(1) should be made by an Appeal Sheriff rather than a single judge of the High Court. In the event that an Appeal Sheriff does not grant leave to appeal under that provision, an appellant will be able to apply to the Sheriff Appeal Court for leave to appeal under section 180(4). An appeal by the prosecutor by stated case will continue not to require leave to appeal.

269. The disposals available to the Sheriff Appeal Court on an appeal by way of stated case should be those that are currently available to the High Court under section 183 of the 1995 Act.

270. Appeals which are currently made to the High Court under Part X of the 1995 Act by way of note of appeal will now be made to the Sheriff Appeal Court by way of note of appeal. Any appeal by a person convicted of an offence under section 175(2)(b), (c) or (cza) of the 1995 Act (i.e. an appeal against sentence) or any appeal by a prosecutor under section 175(4) of the 1995 Act (i.e. against an acquittal or a sentence passed on conviction (both on a point of law)) is to occur by note of appeal in accordance with section 186 but to the Sheriff Appeal Court as opposed to the High Court.

271. Leave to appeal in appeals made by note of appeal will remain as currently provided in Part X of the 1995 Act save that the decision whether to grant leave to appeal under section 187(1) will be made by an Appeal Sheriff rather than a single judge of the High Court. In the event that an Appeal Sheriff does not grant leave to appeal under that provision, an appellant should be able to apply to the Sheriff Appeal Court for leave to appeal under section 187(3). An appeal by the prosecutor by note of appeal will continue not to require leave to appeal.

272. The disposals available to the Sheriff Appeal Court on an appeal by way of stated case should be those that are currently available to the High Court under sections 188 to 190 of the 1995 Act.

273. The policy is that an appeal by suspension or advocacy on ground of miscarriage of justice under section 191 of the 1995 Act will be to the Sheriff Appeal Court as opposed to the High Court. It is not intended to modify the rights of appeal by suspension or advocacy in any other instance.

Appeals from Sheriff Appeal Court

274. The Sheriff Appeal Court is not intended, however, to be the final court of appeal in relation to summary criminal proceedings. The policy is that there should be a right of onward appeal from a decision of the Sheriff Appeal Court to the High Court.

275. In relation to criminal matters, the Scottish Civil Courts Review recommended that there should be a right of appeal to the High Court from the Sheriff Appeal Court, but only on a point of law and only with the leave of the High Court. The Review considered that since the appeal would already have received careful consideration, leave should only be granted by the High Court where there are “clearly arguable grounds of appeal”.

276. As with civil appeals, the Scottish Government would wish to avoid the possibility that the Sheriff Appeal Court should become simply an extra appellate level. The policy is, therefore, for the Bill to provide for a further right of appeal from a decision of the Sheriff Appeal Court from summary criminal proceedings to the High Court, but that these ‘second appeals’ should only be on a point of law and will require the leave of the High Court.

277. The Bill provides for a right of appeal to the High Court of any decision or disposal of the Sheriff Appeal Court taken in relation to a criminal appeal, including an appeal under the modified provisions of Part X of the 1995 Act – sections 174 (appeals relating to preliminary pleas), 175 (general right of appeal) and 191 (appeal by suspension or advocacy on ground of miscarriage of justice) – and a decision of the Sheriff Appeal Court in an appeal under section 32 (bail appeal). An appeal to the High Court may be brought at the instance of either party to an appeal decided upon by the Sheriff Appeal Court on a point of law only.

278. The appellant or respondent may only appeal a decision or disposal of the Sheriff Appeal Court with leave of the High Court. In order to ensure that trivial or unworthy appeals are not considered, such leave will only be granted where the High Court is satisfied that the decision of or disposal adopted by the Sheriff Appeal Court raises an important issue of principle or practice or there is another compelling reason for allowing the appeal to proceed.

279. The Bill prescribes the procedure applying to an application for leave to appeal, and requires that an application for a second appeal to be made to the High Court within 14 days of the determination of the Sheriff Appeal Court which is the subject of the second appeal. This time limit may be extended by the High Court, on the application of the appellant, in exceptional circumstances. Further provision regarding the procedure for appeals from the Sheriff Appeal Court to the High Court will be made by act of adjournal.

280. All appeals from the Sheriff Appeal Court to the High Court in relation to summary criminal matters will be heard by a quorum of three of the Lords Commissioners of Justiciary and any determination of any question in relation to such an appeal by the High Court shall be by majority vote of the members of the High Court which are sitting (including the presiding judge). Each judge will be entitled to pronounce a separate opinion. There is no policy intention to distinguish between the procedure which should apply to the various decisions of the Sheriff Appeal Court which may be appealed to the High Court.

281. In disposing of an appeal from the Sheriff Appeal Court, the High Court will be able to make the same array of disposals as are available to the Sheriff Appeal Court when disposing of the initial appeal. The Bill, therefore, enables the High Court to dispose of an appeal by (a) remitting the cause to the Sheriff Appeal Court with its opinion and any direction thereon; or (b) exercising any power which was available to the Sheriff Appeal Court in disposing of the initial appeal. It also enables the High Court to exercise any other powers which were available to the Sheriff Appeal Court under Part X of the 1995 Act or any other enactment in order to facilitate the hearing and disposal of the appeal.

Remitting from the Sheriff Appeal Court to the High Court

282. Since the High Court is currently the only criminal court of appeal in Scotland, there is no process for remitting a complicated appeal to a higher court, but it is the policy of the Bill that it should be possible for the Sheriff Appeal Court to refer a novel or complicated issue arising in a summary appeal to the High Court for further instruction. The High Court will be able to dispose of such a matter only by remitting the matter back to the Sheriff Appeal Court with its opinion and any direction thereon. It is not the intention that the High Court should determine the appeal, but only the matter referred. The procedure for referrals from the Sheriff Appeal Court to the High Court will be prescribed by act of adjournal.

Scottish Criminal Cases Review Commission

283. The Scottish Criminal Cases Review Commission may presently refer cases which have been dealt with on indictment or complaint to the High Court in terms of section 194B of the Criminal Procedure (Scotland) Act 1995. The Bill provides for this power to continue, despite the general transfer of the High Court's summary appeal jurisdiction to the Sheriff Appeal Court. It will be possible for the Scottish Criminal Cases Review Commission to refer appropriate summary criminal cases to the High Court as it presently does, regardless of whether there has already been an appeal, and regardless of whether the earlier appeal was disposed of by the Sheriff Appeal Court or the High Court.

Bail appeals

284. The Scottish Civil Court Review recommended that the Sheriff Appeal Court should have jurisdiction to deal with bail appeals.

285. The policy of the Bill is that section 32 of the Criminal Procedure (Scotland) Act 1995 should be amended to take into account the establishment of the Sheriff Appeal Court and its position in the criminal appellate structure with particular reference to appeals relating to interim liberation (bail). It is intended that, in addition to appeals by the accused (on grounds of refusal of bail or the amount of bail) or the public prosecutor (on grounds of bail being allowed or the

amount of bail), it should be possible to make an appeal on a point of law from a decision of the Sheriff Appeal Court on a bail appeal.

286. The policy is that it should be possible for the Sheriff Appeal Court to remit a novel or complicated issue relating to a bail appeal to the High Court. Determination of bail appeals by the Sheriff Appeal Court are themselves to be appealable to the High Court. Such appeals are to be treated in the same way as any other appeal from the decisions of the Sheriff Appeal Court and subject to the same tests.

PART 6 OF THE BILL

JUSTICE OF THE PEACE COURTS

287. The Scottish Civil Courts Review did not consider what was to happen to stipendiary magistrates who are provided for in section 74 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and whose powers match those exercised by a sheriff dealing with summary criminal business. There are only four full-time stipendiary magistrates in Scotland at present (and a small number of part-time ones), all of whom are based in Glasgow. The Summary Justice Review Committee²⁶ headed by Sheriff Principal McInnes envisaged that summary sheriffs would take over their role and that no further stipendiary magistrates would be appointed. The Scottish Government agrees, and proposes that any stipendiary magistrates in post on implementation of the legislation will convert to become summary sheriffs.

288. The existing stipendiary magistrates will be appointed as summary sheriffs unless they decline appointment. This will mean that they will have a civil competence as well as their current criminal competence, a development also envisaged by the McInnes Review.

289. In order to provide maximum flexibility in relation to the programming of business in the justice of the peace courts, summary sheriffs will also be able to sit in those courts. When summary sheriffs sit in the justice of the peace court, they will, however, only be entitled to exercise the same summary criminal powers as the justice of the peace, whereas when they sit in the sheriff court, they will be able to exercise the same powers as the sheriff (in relation to summary criminal cases).

PART 7 OF THE BILL

SCOTTISH COURTS AND TRIBUNAL SERVICE

290. The Scottish Ministers currently have a statutory responsibility to provide administrative support to a number of tribunals which relate to devolved matters. Namely:

- the Mental Health Tribunal for Scotland (MHTS);²⁷
- the Lands Tribunal for Scotland (LTS);²⁸
- the Additional Support Needs Tribunals for Scotland (ASNTS);²⁹

²⁶The Summary Justice Review <http://www.scotland.gov.uk/Publications/2004/03/19042/34184>

²⁷ The Mental Health (Care and Treatment) (Scotland) Act 2003, schedule 2, paragraph 8(1) and (2).

²⁸ The Lands Tribunal Act 1949, section 2(7).

- the Private Rented Housing/Homeowner Housing Panels (PRHP/HOHP),³⁰ and
- the Scottish Charity Appeals Panel (SCAP).³¹

291. In addition, the Scottish Ministers also have responsibility to provide administrative support to one tribunal which relates to reserved matters – the Pension Appeal Tribunals for Scotland (PATS).³²

292. The provision of administrative support to tribunals typically involves the provision of property, staff and services to the tribunals (although the exact wording of the provision varies with the enactments which establish and govern the proceedings of the tribunals).

293. The Scottish Ministers currently discharge their responsibilities through “the Scottish Tribunals Service” (STS) which is simply a division of the Scottish Government. STS does not have a separate legal personality and currently operates as a delivery unit of the Justice Directorate.

294. The system of devolved tribunals in Scotland is already the subject of considerable reform. The Tribunals (Scotland) Bill was introduced to the Scottish Parliament on 8 May 2013. It establishes two new tribunals – the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland³³ with the intention that the First-tier Tribunal will operate, primarily, as a tribunal deciding cases in the first instance with a right of appeal to the Upper Tribunal.

295. That Bill does not directly confer any functions on the First-tier Tribunal but instead provides for a mechanism by which it can acquire them from the existing tribunals named above which fall within devolved competence.

296. One of the principal motivating factors for reform of tribunals in Scotland was the desire to increase the independence of the tribunals from the Scottish Ministers, particularly as a number of tribunals are required to review ministerial decisions, actions and omissions. Currently, the Scottish Ministers have full control over the appointment and removal of the members of devolved tribunals and the responsibility for making procedural rules governing their practice and procedure.

297. The new First-tier and Upper Tribunals will, however, fall within the control of the Lord President who is designated as the Head of the Scottish Tribunals. There is an obvious disconnect with the fact that the Lord President is the Head of the Tribunals and has responsibility for ensuring the efficient disposal of business in the Tribunals while the Scottish Ministers have responsibility for providing administrative support. The policy of the current Bill is, therefore, that the duty to provide administrative support to the First-tier and Upper Tribunals

²⁹ The Education (Additional Support for Learning) (Scotland) Act 2004, schedule 1, paragraph 9.

³⁰ The Rent (Scotland) Act 1984, Schedule 4, paragraph 11.

³¹ The Charities and Trustee Investment (Scotland) Act 2005, schedule 2, paragraph 3.

³² The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999, section 5 and Schedule 2, paragraph 2(a)(iv).

³³ The Tribunals (Scotland) Bill, section 1(1).

should be imposed on the SCS (which falls within the control of the Lord President) rather than the Scottish Ministers.

298. It is recognised that it may still be a considerable time before all of the functions of the devolved tribunals mentioned above are transferred to the new tribunals and the responsibility to provide administrative support to those tribunals which are currently supported by the Scottish Ministers to be conferred on the SCS. It is acknowledged that this gives rise to a different dichotomy whereby the Lord President/SCS will effectively be responsible for providing administrative support to tribunals which are under the control of the Scottish Ministers but this will be a temporary issue since the functions of those tribunals are due to be transferred to the new system in the future.

299. Provision was not made in the Tribunals (Scotland) Bill because the proposal had not been fully consulted on and it was thought to be inappropriate to introduce such a change by a Stage 2 amendment. For this reason the change has been included in this Bill. It is intended that the proposals should be given effect to by April 2015 ahead of the wider reform of the Scottish courts made by the Bill.

300. The Bill therefore renames the Scottish Court Service as “the Scottish Courts and Tribunals Service” with the acronym “SCTS” and makes consequential changes to the Judiciary and Courts (Scotland) Act 2008. In order to highlight that the administrative support for tribunals will be a major function of the new SCTS and not merely subordinate to the provision of administrative support to the Scottish courts and judiciary, the Bill confers this function on SCTS. This provision confers the function of providing, or ensuring the provision of, the property, services, officers and other staff required for the purposes of the following tribunals:

- the First-tier Tribunal for Scotland;
- the Upper Tribunal for Scotland;
- the Mental Health Tribunal for Scotland;
- the Lands Tribunal for Scotland;
- the Additional Support Needs Tribunals for Scotland;
- the Private Rented Housing/Homeowner Housing Panels; and
- the Scottish Charity Appeals Panel.

301. The policy is that the Bill should also make equivalent provision as is made in section 61(2) of the 2008 Act so that in carrying out its functions in relation to tribunals, SCTS must take account of the needs of members of the public and those involved in proceedings in the tribunals listed above and so far as practicable and appropriate, co-operate and co-ordinate activity with any other person having functions in relation to the administration of justice.

302. Staff employed by the Scottish Ministers in the delivery unit of the Scottish Government known as “the Scottish Tribunals Service” will be transferred to SCTS. Any property and liabilities will also be transferred.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

303. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website <http://www.scotland.gov.uk/Publications/Recent>.

304. The Bill will make significant changes to the structure and practice of the Scottish civil justice system and some consequential changes to the criminal justice system.

305. At every stage in the development of the policy underpinning the provisions in the Bill, there has been research and consultation with civil justice partners, key stakeholders and the wider public. From the Scottish Civil Courts Review itself and the public consultation published by the Scottish Government to informal discussions with relevant organisations and individuals, policy officials have created an evidence base from which to develop and assess provisions against the equality duty and human rights legislation. Accordingly, the Bill's provisions do not discriminate on the basis of age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief.

306. Scottish Government Justice Analytical Services provided analytical expertise to facilitate a framing workshop for the EQIA process. This exercise enabled policy officials to identify relevant data and establish an accurate and informed context with which the reforms to the civil and criminal justice systems will operate and against which equality matters can be assessed.

307. To summarise the key results of the EQIA process, all parties are judged to benefit from fewer delays in the system and more proportionate costs.

308. Overall, the Scottish Government believes that the Bill will provide for a more efficient and effective civil justice system where users will experience fewer unnecessary delays and more proportionate costs in resolving disputes through the civil courts, and therefore better access to justice. An effective system should benefit, either directly or indirectly all sections of society.

309. The EQIA identified no negative impacts against the protected characteristics and no changes were required.

Island communities

310. The provisions of the Bill apply equally to all communities in Scotland.

311. It is not expected that there will be many changes to the provision of civil justice at Scotland's island sheriff courts. The SCS is proposing that the island sheriff courts will become sheriff and jury centres for criminal business. It is therefore envisaged that the sheriffs currently in post at those island courts will remain in place and it seems doubtful that there would be sufficient business to justify the appointment of a summary sheriff at those courts, at least in the short term.

Local government

312. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum.

313. Some of the proposals in the Bill (such as the provisions for extended interdicts) will have a beneficial impact on the position of local authorities. Local authorities will benefit in the same way as other court users from the reforms in terms of civil cases being dealt with more promptly and efficiently, and at a proportionate cost to the parties. In particular, the proposals for greater specialisation in the sheriff courts will assist local authorities in areas such as housing.

Sustainable development and environmental issues

314. The Bill will have no negative impact on sustainable development.

315. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

Human rights

316. A number of other provisions of the Bill are relevant to the European Convention on Human Rights. As a Bill concerned with establishing a framework for the determination of civil disputes and summary criminal cases, article 6(1) of the Convention is of particular relevance:

- In re-enacting provisions relating to removal of judicial officers and introducing the same system for removal of summary sheriffs, the Bill ensures compliance with article 6(1) the requirement for an independent and impartial tribunal by providing that a judicial officer may be removed by the First Minister only following the report of a tribunal; that the constitution of the tribunal must be agreed by the Lord President; that the report of the tribunal must be laid before the Scottish Parliament; and that the final removal of a sheriff principal, sheriff or summary sheriff must be effected by an order subject to negative procedure in the Scottish Parliament. These measures ensure that that judicial officers continue to enjoy security of tenure, free from the real or apparent interference of the executive, meeting the requirements of article 6 as explored by the European Court of Human Rights in *Ringeisen v Austria* and *Campbell and Fell v UK* and by the Court of Session in *Clancy v Caird*.
- The provisions on lay representation for non-natural persons enable the court to permit lay representation in any case in which this might be necessary in order to comply with article 6(1) and access to justice, displacing the current rule whereby non-natural persons may be represented only by a solicitor or advocate (following from the decision of the House of Lords in the 1943 case of *Equity and Law Life Assurance Society v Tritonia Ltd.*, which was referred to as binding in the 2012 Inner House decision in *Apollo Engineering v James Scott Ltd.*) The Scottish Government considers that there may arise cases in which the effect of this rule would be

effectively to deny non-natural persons access to justice, in breach of the requirements of article 6(1). The Bill accordingly includes provisions allowing lay representation in cases governed by simple procedure, and permitting the court to allow such representation in other cases if it considers that it is in the interests of justice to do so. This provides a “safety valve” to allow the court to avoid situations in which the existing general rule might deprive a non-natural person of access to justice.

- The Bill also includes provision for strengthening the power of the court to deal with vexatious litigants, by allowing the Lord Advocate to seek an order against such a litigant preventing that litigant from taking a specified step in specified legal proceedings without the permission of a judge of the Outer House of the Court of Session. This new power is similar to that available to the courts in England and Wales under section 42 of the Senior Courts Act 1981, under which the Attorney General may seek an order of the court preventing a litigant from taking any action in any existing civil proceedings. Abuse of court proceedings by such vexatious litigants occupies the time and resources of the court, and causes unnecessary worry and expense to the other parties to their actions. As the Inner House of the Court of Session noted in the 2009 decision in *Lord Advocate v McNamara*, decisions of the European Court of Human Rights provide that the right of access to the courts may properly be subject to limitations in the form of regulation by the state, provided that two conditions are satisfied: (1) the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; and (2) a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. The new measures continue to allow for access to the courts with the permission of an Outer House judge, and are in the Scottish Government’s view a proportionate means to the legitimate aim of providing appropriate controls on abuse of the court’s process and so protecting others’ access to justice.

317. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

This document relates to the Courts Reform (Scotland) Bill (SP Bill 46) as introduced in the Scottish Parliament on 6 February 2014

COURTS REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

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