

Making Justice Work

Courts Reform (Scotland) Bill – A Consultation Paper

February 2013



Ministerial Foreword

The Scottish legal system is going through a period of unprecedented change.

Society has changed and our civil courts system needs to change with it. An efficient civil justice system is vital to Scotland's economy in helping to make Scotland an attractive place to do business. And an understandable and accessible system is vital in giving all those who litigate confidence that their problems will be resolved.

The proposals and reforms set out in this paper are part of the wider Making Justice Work Programme being led by the Scottish Government in partnership with the Scottish Courts Service, the Scottish Legal Aid Board, the Crown Office & 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.

The case for reform of the civil courts is already well established through the 2007 findings of the Civil Justice Advisory Group, and the 2009 *Scottish Civil Courts Review* led by Lord Gill. Once again I would like to thank Lord Gill and the members of his group for their landmark contribution to the reform of civil justice in Scotland.

Lord Gill's diagnosis was that Scotland's civil courts today are based largely on an unreformed Victorian model, sometimes characterised by unacceptable delay and that "the practitioners of 100 years ago would have little difficulty picking up the threads" of today's courts. He 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".

The review made 206 recommendations for change the majority of which have been accepted by the Scottish Government. This consultation sets out proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. It invites views on key proposals such as the introduction of new "summary sheriffs" to deal with low level civil and summary criminal business, a new Sheriff Appeal Court, a new specialist Personal Injury Court, and the proposal to raise the privative limit of the sheriff court to £150,000.

We have included a draft Courts Reform (Scotland) Bill as part of this consultation and intend to introduce this to the Scottish Parliament as soon as an opportunity arises in the legislative programme.

I hope that you will submit views on our proposals and look forward to receiving them.

A handwritten signature in black ink that reads "Kenny MacAskill". The signature is written in a cursive, slightly slanted style.

Kenny MacAskill MSP
Cabinet Secretary for Justice

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CONSULTATION ON COURTS REFORM (SCOTLAND) BILL

Responding to this consultation paper

We are inviting responses to this consultation paper by 24 May 2013.

Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

courtsreform@scotland.gov.uk

or

Courts Reform Bill – Consultation
Scottish Government
Area 2W, St Andrew's House
Regent Road
Edinburgh
EH1 3DG

If you have any queries contact Hazel Gibson on 0131 244 4830.

We would be grateful if you would use the consultation questionnaire provided as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk>. This system allows individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of the consultation questionnaire (Annex A) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form), in the Autumn. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision. We aim to issue a report on this consultation process by Autumn 2013.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Hazel Gibson using the contact details above.

INTRODUCTION

Background

1. This consultation invites views on proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland. They are intended to provide the legal framework for implementing the majority of recommendations of the Scottish Civil Courts Review (the “SCCR”)¹, led by Lord Gill.

2. The SCCR makes a forceful case for reform. While the current system has served us well in the past, the increasingly fast paced changes in the social and economic life of Scotland have left us with a court system that is, in varying degrees, unsatisfactory, unaffordable or inefficient. In the SCCR's own words, “the basic structure of the civil jurisdictions in the Scottish courts remains much as it was in the late nineteenth century. ...Reform is long overdue.”

3. The Scottish Government accepts the SCCR's analysis of the problems facing the courts and the SCCR's six principles for the operation of the civil justice system:

- It should be fair in its procedures and working practices.
- It should be apt to secure justice in the outcome of disputes.
- It should be accessible to all and sensitive to the needs of those who use it.
- It should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice.
- It should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake.
- It should have regard to the effective and efficient application of the resources of others.

4. As the Scottish Government set out in its 2010 response² to the SCCR,

“Such a system of civil justice — affordable, efficient and fair — is essential to the health of any nation. It is a pre-requisite for the achievement of the Scottish Government's core purpose, to focus public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. A more efficient, affordable and fair system of civil justice holds public authorities to account and underpins the rule of law which, in turn, supports a fairer Scotland with stronger communities in which people are helped to live full lives and reach their potential.”

5. Since the SCCR reported in 2009, the global economic downturn and increased pressure on the Scottish public sector have increased the imperative for reform. By way of illustration, Audit Scotland estimate that, in the criminal justice system alone, inefficient and outmoded systems are wasting up to £55 million every year. Translated to the court system more broadly, reform is not just about simply cutting costs - it is about making the system fit for the 21st century: making it faster

¹ www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review

² www.scotland.gov.uk/Publications/2010/11/09114610/0

and more efficient; making it more flexible and more responsive to change; and ensuring that it is more proportionate to the problem at hand.

Criminal Justice

6. Whilst the SCCR was focused on civil justice, a number of the proposals taken forward in this Bill, will have an effect on criminal justice. The proposals for a new judicial tier (Chapter 2) include the intention for this tier to deal with summary crime, and the proposal for a Sheriff Appeal Court (Chapter 3) includes the intention for summary criminal appeals to be heard in this new court.

The Scottish Government's response to the SCCR

7. The Scottish Government published its response to the SCCR in 2010, accepting the vision provided by the SCCR and broadly accepting the detail of its recommendations, and a number of the SCCR's recommendations have been taken forward already:

- The Legal Services (Scotland) Act 2010 has provided a firm basis for lay representatives in cases involving party litigants.
- The Children's Hearings (Scotland) Act 2011 has modernised arrangements for the management of safeguarders in the Children's Hearings system.
- The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 will enable the establishment of the Scottish Civil Justice Council - vital to implementing many of the SCCR's other recommendations – later this year.
- The Court of Session has codified the current practice on lay advisers (McKenzie friends) and has implemented Lord Penrose's recommendations for reforming the business of the Inner House.
- The Scottish Government has carried out a consultation on protective expenses orders for cases falling within the Public Participation Directive. The Court of Session Rules Council considered and approved draft rules in relation to these orders at a recent meeting. The draft rules are currently being finalised and should be in place later this Spring.
- The Scottish Government has established a review, led by Sheriff Principal James Taylor, into the cost and funding of litigation. The review is expected to report later this year.

The Scottish Government's Making Justice Work programme

8. The Scottish Government Justice Directorate has recognised that justice reform is best done in a properly joined up and managed way, with all the essential organisations involved in making the reforms happen brought into the process from the beginning. Therefore, in 2010, the Scottish Government established a formal four year reform programme called "Making Justice Work"³, with the vision that:

"The Scottish justice system will be fair and accessible, cost-effective and efficient, and make proportionate use of resources. Disputes and prosecutions will be resolved quickly and secure just outcomes."

9. The programme has a supervisory board, whose role it is to ensure that the justice reform projects within the programme are carried out and the benefits delivered. Its membership comprises representatives of: the Scottish Government's Justice Directorate; the Scottish Court Service; the Crown Office and Procurator Fiscal Service; the Scottish Legal Aid Board; Judicial advisers, the Association of Chief Police Officers in Scotland (ACPOS); Consumer Focus Scotland, the Scottish Tribunal Service and Professor Richard Susskind.

10. The programme comprises the following 5 projects: (1) delivering efficient and effective court structures; (2) improving procedures and case management; (3) enabling access to justice; (4) co-ordinating information technology and management Information; and (5) establishing a Scottish Tribunals Service.

11. The work of implementing the SCCR sits principally under the first project, and links with a number of other workstreams being taken forward under the programme:

Future courts work

12. The Scottish Court Service has been leading a review of future court structures to determine what changes might be required to the court estate as a result of changing patterns of business, the current financial climate and the changes proposed through civil court reform. This has been subject to a separate formal consultation which ended in December 2012 and a report will be produced in Spring 2013. The consultation considers court closures, changes to the High Court circuit and regional Sheriff and Jury centres.

Summary justice system model & getting people to court

13. These workstreams seek to reduce the time it takes to deliver justice and reduce the amount of delays in our courts. This will be achieved by a range of non-court and court measures as well as work to develop changes in cultures and behaviours.

³ <http://www.scotland.gov.uk/Topics/Justice/legal/mjw>

The Carloway review

14. Lord Carloway published his report into criminal law and practice in November 2011⁴, recommending historic reforms to the procedures for arrest and detention; rights of access to a lawyer; the treatment of child and vulnerable suspects; the law of evidence; and appeals procedures. The Scottish Government undertook a consultation exercise from July to October 2012, and intends to bring forward legislation later in 2013 to implement these recommendations.

15. Lord Carloway's recommendations to eliminate or reduce sources of delays in the appeals procedures will be complemented by the reforms recommended by the SCCR to introduce a new summary sheriff and Sheriff Appeal Court to create speedier and more proportionate handling of summary criminal cases.

The Bowen review

16. In June 2010, Sheriff Principal Bowen published his review of the arrangements for improving sheriff and jury trials in solemn cases⁵. The Scottish Government intends to address his recommendations in the same legislation which will implement Lord Carloway's.

Alternative Dispute Resolution

17. The Scottish Legal Aid Board is leading a project on how non-court methods of dispute resolution such as mediation may be better assimilated into the civil justice system.

Victims and witnesses

18. The Victims and Witnesses (Scotland) Bill, introduced in January 2013⁶ includes various reforms of the justice system to improve the support available to victims and witnesses and put victims' interests at the heart of the justice system. Among other measures, the Bill will give victims of crime a right to certain information about their case; will give certain categories of victim the right to use special measures when giving evidence (eg the use of a screen or a CCTV link); and will require the court to consider compensation to victims in relevant cases.

Tribunal reform

19. The Tribunals (Scotland) Bill, expected to be introduced to the Scottish Parliament in Spring 2013, will aim to establish a new, simplified statutory framework for the devolved tribunal system in Scotland, under the judicial leadership of the Lord President. Existing devolved tribunals which currently operate in a disparate manner will transfer into the new structure. This will create a more user-focussed and coherent system for devolved tribunals, providing a more efficient way of resolving citizen to state and party to party disputes.

⁴ www.scotland.gov.uk/About/Review/CarlowayReview

⁵ www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/review-sheriff-jury

⁶ www.scottish.parliament.uk/parliamentarybusiness/Bills/59133.aspx

Proposals in this consultation paper

20. This consultation paper invites views on a range of proposals, arising out of the SCCR's recommendations, intended to modernise and improve the structure of, and procedures within, the Scottish court system. We have divided the paper into the following chapters, with each chapter setting out the policy intention behind the proposals, and have included a draft Courts Reform (Scotland) Bill to set out the detail of how we intend to enact them:

- Chapter 1 – Move civil business from the Court of Session to the sheriff courts by raising the privative limit (which we propose to call “exclusive competence”) of the sheriff court to £150,000.
- Chapter 2 – Create a new judicial tier within the sheriff court (whom we propose to call “summary sheriffs”), with a jurisdiction in certain civil cases and in summary criminal cases.
- Chapter 3 – Create a new sheriff appeal court with an all-Scotland jurisdiction to hear civil appeals from the sheriff courts and summary criminal appeals.
- Chapter 4 – Create a specialist personal injury court with an all-Scotland jurisdiction.
- Chapter 5 – Improve procedures for judicial review within the Court of Session.
- Chapter 6 – Facilitate the modernisation of procedures in the Court of Session and sheriff courts.
- Chapter 7 – Alternative dispute resolution.

21. The opportunity is being taken to modernise the legislation which governs the sheriff courts in Scotland and the judiciary who work within them. The Bill will therefore repeal the Sheriff Courts (Scotland) Act 1971 in its entirety, and most of the provisions of the Sheriff Courts (Scotland) Act 1907.

22. This paper does not deal with all the SCCR's recommendations including those regarding multi-party actions or auditors of court. The Scottish Government will address these recommendations in response to the Review of the Expenses and Funding of Civil Litigation in Scotland being taken forward by Sheriff Principal Taylor.

Anticipated Impacts of Proposals

23. Making Justice Work sets out eight benefits that the programme is working to achieve:

- Reduced system costs
- Reduced system/time delays
- Affordable access
- Improved user experience
- Fair and equitable justice
- Increased public confidence in the justice system
- Increased capacity for change and improvement
- Quality assured justice

24. The proposals set out in this consultation will look to help achieve these aims by:

- Providing a clearer, proper hierarchy of civil courts and judicial roles with less overlap in jurisdictions between the Court of Session and sheriff courts – so that users better understand how the system works
- Ensuring that the right cases are heard in the right courts in the first instance through better case management and other processes – so that users experience fewer delays, reduced costs, earlier resolutions and require less time in court

Consultation Process

25. In developing the proposals in this paper, we have spoken to many individuals and organisations and will continue to do so as we prepare the Bill for introduction⁷. We are keen to gather as much evidence as we can on the workability and practical impact of these proposals, and whether the draft Bill makes appropriate provision for them, on users of the courts: individuals, practitioners, and businesses.

26. There are a number of questions at the end of each chapter and further questions at the end asking for comments on the proposals and provisions overall. These questions are replicated on the Respondent Information Form (Annex A) and this form should be used to submit your answers and comments. Please note that you do not need to answer every question in this paper.

⁷ Three stakeholder events were held in the summer of 2012 which were attended by Justice Ministers, members of the judiciary, members of the legal profession and other interested stakeholders.

CHAPTER 1: Moving civil business from the Court of Session to the sheriff courts

Introduction

27. This chapter sets out the Scottish Government's proposals to implement the recommendations associated with Chapter 4 of the SCCR ("structure of the civil court system"). At their heart is the SCCR's vision that the court system:

"should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake; and it should have regard to the effective and efficient application of the resources of others"⁸.

28. The SCCR did not consider the current structure achieved this. At its root, the Scottish civil court system does not have a "proper hierarchy of civil courts at first instance or at appellate level"⁹:

"In a proper hierarchy, the litigant should not have a choice of two courts of equal jurisdiction. There should be a classification by which a 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."¹⁰

Cost of litigation

29. As well as looking at the structures of the courts, the SCCR also highlighted the disproportionate cost of raising and defending actions, particularly in the Court of Session.

30. The review provided evidence that average total costs (both defenders' and recovered pursuers') usually exceed the average value of settlement in all but the higher value claims (Table 4b in Annex C to Chapter 4 of the Scottish Civil Courts Review). In relation to low value claims (where the sum sued for is less than £10,000), the pursuers' recovered expenses exceeded the damages awarded in 81% of cases in the Court of Session.

31. In addition to the fees, the typical costs in preparing for and conducting a three day civil proof in the sheriff court will be in the region of £7,000 to £10,000, together with the additional costs of expert witnesses and similar outlays. The costs of conducting the same case in the Court of Session, are more likely to be in the region of £30,000 to £40,000, with the same additional outlays.

⁸ Included within the principles by which the SCCR thought the court system should operate. These are set out at Volume 1, page 2.

⁹ Volume 1, page iv.

¹⁰ Volume 1, page iv.

32. The issue of the cost and funding of litigation will be examined further in the Review of the Expenses and Funding of Civil Litigation in Scotland which is being taken forward by Sheriff Principal Taylor.

SCCR Recommendation

33. The SCCR concluded that cases must be dealt with at the appropriate level of the court hierarchy – and that this could be “attained only if there is a significant increase in the jurisdiction of the sheriff court”¹¹. One of the key recommendations to achieve this was increasing the “privative jurisdiction” limit of the sheriff court to £150,000¹².

The Scottish Government’s response – options considered

34. The Scottish Government agrees with the SCCR that there should be a “proper hierarchy”, and that cases should be allocated proportionately within it.

35. In thinking about how a proper hierarchy might be achieved, the Scottish Government considered whether it should interfere with the exclusive jurisdiction of the Court of Session – matters which have historically been regarded as appropriate to a superior court. This includes: the supervisory jurisdiction and jurisdiction over exchequer cases, patent cases, actions under the Hague Convention and certain devolution issues.

36. Like the SCCR however, the Scottish Government is not persuaded at present that it is necessary to interfere with the Court of Session’s exclusive jurisdiction, and has therefore not provided for it in the draft Bill.

37. One possible approach to splitting cases between the Court of Session and sheriff court would be to base it on the types of cases. However, the Scottish Government discounted such an approach as being highly cumbersome. Moreover, it would not obviously reflect the principles of allocation of jurisdiction based on value, importance or complexity.

38. The Scottish Government also discounted simply strengthening the powers of remit from sheriff court to Court of Session, and vice-versa. While this would give the courts greater flexibility to move cases around the system, it would not, of itself, address the problem identified by the SCCR: that many cases of lower value or importance can be, and are, first raised in the Court of Session - diverting valuable judicial time and resources in the Court of Session from matters properly worthy of the highest civil court in Scotland.

39. The Scottish Government therefore accepts the general premise behind the SCCR’s structural recommendations.

¹¹ Chapter 4, paragraph 123.

¹² SCCR recommendation 20.

Expected impact

40. The SCCR argued that the Court of Session should deal with only the most complex and important cases and that most routine litigation should be conducted in the sheriff court. These proposals will mean that the Court of Session should be freed up to deal with the most important, legally complex, civil cases, be they contract, reparation, commercial, public law or concerning personal status. In this way, the law of Scotland will be enhanced and improved and the status of the Court of Session will be enhanced.

41. This is not to say that low value personal injury and other cases are not important – if such cases raise new or complex points of law they should be remitted to the Court of Session. However, the Government believes that, for cases which do not involve large sums of money, the sheriff court, where high quality advocacy is provided by experienced solicitors who have expertise in a wide range of cases, is best placed to deal with them. Allowing sheriffs to be freed up to focus on more legally complex work.

42. It should still be possible to be granted sanction for counsel in the sheriff court, but not all cases (and particularly low value, straightforward disputes) will merit the employment of counsel and this should only be available exceptionally, where the subject matter of the case is truly complex. Many solicitors feel that they have the expertise and the experience to conduct even the most complex cases, for example personal injury cases involving catastrophic injury.

43. There is some evidence of a reluctance among a number of businesses to litigate in the Court of Session at present because they believe that it is congested with low value, run of the mill casework. If this continues, it will serve only to diminish the role of the Court of Session as a supreme civil court, and the importance of the Scottish legal system.

44. It is hoped therefore that the Court of Session will be freed up by the change to the exclusive competence of the sheriff court and that it will have an opportunity to develop its expertise in developing areas of the civil law including some, like intellectual property, where few cases have hitherto been raised in it. The fact that it will have greater capacity will mean that it should become more attractive as a potential venue for dispute resolution for cases arising from industries such as the oil and gas industry, which have in the past gone to the Technology and Commercial Court in London, as well as new industries such as renewables and carbon capture.

The Scottish Government's proposals

Raise the exclusive competence of the sheriff court to £150,000

45. Section 38 of the draft Bill provides for raising the privative limit (to be called “exclusive competence”) of the sheriff court, and will extend the exclusive competence to cases where the sum sued for is less than or equal to £150,000.

46. The current way in which the value of the claim is calculated (eg where the sum sued for is constituted by a number periodic payments) is set out in case law. However, Section 38(7) of the Bill provides that rules of court will set out how the value is to be calculated.

Give the Court of Session and sheriff court sufficient powers of remit to ensure cases are considered by the level in the court hierarchy appropriate to deal with them.

47. It is accepted that there will be cases of particular significance or complexity which merit the earlier consideration of the Court of Session. Equally, there will be cases which are more appropriately matters for the sheriff court to consider initially. Sections 81 and 82 of the draft Bill therefore provide for the sheriff court to remit cases to the Court of Session, and vice-versa.

Court of Session to retain concurrent jurisdiction for family actions regardless of the value of the claim.

48. The draft Bill currently provides, in line with the SCCR’s recommendation¹³, that the Court of Session will retain concurrent jurisdiction in family proceedings where there is a financial sum sued for. Therefore, family actions which include claims for sums under £150,000 would continue to remain competent in the Court of Session. However, given the general thrust of the SCCR’s vision that there should be a proper hierarchy in the system, it may be that the Bill should specify that the Court of Session should not normally be considered to be a first tier family court, and should only have concurrent jurisdiction for very high value financial claims. We are interested in views on this, and are open to considering a different approach.

49. . The Government believes that the new third tier of judiciary described in Chapter 3 should be well equipped to undertake most family work if experienced practitioners are appointed and trained, and have the right procedures, with sheriffs available for family cases of greater complexity or difficulty.

¹³ SCCR recommendation 29.

Questions - Moving civil business from the Court of Session to the sheriff courts:

- Q1. Do you agree that the provisions in the Bill raising the exclusive competence and providing powers of remit will help achieve the aim of ensuring that cases are heard at the appropriate level?
- Q2. Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?
- Q3. Do you think that the Court of Session should retain concurrent jurisdiction in any other areas?
- Q4. What impact do you think these proposals will have on you or your organisation?

CHAPTER 2: Creating a new judicial tier within the sheriff court

Introduction

50. This chapter sets out the Scottish Government's proposals to create a new judicial tier within the sheriff court, recommended in Chapter 4 of the SCCR.

51. Scotland is unusual in having a first tier court in which the judges hear both civil and criminal business (the sheriff court, though some less serious crime is dealt with in the Justice of the Peace courts). In most jurisdictions minor offences and smaller value claims are heard by a separate court of tribunal or a more junior judge. The SCCR concluded that although there were efficiencies in having the facility of deploying a single sheriff to do a variety of criminal and civil work:

“it does not make best use of resources in that a sheriff sufficiently experienced and qualified to deal with trials for serious crimes or complex civil claims may also be assigned to cases involving minor offences or the supervision of arrangements to pay off a debt by instalments”.¹⁴

SCCR Recommendation

52. The SCCR recommended the creation of a new judicial tier to sit in the sheriff court¹⁵, who should have the following civil jurisdiction:

- Actions with a value of £5,000 or less
- Concurrent jurisdiction with the Sheriff in family actions
- Housing actions
- Appeals and referrals from children's hearings
- Able to hear urgent motions for interim orders in ordinary actions¹⁶

53. Although its focus was civil cases, the SCCR recognised much of the pressure placed on the civil courts comes from the programming and handling of criminal cases. Summary crime in particular accounts for over 90% of the sheriff courts' criminal business. The SCCR built on the earlier work of Sheriff Principal McInnes¹⁷ as regards criminal matters, and recommended summary criminal cases should be dealt with by the new third tier rather than the sheriff.

The Scottish Government response – options considered

Whether to have a third tier at all

54. The Scottish Government is not attracted to increasing the exclusive competence of the sheriff court without a third tier. We consider this would merely

¹⁴ Chapter 4, paragraph 173.

¹⁵ SCCR recommendations 37, 39 to 41, 46, 47, 57, 72, 79, 85, 88 and 91.

¹⁶ SCCR recommendations 39 to 41.

¹⁷ The Summary Justice Review Committee reported to the Scottish Ministers in January 2004. The report can be found at <http://www.scotland.gov.uk/Publications/2004/03/19042/34176>.

replicate many of the current problems with the overlap between the Court of Session and sheriff court's jurisdictions.

55. The Scottish Government is therefore supportive of the SCCR's recommendation for a new third tier within the sheriff court. It reflects one of the SCCR's principles, that cases should be allocated proportionately within the system: freeing up sheriffs to hear more complex civil cases, and solemn crime.

56. However, the intention is not that the new third tier should be merely a cut price sheriff – as noted below, they will have the same qualifications as sheriffs and will be drawn from the ranks of practitioners who have expertise in dealing with the kinds of case which will fall within the competence of the new tier (ie family and housing lawyers, as well as criminal practitioners). The intention is instead that the new third tier will be able to develop new, more user-friendly and appropriate ways to deal with cases that are within their jurisdiction.

The name of the third tier's new judge

57. In thinking about what the new judge should be called, the Scottish Government does not favour the SCCR's suggested name of "district judge" as it tends to suggest that a new type of court is being created.

58. Sheriff Principal McInnes, in his earlier review of the summary criminal courts, recommended the creation of a third tier judge in the sheriff court for criminal cases – and recommended they should be called a "summary sheriff". Although the new judge will also have a civil jurisdiction, the Scottish Government prefers McInnes's term, as it reflects the fact that actions before the new judge will still be in the sheriff court. However, the Scottish Government is open to suggestions of alternatives if it is felt that the term does not adequately reflect the new tier and its jurisdiction.

The division of jurisdiction in the sheriff court

59. One of the challenges in having a third tier is the volume of summary criminal business which could account for up to 80% of the judicial sitting days of a summary sheriff. As the Government noted in its response to the SCCR, there are difficulties in reconciling the SCCR's finding that it is the pressure of criminal business which puts pressure on the civil system, with the recommendation that the third tier should have joint civil and criminal jurisdiction (p28, para 133).

60. Therefore, the Scottish Government considered splitting civil and criminal business at the summary sheriff level, so that some summary sheriffs would only be authorised to deal with civil business. However, initial modelling suggested that this would only require the appointment of around 30 full time summary civil sheriffs. The Scottish Government considers this would be unworkable in a jurisdiction with over 40 sheriff court districts, and so this option was discounted. As such, the Scottish Government accepts that summary sheriffs should have both a criminal and civil jurisdiction, although we intend that there should be scope for flexible deployment and specialisation at summary sheriff level.

61. Whilst the proposal is for the summary sheriff to have jurisdiction for all summary crime there have been suggestions, including in the SCCR, for this new tier to have power in other areas of criminal jurisdiction (including dealing with bail and judicial examinations in solemn proceedings). The Scottish Government would welcome views on this matter.

62. It is also anticipated that there will be a need for part-time sheriffs and summary sheriffs (where part-time relates to a person being both a legal practitioner and a summary sheriff). To address and potential for conflicts of interest, such individuals will not be able to sit in any sheriff court districts where they retain outside business interests.

63. This will also help to ensure maximum flexibility, especially in smaller courts where there may be a smaller concentration of certain types of action. In addition, the Scottish Government proposes that sheriffs will have concurrent jurisdiction with summary sheriffs.

Jurisdiction in family cases

64. The SCCR considered that the summary sheriff should have concurrent jurisdiction with the sheriff in family actions, as many of these are straightforward, and that this should extend to the actions currently listed in Chapters 33, 33A and 33B of the Ordinary Cause rules; actions under the Protection of Abuse (Scotland) Act; and common law and statutory actions for interdict in relation to domestic abuse¹⁸. Schedule 1 to the draft Bill provides for this, and replicates these provisions.

Children's hearing referrals

65. For children's hearings referrals, the Scottish Government proposes that both the summary sheriff and Sheriff should share concurrent jurisdiction to hear referrals from children's hearings.

Diligence

66. While the majority of diligence (ie debt collection) procedures are carried out by sheriff officers, there are a small number of instances where court intervention is required. The Scottish Government, and the Accountant in Bankruptcy who has policy responsibility for diligence, believes that the majority of diligence work in the sheriff court could be handled by summary sheriffs.

Housing cases

67. Most housing cases are currently handled by the sheriff courts. There has been significant discussion in recent years of whether those cases would be better handled by a specialist forum, for example a housing tribunal. Independent reviews have reached different conclusions. The SCCR concluded in 2009 that a housing tribunal was not required, while in 2011 the Civil Justice Advisory Group, chaired by

¹⁸ Chapter 4, paragraph 199.

Lord Coulsfield, recommended in its review of civil justice that there should be a specialist jurisdiction to deal with housing cases.

68. The Scottish Government is currently consulting on how to improve the handling of housing cases¹⁹. The consultation looks at the whole process of dispute resolution in rented housing cases and examines a number of options. These include promoting preventative action to stop housing problems escalating into housing cases, increasing the use of mediation to resolve housing cases before they reach court and creating a housing panel as an alternative forum for resolving housing cases.

69. Depending on what is proposed following the consultation on housing cases, and particularly if it should be proposed that a housing panel or tribunal be established, there may be a significant impact on the number of housing cases raised in the sheriff court. The jurisdiction of such a panel will determine the numbers of cases which it will deal with, but the Government is proceeding on the basis that there is likely to continue to be a role for the sheriff court in housing cases, and not simply as a forum of final appeal, and that the summary sheriffs would take on most of these cases.

Status and standing of summary sheriffs

70. Concerns have been raised in earlier discussions between the Scottish Government and stakeholders that the summary sheriff represents a “downgrading” of justice.

71. The Scottish Government is clear however that summary sheriffs are intended to be a new *type* of judge, and are not in any way intended to represent a downgrading of justice. They will be drawn from the ranks of practitioners who have been qualified for at least 10 years (the same requirement as for a sheriff) and have experience of the kinds of cases which will fall within the competence of the summary sheriff. They will be appointed by Her Majesty, following the recommendation of the Judicial Appointments Board for Scotland, to meet the requirements of the Lord President, and will be trained as necessary by the Judicial Institute for Scotland.

72. The Scottish Government is also attracted to the aspiration that the new summary sheriff role should offer the opportunity to evolve and develop a new style of judging in civil cases, with a greater emphasis on problem solving. The SCCR recommended that summary sheriffs should operate a new simple procedure for low value claims based on a problem solving and interventionist approach by which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. Sections 70-78 of the draft Bill provide for this new simple procedure, though its rules will be set out in court rules.

¹⁹ scotland.gov.uk/Publications/2013/01/6589

The Scottish Government's proposals

A new tier of judiciary ("summary sheriff") to be created.

73. Section 5 of the draft Bill provides for the creation and appointment of summary sheriffs.

Summary sheriffs will require to have been legally qualified for at least 10 years.

74. Section 15 of the draft Bill provides for the qualifications required to take up a judicial office including that of summary sheriff.

Summary sheriffs should have both a criminal and civil jurisdiction. They will not have an exclusive jurisdiction in any area, but will share concurrent jurisdiction in a number of areas with sheriffs.

75. Section 42 and schedule 1 provides for their jurisdiction.

76. The Scottish Government agrees with the SCCR's recommendation that the new summary sheriff's criminal jurisdiction should extend to all summary crime currently dealt with by Sheriffs. This jurisdiction will be shared with Sheriffs. Section 43 of the draft Bill provides for this.

77. The Scottish Government proposes that the new approach to judicial problem solving should be a matter for court rules and training rather than set out in the Bill itself.

That cases with concurrent jurisdiction will be allocated by the Sheriff Principal.

78. The Scottish Government proposes to depart from the SCCR on the detail of implementation. The SCCR proposed (Ch 5, paragraph 87) that pursuers should be able to indicate a preference for sheriff or summary sheriff (for cases within the competence of summary sheriffs). Instead, we think case allocation should be a matter for the sheriff principal (section 26 of the draft Bill). The summary sheriff will be able to transfer cases to a Sheriff from simple procedure (section 76 of the draft Bill).

Current stipendiary magistrates will become summary sheriffs.

79. The SCCR did not consider what was to happen to stipendiary magistrates. The McInnes review however 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 full time stipendiary magistrates in post on implementation of the legislation will convert to summary sheriffs. Section 95 of the draft Bill provides for this.

Questions (summary sheriffs):

- Q5. Do you think that the term "summary sheriff" adequately reflects the new tier and its jurisdiction?
- Q6. Do you agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff?
- Q7. Do you agree with the proposed competence of summary sheriffs in family cases?
- Q8. Do you agree that summary sheriffs should deal with referrals from children's hearings?
- Q9. Do you think that in addition to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction?
- Q10. Do you agree that the allocation of cases where there is concurrent competence between sheriffs and summary sheriffs should be an administrative matter for the relevant Sheriff Principal?
- Q11. What impact do you think these proposals will have on you or your organisation?

CHAPTER 3: Creating a new sheriff appeal court

Introduction

80. This chapter sets out the Scottish Government's proposals to create a new sheriff appeal court with a jurisdiction over civil appeals and summary criminal appeals from the sheriff and justice of the peace courts, recommended in Chapter 4 of the SCCR.

81. The SCCR recommended the creation of a national sheriff appeal court whose decisions would be binding on all sheriffs in Scotland. In terms of its jurisdiction, the SCCR recommended the court would hear summary criminal appeals from justices of the peace, from summary sheriffs and sheriffs. It also recommended the court would hear civil appeals from summary sheriffs and sheriffs.

82. The SCCR heard views from respondents that some sheriffs might be sensitive about dealing with a colleague's appeals and be particularly reluctant to sit on appeals from their own sheriffdom. The SCCR therefore considered that it would be inappropriate for the new appeal court to consist of members of the same level of judicial hierarchy. As such, they recommended that the new judges should be at the same level as Sheriffs Principal.

The Scottish Government response – options considered

Whether there should be a sheriff appeal court at all

83. The Scottish Government considered whether, in principle, there should be a national sheriff appeal court for both civil and summary criminal appeals.

84. A disadvantage of the current system on the civil side is that the decisions of sheriffs principal currently only apply in their sheriffdom. An advantage of a national appeal court is that it affords more opportunity for the legal system to evolve and develop from cases appealed in any part of Scotland, rather than just applying within the sheriffdom, and it allows practice to better align across sheriffdoms.

85. The Scottish Government considered whether a new national appeal court might be delivered by simply allowing appeals to go straight from the sheriff court to the Court of Session or High Court. For civil cases, it does not favour this option as it would be disproportionate for senators to be hearing many of the appeals and goes against the vision of the SCCR that cases should be heard at an appropriate level within the Scottish court system).

86. Similarly for criminal cases the Scottish Government considers that having a sheriff appeal court consider the majority of summary criminal cases is a more proportionate use of judicial resource than the current system where summary criminal appeals go to the High Court. Both these reforms offer opportunities for greater efficiencies within the system.

87. The Scottish Government therefore accepts in principle that there should be a sheriff appeal court with a national jurisdiction for both summary criminal and civil appeals.

Location of the sheriff appeal court

88. We have provided in section 55 of the draft bill that a sheriff appeal court will be able to be held at any place where a sheriff court may be held. The court may sit simultaneously in different locations, allowing it to deal with more than one case at a time. The President of the sheriff appeal court will set out in practice where the court is to sit, although this power will come under the general jurisdiction of the Lord President in the same way as the administrative functions of the sheriff principal do at present²⁰.

89. The Scottish Government agrees with the SCCR's recommendation that criminal appeals should be administered centrally²¹. For civil appeals, the SCCR recommended that they would be administered and heard in the sheriffdom from which they originate. The Scottish Government is however open-minded about the civil recommendation as there are potential efficiencies in having the appeal court based in a single central location.

90. The Bill has been drafted to provide as much flexibility around location as possible.

Appeal Sheriffs

91. The Scottish Government proposes that the sheriff appeal court should comprise the six Sheriffs Principal and sheriffs of at least 5 years' experience (the number to be determined by the Lord President).

92. The Scottish Government considered the views of the SCCR on the appropriate level for Appeal Court Sheriffs. The Scottish Government is of the view that the sensitivities regarding the level of Appeal Court Sheriffs relayed to the SCCR may be overstated, as this has not been the experience of sheriffs who have acted up as temporary Sheriffs Principal or temporary Court of Session judges.

93. The McInnes review on summary justice²², which recommended the creation of summary sheriffs, considered it would be possible for experienced sheriffs to be seconded to the sheriff appeal court (to hear criminal cases) at least for a period of time.

What the composition of the sheriff appeal court should be

94. When the SCCR team was carrying out its review, the information they had at the time in 2007 and 2008 was that approximately one third of all civil appeals to the Inner House came from the sheriff court; and, of these, almost two thirds were

²⁰ Section 2(2)(a) and (2A) of the Judiciary and Courts (Scotland) Act 2008

²¹ SCCR chapter 4, paragraph 85

²² www.scotland.gov.uk/Resource/Doc/925/0008781.pdf

appeals direct from the Sheriff to the Inner House. At that time, there was a significant delay in civil appeals being heard in the Inner House, and the SCCR considered a new Sheriff Appeal Court would deliver appeal decisions more quickly and in a more proportionate way.

95. However, since the SCCR reported, the Scottish Government understands that there has been a drop in the level of delays and that issues in current appeals are often only of minor importance or complexity.

96. The Scottish Government therefore considers that the SCCR's original recommendation - that civil cases should generally be heard by a bench of three - needs revisiting²³ to ensure a more proportionate use of judicial resources. Accordingly the quorum required for the Sheriff Appeal Court will be flexible and proportionate to the type of case being heard. Court rules will be made on quorum to allow the court to use judicial resources appropriately (section 86(2)(o)). Further the President of the court will have responsibility for ensuring the efficient disposal of business by the court. The President's functions are set out in sections 54 and 55, and he or she will be appointed by the Lord President.

²³ SCCR recommendation 12.

The Scottish Government's proposals

The establishment of the Sheriff Appeal Court.

97. The Scottish Government agrees in principle, that a single national appeal court is better than the possibility of appeals binding only in the sheriffdom, as is the case with civil cases at the moment. Part 2 of the draft Bill provides for the creation and operation of the sheriff appeal court.

98. There are no provisions in the Bill outlining the required quorum of appeal sheriffs sitting in the Sheriff Appeal Court. We propose that this should be fixed by rules of court thus permitting maximum flexibility.

99. For civil appeals, the Sheriff Appeal Court will hear all appeals from sheriffs and summary sheriffs. There will be a restricted further appeal to the Court of Session but only with the leave of the Sheriff Appeal Court, or if it refuses, the Court of Session itself.

100. For criminal appeals, we propose that the Sheriff Appeal Court would take over the criminal jurisdiction of the High Court of Justiciary currently provided for by Part X (appeals from summary proceedings) of the Criminal Procedure (Scotland) Act 1995. We have not provided draft provisions at this stage and would welcome views on this approach.

101. Thereafter, we propose that there should be an appeal to the High Court of Justiciary against any decision of the Sheriff Appeal Court in criminal matters. But, the appeal should be on a point of law only and with leave of the court, or if it refuses, the High Court of Justiciary itself.

Appeal Court Sheriffs should comprise the six existing Sheriffs Principal and sheriffs of at least five years' experience (the number of which to be decided by the Lord President.

102. Part 2, Chapter 2 of the Draft Bill provides for the Appeal Sheriffs including provisions for necessary experience and recommendation for appointment; ability to continue to act as sheriff; and that there will no additional remuneration in respect of this office.

Questions (creating a new sheriff appeal court):

- Q12. Do you agree that criminal appeals should be held in a centralised national appeal court?
- Q13. Do you think that civil appeals should be heard in the sheriff appeal court sitting in the sheriffdom in which they originated?
- Q14. Do you agree that the sheriff appeal court should be composed of appeal sheriffs who are sheriffs principal and sheriffs of at least five years' experience?
- Q15. What impact do you think that these proposals will have on you or your organisation?

CHAPTER 4: Creating a specialist personal injury court

Introduction

103. This chapter sets out the Scottish Government's proposals to establish a specialist personal injury court, recommended in Chapter 4 of the SCCR²⁴ with a capacity to hear civil jury trials²⁵.

104. The SCCR agreed that the previous reforms for personal injury actions ("Chapter 43 procedure for personal injury actions") had made the handling of personal injury actions in the Court of Session more efficient. However, they added that:

"...although the Chapter 43 reforms have been successful in promoting earlier settlement and reducing the amount of judicial time spent on procedural business, the amount of administrative work involved in dealing with personal injury actions is considerable. More importantly, although relatively few proofs or jury trials proceed, the number that are fixed and do not proceed reduces the capacity for non personal injury business in the civil programme and increases the waiting times for such business, which has a greater likelihood of proceeding to proof."²⁶

105. Therefore, the SCCR recommended that a specialist personal injury court should be set up with a Scotland wide jurisdiction.

106. In addition, the SCCR recommended that civil jury trial should be extended to this personal injury court but not to those actions that are litigated in other sheriff courts.

The Scottish Government response – options considered

Whether to create a specialist personal injury court at all

107. The Scottish Government considered whether, following the increase in the exclusive competence of the sheriff court, personal injury litigation might simply be subsumed within the sheriff courts, with no specific provision being made. However, it is persuaded that there are efficiencies of scale and convenience and benefits to some litigants, in raising actions in a single central court where particular expertise exists.

108. The Scottish Government therefore agrees in principle with the SCCR's recommendation that there should be a specialised personal injury court. The provisions in the draft Bill will allow for this to be in any sheriff court and, and will also permit any sheriff court to be given all-Scotland jurisdiction in specified types of proceedings.

²⁴ SCCR recommendation 32.

²⁵ SCCR recommendation 35. Civil jury trials have not been competent in the sheriff court since 1980, the result of section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, which repealed section 31 of the Sheriff Courts (Scotland) Act 1907.

²⁶ SCCR Chapter 4, page 81, paragraph 150.

Civil Jury Trials

109. Personal injury actions with a value of up to and including £150,000 which would previously have been eligible for trial by jury in the Court of Session will now have to be raised in the sheriff court due to the increase in the exclusive competence of the sheriff court as outlined in Chapter 1. These actions will be raised either in the specialist personal injury court or a local sheriff court. As civil jury trials have previously been available in the Court of Session, and as the intention is to mirror the procedure for personal injury actions in the new specialist personal injury court, it is proposed that civil jury trials should be available in the specialist personal injury court, but not other sheriff courts.

110. When Scottish Ministers specify a Sheriff Court under section 40 as having an all-Scotland jurisdiction for personal injury actions, civil jury trial will then be competent in actions for damages for personal injury raised in that court.

Local actions

111. Parties who wish to raise personal injury actions in their local sheriff court will still be able to do so, although cases where a civil jury is sought will require to be raised in the specialist court. The proposals will therefore provide claimants with a choice between the central specialist court or their local sheriff court. The Government considers that this choice maximises access to justice.

112. It should be borne in mind that under the SCCR proposals for greater specialisation among sheriffs in the sheriff court, there may be at least one sheriff in each sheriffdom who specialises in personal injury actions and so it may not be necessary for actions to be raised in the specialist court to access a specialist sheriff.
²⁷

Estimated impact

113. The Scottish Court Service estimate that if all future personal injury business within the proposed exclusive competence limit were to transfer to the new specialist court, approximately 200 sitting days and two specialist sheriffs would be required to deal with the additional volume. The vast majority of personal injury cases will operate under the case flow management procedure, widely considered to be efficient and effective.

The Scottish Government's proposals

The establishment of a specialist personal injury court.

114. Section 40 of the draft Bill provides for the creation of the new specialist court. The approach taken in this section is that Scottish Ministers may by order stipulate that the jurisdiction of a sheriff of a specified sheriffdom at a specified sheriff court will be all-Scotland for specified kinds of civil proceedings.

²⁷ SCCR recommendations 4-7; 32-33; and 62-63.

Civil jury trials will be extended to the specialist personal injury court.

115. Section 61 provides for civil jury trials.

Questions (creating a specialist personal injury court):

Q16. Do you agree with the establishment of a specialist personal injury court?

Q17. Do you agree that civil jury trials should be available in the specialist personal injury court?

Q18. What impact do you think these proposals will have on you or your organisation?

CHAPTER 5: Improving judicial review procedure in the Court of Session

Introduction

116. This chapter sets out the Scottish Government's proposals to improve judicial review procedure. These respond to the recommendations in Chapter 12 of the SCCR: to widen the law of standing; to introduce a time bar within which to bring judicial reviews; and to introduce a requirement to obtain leave before being able to bring a judicial review.

117. The SCCR were persuaded that the current law on standing was too restrictive and recommended that the separate tests of title and interest should be replaced by a single test: whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings.²⁸

118. The SCCR were also persuaded that there is a public interest in challenges to the decisions of public bodies being made promptly and resolved quickly. Accordingly, they recommended that petitions for judicial review should be brought promptly and within a period of three months, subject to the court's discretion to permit a petition to be presented outwith that period.²⁹

119. In addition the SCCR heard that the introduction of a pre-action protocol and a procedure, by which a respondent may oppose the granting of permission, in England and Wales, resulted in around a third of all applications for judicial review being resolved prior to the permission stage. Therefore, the SCCR recommended the introduction of a requirement to obtain leave to proceed with an application for judicial review.³⁰

The Scottish Government response – options considered

120. The Scottish Government's proposals in this chapter should be read along with the SCCR's proposal to abolish the distinction between ordinary and petition procedure (discussed in Chapter 6), which the Scottish Government also accepts, and which should act to stop cases falling foul of technicalities by being raised in the wrong form.

Whether to alter the scope of the supervisory jurisdiction

121. The SCCR did not recommend fundamentally altering the scope of the Court of Session's underlying supervisory jurisdiction, and the Scottish Government is not minded to alter that.

²⁸ SCCR recommendation 150.

²⁹ SCCR recommendation 151.

³⁰ SCCR recommendation 152.

Whether it is necessary to widen the law of standing

122. The Court of Session's supervisory jurisdiction essentially exists at common law. Since the SCCR was published, the scope of standing required to invoke the Court of Session's supervisory jurisdiction has been widened to the extent recommended by the SCCR as a result of the UK Supreme Court's decision in *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)*³¹.

123. As such, the Scottish Government does not consider it necessary to provide further for this matter in primary legislation.

Introducing a leave to appeal mechanism

124. At present, there is no mechanism by which unmeritorious applications for judicial review can be sifted out. The SCCR noted that there "has been a steady increase in numbers of petitions for judicial review. These take up a disproportionate amount of sitting days"³². In England and Wales, where a permission stage has been introduced, permission is refused in a relatively high percentage of cases and only in a small minority of cases is there an appeal against refusal of permission. This indicates to the Scottish Government that a leave to appeal stage works well in sifting out unmeritorious cases.

125. The Scottish Government therefore agrees with the SCCR's recommendation that there should be a mechanism to sift out applications which have no realistic prospect of success.

Introduction of a time bar for judicial review

126. The SCCR recommended the introduction of a time bar for bringing a judicial review. The SCCR recommended that petitions 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 outwith that period³³.

127. The Scottish Government agreed with the recommendation at the time the SCCR was published. However, since then, recent case law has held unenforceable a similar requirement in rule 54.5 of the Civil Procedure Rules in England and Wales³⁴, when a claimant sought to rely on an EU Directive. The basis for the decision was that "promptly" was considered to be too uncertain.

128. The Scottish Government is nevertheless concerned to ensure that judicial review claims are brought timeously and ideally as soon as possible. As was argued during the SCCR's preparatory stages, "the interests of good administration, and the

³¹ http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf

³² SCCR, volume 2, chapter 12, paragraph 51.

³³ SCCR recommendation 151.

³⁴ *R on the application of Buglife - The Invertebrate Conservation Trust) v Medway Council and National Grid Property Holdings Limited*. Rule 54.5 of the Civil Procedure Rules required that the time limit for filing a judicial review claim should be "promptly, and in any event not later than 3 months after the grounds to make the claim first arose".

right of third parties to rely on administrative decisions once they have been made, require that an affected person wishing to challenge an administrative decision should do so at the earliest possible opportunity”³⁵.

Estimated impact

129. The introduction of a time limit in respect of judicial review should result in a speedy and effective remedy for those who feel that it is appropriate to challenge the decisions of public bodies. As stated by the SCCR it is in the public interest that such challenges are made promptly and quickly resolved.

130. The Scottish Government’s proposals will result in applications being resolved more swiftly and efficiently. There is a possibility that the time-limit will result in more unmeritorious cases as those wishing to apply will have less time to consider the application. However, the Scottish Government considers that three months is sufficient time to make an application and, should an application genuinely take longer, there is a provision for the court to have discretion as regards the time-limit.

131. In addition, the introduction of the leave or permission to apply stage will filter out unmeritorious cases. The net result is that there should be fewer judicial review cases before the courts and those that do proceed will have an increased probability of early resolution.

132. The Scottish Government considers the proposals on this will balance the desire (reflected in the SCCR’s recommendation itself) to ensure the earliest date of bringing a judicial review with giving parties enough time to present their case to ensure access to justice.

³⁵ SCCR Chapter 12, paragraph 26.

The Scottish Government's proposals

Introduction of a time limit of three months for judicial review claims to be brought.

133. Section 84 amends the Court of Session Act 1988, inserting a new section 27A to provide for this.

Introduction of a requirement for leave of the Court of Session before a judicial review can be brought.

134. Section 84 amends the Court of Session Act 1988, inserting new sections 27B to 27D to provide for this.

135. It could be argued that the proposal to require parties to obtain the leave of the Court of Session before a judicial review can be brought, limits access to justice. However, the Scottish Government considers that the right of a prospective applicant to request an oral hearing if there has not already been one, and the right of appeal following a refusal of permission to proceed after an oral hearing, are sufficient safeguards to ensure access to justice.

Questions (Improving judicial review procedure in the Court of Session)

- Q19. Do you agree with the three month time limit for judicial review claims to be brought?
- Q20. Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?
- Q21. Do you agree that these proposals to amend the judicial review procedure will maintain access to justice?
- Q22. What impact do you think these proposals will have on you or your organisation?

CHAPTER 6: Facilitating the modernisation of procedures in the Court of Session and sheriff courts

Introduction

136. This chapter sets out the Scottish Government's proposals to facilitate the improvement of procedures in the Court of Session and the sheriff courts. It discusses five proposals:

A) The improvement of civil procedure generally in the Court of Session and sheriff courts.

B) The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.

C) The abolition of the distinction between ordinary and petition procedure in the Court of Session.

D) New procedures for dealing with vexatious litigants.

E) Scotland-wide enforcement of interdict and interim orders

137. The Scottish Government's preferred approach is to leave much of the detail in these areas to be developed by the Scottish Civil Justice Council through court rules. The Court of Session will be able to go into greater detail and provide more flexibility for the judiciary in court rules than would be possible for Parliament through primary legislation.

A) The improvement of civil procedure generally in the Court of Session and sheriff courts

Background

138. The SCCR makes a number of important recommendations to improve civil procedure in the Scottish courts. These include:

- creating compulsory pre-action protocols for personal injury cases³⁶
- enhancing the judge's powers of case management³⁷
- encouraging briefer pleadings, and giving the judge power to determine what further specification is needed³⁸
- creating new rules for treating expert evidence³⁹

³⁶ SCCR chapter 8.

³⁷ SCCR chapter 9.

³⁸ SCCR chapter 9.

³⁹ SCCR chapter 9.

The Scottish Government response – options considered

139. The Scottish Government discounted simply providing for these matters in full in primary legislation: it would be far too rigid, and too inflexible. It therefore favours leaving the development of the detail to court rules, to be developed – and adjusted over time as needs be - by the Court of Session with the assistance of the Scottish Civil Justice Council.

140. The Court of Session currently has fairly extensive powers already to make provision for the treatment and handling of civil cases in both the Court of Session and sheriff courts as set out in sections 5 and 5A of the Court of Session Act 1988 and section 32 of the Sheriff Courts (Scotland) Act 1971. These powers, particularly those in section 32 of the Sheriff Courts (Scotland) Act 1971, go into a lot of detail about the specific type of matters and proceedings which can be covered by the general rule making power.

141. While simply reviewing and augmenting the existing powers, as needs be, would of course be possible, there are a number of disadvantages to it. In particular, it is a fairly rigid model, relying on a high degree of particularisation about the areas of practice and procedure which it purports to cover, and increases the likelihood of amendment by future legislation to add further particular examples, for the avoidance of doubt.

The Scottish Government's proposals

Replace the existing rule making powers with more general and generic powers.

142. Section 85 of the draft Bill set out the provisions as regards the Court of Session, and section 86 as regards the sheriff courts and the new Sheriff Appeal Court.

143. The intention is to put beyond doubt the legal basis to provide for the matters which may be prescribed in rules of court, but avoiding setting out all the detailed, particular cases mentioned in the existing powers (especially in section 32 of the 1971 Act). This approach means that the current references to specific pieces of legislation will be removed.

Issues to consider

144. Sections 85 and 86 of the draft Bill reflect the following intentions:

- The rule making powers, for both the Court of Session and sheriff court, need to be sufficiently wide to ensure they can sufficiently regulate court processes and procedures.
- The rule making powers also need to enable the delivery of the SCCR recommendations on case management.

- The rule making powers need to be expressed clearly to avoid any successful challenges to the underlying powers of the rules⁴⁰ made in exercise of them.
- The powers must ensure the judiciary are empowered and enabled to deliver the reforms; without, however, interfering with judicial discretion.
- The rule making powers need to be “future proofed” as far as possible: to allow sufficient scope for court procedures to evolve and adapt; and, to avoid the need for new legislation to have to cater for particular types of procedure.

Questions (civil procedure in the Court of Session and sheriff courts)

- Q23. Do you agree that the new rule making provisions in sections 85 and 86 of the draft Bill will help improve the civil procedure in the Court of Session and sheriff courts?
- Q24. Are there any deficiencies in the rule making provisions that would restrict the ability of the Court of Session to improve civil procedure in the court of Session and sheriff courts?
- Q25. What impact do you think these proposals will have on you or your organisation?

⁴⁰ This basis of the rule making power is sometimes referred to as the rule’s “*vires*”.

B) The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.

Background

145. The SCCR recommended that Scottish Ministers should consider introducing legislation that would “make for a sift mechanism for reclaiming motions and statutory appeals” to the Inner House of the Court of Session⁴¹. The recommendation was based on a recommendation of Lord Penrose⁴² who, essentially, recommended:

- A single judge of the Inner House should be able to consider the grounds of appeal/motion. And, if he or she thought appropriate, the single judge would be able to put the case out for submissions on whether the appeal/reclaiming motion should be refused on the grounds that it was not arguable.
- If the single judge concluded the appeal/motion should be refused on the basis it was unarguable, that decision was to be final and not open to review.
- But, the Inner House would have power to reopen the single judge's final determination, if the Inner House thought that: (a) it was necessary to do so to avoid real injustice; (b) the circumstances were exceptional; and (c) there was no effective, alternative remedy.

The Scottish Government response – options considered

146. The Scottish Government agrees with the SCCR’s recommendations that there should be a sift mechanism for appeals and reclaiming motions to the Inner House: it is essential to the administration of justice in Scotland that the most senior court in Scotland is not tied up considering unarguable cases or cases with no reasonable prospect of success.

147. To meet concerns expressed by the Scottish Parliament during the passage of the Judiciary and Courts (Scotland) Act 2008, the SCCR proposed that the Inner House would have power to reopen the single judge's final determination, if the Inner House thought that: (a) it was necessary to do so to avoid real injustice; (b) the circumstances were exceptional; and (c) there was no effective, alternative remedy.

The Scottish Government’s proposals

Introduce a sift mechanism for reclaiming motions and statutory appeals.

148. We have not offered draft provisions at this stage, as we are interested to hear views on the proposals.

⁴¹ SCCR recommendation 19. And see the discussion in the SCCR in Chapter 4, paragraphs 97 to 99.

⁴² Review of Inner House Business by the Rt Hon Lord Penrose 2009. www.scotcourts.gov.uk

Questions (sift and disposal of appeals in the Inner House of the Court of Session)

- Q26. Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?
- Q27. What impact do you think these proposals will have on you or your organisation?

C) The abolition of the distinction between ordinary and petition procedure in the Court of Session.

149. The SCCR recommended that the distinction between Ordinary and Petition procedure in the Court of Session should be abolished, and that all actions in the Court of Session should be replaced by a standard initial procedure⁴³.

The Scottish Government response – options considered

150. The Scottish Government agrees with the general thrust of the SCCR's recommendation, that procedure in the Court of Session should be streamlined. It also agrees with the principle of abolishing the distinction between ordinary and petition procedure.

The Scottish Government's proposals

Abolish the distinction between ordinary and petition procedure.

151. The Scottish Government believes that this should be done by rules of the Court of Session to be developed by the Scottish Civil Justice Council. As such, we have not offered draft provisions. However we are interested in views as to the practical considerations arising as a result of abolishing the distinction, particularly with a view to avoiding any unintended consequences.

Questions (reforms in the Court of session):

- Q28. Do you agree that the distinction between ordinary and petition procedure should be abolished?
- Q29. Do you foresee any unintended consequences for this change?
- Q30. What impact do you think these proposals will have on you or your organisation?

⁴³ SCCR recommendation 56 and see further SCCR Chapter 5, paragraphs 69 and 70.

D) New procedures for dealing with vexatious litigants.

Background

152. The SCCR makes a number of recommendations to improve procedures relating to vexatious litigants⁴⁴. The SCCR noted that "litigants who conduct their cases in an unreasonable manner present a growing problem for the administration of justice." Therefore, the SCCR recommended that:

"...the civil courts should have powers similar to those in England and Wales in relation to civil restraint orders which would provide for a graduated system of orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process."⁴⁵

The Scottish Government's proposals

Introduce a new procedure to replace the Vexatious Litigants Act 1898.

153. The new procedure will give the Court of Session and sheriff courts power to grant a civil order regulating the behaviour of parties (whether individuals or bodies) who persist in conduct which the relevant Court thinks amounts to an abuse of process.

154. In detail, this means that:

- Both the sheriff court and Court of Session should have power, on their own motion, barring the litigant from making any further applications in relation to particular live proceedings (a "limited civil restraint order").
- The Court of Session should have power, on its own motion, to restrain a party from issuing particular claims or applications in specified courts where these involve, relate to, touch upon or led to the proceedings in which the order is made (an "extended civil restraint order").
- The Court of Session should also have power to make an order that no civil legal proceedings may be begun by a party in a Scottish court unless the party obtains the leave of a judge sitting in the Outer House (a "general civil restraint order").

155. In granting any order under the new provisions the court should be entitled to take into account proceedings, either active or historic, in other jurisdictions. Where the conduct occurs in the sheriff court and the sheriff thinks it may be appropriate for an extended or general restraint order to be granted, he may refer the matter to the Court of Session.

⁴⁴ See paragraphs 170 to 190 of chapter 9 SCCR.

⁴⁵ SCCR, Chapter 9, paragraph 190, page 243

156. The Scottish Government also proposes that the Lord Advocate should have express power to apply to the court for a civil restraint order (of whichever degree).
Issues for consideration

157. We have not offered draft provisions at this stage, as we are interested to hear views on the proposals.

Questions (procedures for dealing with vexatious litigants)

Q31. Do you agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants?

Q32. What impact do you think these proposals will have on you or your organisation?

E) Scotland-wide enforcement of interdict and interim orders

Background

158. The SCCR stated that respondents that the current system, where sheriff court orders (particularly those granting interim interdict) are enforceable only in the sheriffdom in which they are granted, caused difficulties in cases involving domestic abuse and in regulatory and enforcement proceedings at the instance of local authorities or public bodies.

159. The SCCR recommended that:

“The sheriff court legislation should be amended to provide that an interdict or other interim order granted in one sheriff court shall be enforceable throughout Scotland.”⁴⁶

The Scottish Government response – options considered

160. We wish to remove any doubt about whether the effect of interdict is Scotland wide and make it clear that a sheriff or summary sheriff may grant an interdict which prohibits the carrying out of specified actions in any part of Scotland. We think that the person/body to whom the interdict is addressed should be served with a notice making it clear that they are prohibited from carrying out a certain action or actions anywhere in Scotland. Of course the object of the interdict may be situated within the sheriffdom where the interdict is granted, but we are looking at circumstances where this is not the case.

161. Changing the law to give interdict all-Scotland effect seems straightforward enough, but there may be difficulties in relation to enforcement. The question arises as to whether an action for enforcement should be raised in the sheriffdom in which the interdict was granted or whether it should be capable of enforcement in any sheriffdom in Scotland, based on the Scotland-wide effect of the original order. The Scottish Government would welcome views on this.

162. As regards interim orders and warrants, it would be desirable to achieve the same Scotland-wide result as with interdict, but the Government would welcome views on how this may be achieved.

The Scottish Government’s proposals

163. We have not offered draft provisions at this stage as we are interested to hear views on this.

⁴⁶ SCCR Chapter 4, page 86, paragraph 172.

Questions (Scotland-wide enforcement of interdict and interim orders):

- Q33. Do you think that an order for interdict should be capable of being enforced at any sheriff court in Scotland?
- Q34. Should interim orders and warrants have similar all-Scotland effect and be capable of enforcement at any sheriff court?
- Q35. What impact do you think these proposals will have on you or your organisation?

CHAPTER 7: Alternative Dispute Resolution

Background

164. 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.

165. The view of the SCCR was that ADR was “a valuable complement to the work of the courts”⁴⁷, but supplementary, rather than a complete alternative, and quoted approvingly the view of Dame Hazel Genn that “a well-functioning civil justice system should offer a choice of dispute resolution methods”⁴⁸. The Review did not recommend that primary legislation might be used to promote ADR.

Options considered

166. 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.

167. The final report of the Civil Justice Advisory Group, headed by Lord Coulsfield⁴⁹, 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”.

The Scottish Government’s proposals

168. The Scottish Government has long supported and encouraged the use of alternative methods of dispute resolution in appropriate cases and agrees with the recommendation of the SCCR and the Civil Justice Advisory Group.

⁴⁷ SCCR, Chapter 7, page 169, paragraph 20.

⁴⁸ SCCR, Chapter 7, page 170, paragraph 22.

⁴⁹ “Ensuring Effective Access to appropriate and affordable dispute resolution: The final report of the Civil Justice Advisory Group, Page 49
<http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

169. The Bill makes clear in the rule-making provision in sections 85 and 86 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.

Questions (alternative dispute resolution):

Q36. Do you think that ADR should be promoted by means of court rules?

Q37. What impact do you think these proposals will have on you or your organisation?

ASSESSING IMPACT

As highlighted in the introduction, this consultation is designed to give you the opportunity to share your views on the potential impacts of the proposals set out in this paper.

Whilst there is a question within each chapter to discuss the impacts of that proposal please use the questions below to highlight any potential impacts of the proposals as a whole. This is also your opportunity to highlight any broader equality or economic issues and also any comments on the legislation itself.

Equality

Q38. Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

Business and Regulatory

Q39. Please tell us about any potential economic or regulatory impacts, either positive or negative, you feel any or all of the proposals in this consultation may have.

Legislation

Q40. Please tell us about any comments you have on the legislation as set out in the Draft Bill. Are there any omissions or areas you think have not been covered.



**The Scottish
Government**
Riaghaltas na h-Alba

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